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**DONATED  
BY**

*R. N. Vaishnavi*

M.A. (PSYCHO.); M.A. (POL. SC.); PUNJAB  
L.L.B. ALLAHBAD

**Advocate**

*Supreme Court of India*

*High Court of J & K State*

**9B, R. C. ROAD, PRATAP PARK,  
SRINAGAR (KASHMIR.)**

THE  
**ALL INDIA REPORTER**

**1953**

[ Vol. 40 ]

**JAMMU AND KASHMIR SECTION**

*WITH COMPARATIVE TABLE FOR*

10 & 11 JAMMU & KASHMIR LAW REPORTS



**CITATION : A. I. R. (40) 1953 JAMMU & KASHMIR**



**PUBLISHERS**  
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**1953**





# JAMMU AND KASHMIR

1953

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# THE ALL INDIA REPORTER 1953

## Jammu & Kashmir

A. I. R. 1953 JAMMU AND KASHMIR 1

WAZIR C. J. AND KILAM J.

Samad Malik, Appellant, v. State.

Criminal First Appeal No. 8 of 2009 D/-  
9th Assuj, 2009.

(a) Criminal P. C. (1898), S. 164 — Retracted  
confession — Evidentiary value.

It is not illegal to base conviction on a retracted confession but the rules of prudence require that a retracted confession must be corroborated by independent evidence connecting the accused with the crime.

(Para 14)

Anno: Cr. P. C., S. 164 N. 18 Pt. 1.

(b) Penal Code (1860), S. 300 — Murder —  
Burden of establishing guilt — Duty of prosecution — Evidence Act (1872), S. 103.

The burden of establishing guilt of the accused is throughout on the prosecution and the prosecution must prove every link in the chain of evidence against the accused from the beginning to the end. When two persons are seen together and shortly afterwards one of them is found to have been murdered it cannot be inferred positively that his companion is responsible for the murder of the deceased unless there are other circumstances to support that inference. No doubt the circumstance that the deceased was last seen in the company of the accused raises a strong suspicion against the accused but mere circumstances of suspicion without more conclusive evidence are not sufficient to justify conviction of the accused.

(Para 15)

Anno: I. P. C., S. 300 N. 43, 45; Ev. Act, Ss. 101 to 103 N. 3.

J. N. Bhan, Amicus Curiae, for Appellant;  
Asst. Advocate General, for the State.

WAZIR C. J.: Samad Malik has been found guilty of the murder of one Wali Mir s/o Jabban Mir resident of Pandit-Pura, Tehsil Handwara and under S. 302, Ranbir Penal Code, has been sentenced to death. He has appealed against his conviction and sentence and the case is also before the Court for confirmation of the sentence.

(2) The facts of the case are given in great detail in the judgment of the Learned Sessions Judge and need only be briefly recapitulated here.

(3) Wali Mir deceased was the son of Jabbar Mir. The accused Samad Malik is the son-in-

1953 J & K/1

law of Jabbar Mir. He was made Khana Damad and was residing in the house of his father-in-law Jabbar Mir who had executed a document in his favour by which he had given him half share in his immovable property. Jabbar Mir died during winter of S. 2008. Samad Malik was away in the Punjab at the time of the death of his father-in-law. On hearing the news of his death he returned home. He asked for his half share in the immovable property left by Jabbar Mir but his mother-in-law, Mst. Farzani, refused to give him share in the land and wanted to retain the whole of land for her son, Wali Mir deceased. The matter was referred to the Panchayat and the members of the Panchayat decided that Samad Malik should get half share in the house, the Kothar and the vegetable garden and should not demand any share in the land left by Jabbar Mir as he had already got some land from his own father. It is alleged that Samad Malik accepted the award given by the Panchayat and agreed to have a share in the house and the Kothar only. It is further alleged that for some time he was not willing to cultivate the land belonging to his father-in-law but at the insistence of his mother-in-law he cultivated the land. On the 3rd of Jeth 2009 he asked his mother-in-law to allow Wali Mir, her son, to accompany him so that they may both go to the fields and take the woods out. Wali Mir accompanied Samad Malik and they both went to the fields. After some time Samad Malik came back alone. He asked his mother-in-law as to where Wali Mir was. She replied that he should know better as Wali Mir had gone with him. The mother began to search for the boy and she asked some neighbours also to look for the boy. The accused Samad Malik, it is alleged, told his mother-in-law that a Fakir had taken fancy to the boy and he might have gone with that Fakir. The villagers began to search for the boy but could not trace him. On the 5th of Jeth the accused is alleged to have confessed before Ahad Gansi, the Deh president and Khawaja Rasul Numberdar that he had murdered the boy and had drowned him in the river. On the 6th a report was lodged in Thana Handwara.

(4) Nazir Ahmed Head Constable who was on some other duty repaired to the scene of occurrence and started investigation. He conducted the search for the body of Wali Mir which could not be found. During the search the chaddar which the deceased was wearing was



recovered from underneath a heap of sand. The search went on and after some days the dead body was recovered from the junction of the river called Nubal. It was sent for post mortem examination and on the 11th Jeth Dr. Dwarka Nath, Medical Officer Handwara, performed the autopsy. The Head Constable came to the village and arrested the accused. He was called on some other business by the Inspector General of Police and another Officer Mr. Sri Kanth Sub-Inspector of Police arrived in the village on the 16th and took charge of the investigation. He seized the clothes of the accused as he found some blood stains on them.

(5) The dead body was identified by Qadir Mir, the uncle of the deceased. Dr. Dwarka Nath found the following injuries on the person of the deceased:

1. A circular wound nearly 2½" in diameter over the left side of chest above the nipple. The skin and the muscle below were absent in this area down to the ribs.
2. A 3½" in area oval gap in the abdominal wall on the right side corresponding to the 8th, 9th or 10th rib. The intestines were protruding from this gap.
3. An incised wound 1" long ½" deep ½" wide near the external end of right clavicle.
4. Ecchymosis of the right side of the forehead above the eye and also of the right upper and lower eye-lids."

In his opinion the death of the deceased was caused by shock and haemorrhage due to the injuries which he had already received. He further stated that the deceased had some signs of life when he was drowned. According to the doctor all the injuries were ante-mortem and were caused by some sharp weapon.

(6) The accused is alleged to have made a confession before the police and he was produced before the Tehsildar Magistrate First Class Handwara for recording his confession. The Magistrate ordered that the accused should be kept in the judicial lock-up before his confession is recorded. The accused was kept in the judicial lock-up in Baramulla and was produced before the Magistrate on the 20th of Jeth for recording the confession. The Magistrate, after complying with the necessary formalities required by law, recorded the confession of the accused. The accused was committed to Sessions on a charge of murder.

(7) There is no direct evidence in this case. The evidence consists of this fact that the accused was last seen in the company of the deceased, that the deceased and the accused went together towards the river and the accused came home all alone. There is the evidence of Mst. Farzani that the accused asked her to permit her son to go with him. They both went together. There is the evidence of Mahad Mir and Wahab Mir who stated that they saw the accused and the deceased going towards the river. They enquired from them and were told that they were going to catch small fish in the river. Mst. Mukhti, the wife of the accused, stated that her husband had remarked that he would not allow Wali Mir to get any share of the land left by Jabbar Mir, his father but she did not attach much importance to this remark as her husband, Samad Malik, was trying to make arrangements for the marriage of Wali Mir. Qadir Mir has appeared as a prosecution witness and from his

statement it appears that Samad Malik accused was reluctant to cultivate the land as he was not given his share in the land which was given to him by his father-in-law but the Panchayat had decided that he should get share in the Kothar and the House and give up his share in the land in favour of his brother-in-law Wali Mir. Another witness has been produced by the prosecution, Sultan Mir, who stated that he saw with his own eyes the accused pushing away the dead body into the river with a stick. There are two other prosecution witnesses Ahad Ganai Deh, President and Khawaja Rasul Numberdar, who have deposed that the accused made extra-judicial confession before him admitting his guilt.

(8) The learned Sessions Judge has discussed all the evidence which has been produced in this case and has not believed the testimony of Ahad Ganai and Khawaja Rasul who are witnesses of extra-judicial confession.

(9) We have carefully gone through the testimony of Ahad Ganai and Khawaja Rasul and we find that their evidence cannot be relied upon. According to these witnesses the accused made extra-judicial confession before them on the 5th of Jeth, two days after the occurrence. The first information report was lodged on the 6th of Jeth and there is no mention of the fact that the accused had confessed having murdered the deceased. If the accused had actually confessed his guilt before these two witnesses it was expected that this confession would have found place in the first information report. In view of the fact that there is no mention of this fact in the first information report the evidence of these witnesses is false and, therefore, cannot be relied upon.

(10) The evidence of Sultan Mir also is by no means convincing. According to him he saw the accused pushing off the dead body into the river. It is strange that he did not mention this fact to any one till he was called by the police long after the occurrence when he came out with this important information. His evidence is unreliable and has been rightly brushed aside by the Sessions Judge.

(11) The learned Sessions Judge has relied upon the confession of the accused which was subsequently retracted by him before the committing Magistrate and before the Sessions Judge and also on the fact that the accused was last seen with the deceased on the fateful day of occurrence. He has further been impressed by the fact that a Chaddar was recovered from a heap of sand at the instance of the accused which was worn by the deceased on the day he was done to death.

(12) It is necessary to give in detail the so-called confession made by the accused before the Magistrate at Handwara. In the confession the accused has stated that he threw Wali Mir in the river and placed his leg on his neck till he breathed his last.

(13) The accused does not mention that he inflicted injuries on his person with a sharp-edged weapon and then threw him in the river till he died. We have it from the medical evidence that the accused had a number of injuries on his body which were caused by a sharp weapon and all these injuries were ante-mortem. The accused has not admitted anywhere in the confession that he inflicted injuries on the body of the deceased. Moreover the accused has stated that under police pressure he made the statement before the Magistrate at Handwara confessing his guilt. He



completely denied having committed the offence.

(14) There is, therefore, retracted confession of the accused before us and we have to see whether or not his confession is voluntary. It is not illegal to base conviction on a retracted confession but the rules of prudence require that a retracted confession must be corroborated by independent evidence connecting the accused with the crime. We have to see whether the confession receives any corroboration by any independent evidence adduced in this case.

(15) There is no doubt evidence to show that the accused and the deceased went together towards the field on the fateful day. There is further evidence of Mahda and Wahab who stated that they saw the accused and the deceased going towards the river. But this evidence is not sufficient to connect the accused with the commission of the crime. Great stress has been laid by the counsel appearing for the state that as the accused was last seen in the company of the deceased that fact alone should justify the inference that the accused was responsible for the murder of the deceased. The burden of establishing guilt of the accused is throughout on the prosecution and the prosecution must prove every link in the chain of evidence against the accused from the beginning to the end. When two persons are seen together and shortly afterwards one of them is found to have been murdered it cannot be inferred positively that his companion is responsible for the murder of the deceased unless there are other circumstances to support that inference. No doubt the circumstance that the deceased was last seen in the company of the accused raises a strong suspicion against the accused but mere circumstances of suspicion without more conclusive evidence are not sufficient to justify conviction of the accused.

(16) In this case we have to see what are the other circumstances which connect the accused with the crime. As pointed out above the accused has made a confession which he retracted at the first opportunity when he was put on trial. He has given a cogent explanation that the confession was extorted from him under Police pressure. The retracted confession is not corroborated by any other independent evidence. The learned Sessions Judge has taken into consideration the recovery of a Chaddar from underneath a heap of sand. We have examined the recovery list and we find there is no mention in the list that the Chaddar was recovered at the instance of the accused. There is no reliable evidence to show that the Chaddar was recovered at the pointing of the accused. The evidence is to the effect that a certain Chaddar in the course of search for the body was recovered from the sand. That recovery does not connect the accused with the commission of the offence. I fail to see how the Sessions Judge has attributed the recovery of Chaddar to the information supplied by the accused. Moreover it appears that the Chaddar was recovered long before the accused was arrested and the confession of the accused was recorded on the 20th of Jeth long after the recovery of the Chaddar. The recovery of Chaddar even if it had been at the instance of the accused could not form a corroborative piece of evidence of the retracted confession.

(17) Much stress was laid on the motive which induced the accused to commit this crime. It is stated that the accused wanted to

avenge upon Mst. Farzani for not having given to him the share which he got by virtue of the gift deed executed in his favour by his father-in-law. There is no doubt some evidence to show that Mst. Farzani did not agree to part with half portion of the share in the land to the accused but after the decision of the Panchayat which was accepted by the accused it does not appear that the accused had any ill feelings towards his mother-in-law. Even if he felt a little aggrieved we do not think it would be such a strong motive as would induce him to commit such a heinous crime especially when he was so well disposed towards Wali Mir deceased that he was making arrangements for his marriage.

(18) Taking all the circumstances into consideration we do not think that the prosecution has made out a charge of murder against the accused. We, therefore, accept the appeal, set aside his conviction and sentence and direct the release of Samad Malik forthwith, unless required in connection with some other charge.

B/V.S.B.

Conviction quashed.

### A. I. R. 1953 JAMMU AND KASHMIR 3

KILAM J. (Reviewing Judge)

Ghulam Nabi and others, Accused-Applicants v. State.

Criminal Revn. No. 28 of 2006, D/- 9 Maghar 2006.

(a) (Jammu and Kashmir) Constitution Act (14 of 1996) Ss. 5, 38 — Ordinances passed under — Distinction — J. and K. Ordinance No. 8 of 2005 passed under S. 5 does not expire after six months — (Jammu and Kashmir) Enemy Agents Ordinance (8 of 2005), S. 1).

A time limit of six months is prescribed for an Ordinance that may be passed by His Highness under S. 38 of the (J. & K.) Constitution Act, 1996, on the recommendation of the Council, but as regards the laws and ordinances that are passed by His Highness by virtue of the powers reserved in him under S. 5 of the Constitution Act no time limit has been prescribed in the Act. The result is that any such ordinance passed under S. 5 by His Highness would continue to exist as long as it is on the Statute Book and has not been repealed by the authority promulgating the same.

(Para 7)

Held that the Enemy Agents Ordinance, (8 of 2005) having been passed under S. 5 of the Constitution Act was still in force and would continue to be in force till it was repealed.

(Para 7)

(b) Criminal P. C. (1898) Ss. 156, 537 — Investigation by inferior officer — Defect curable under S. 537 — Trial not vitiated.

As a matter of fact a conviction or an acquittal does not depend upon the question as to which particular officer actually conducted the investigation which resulted in the trial. That is to be determined mainly on the basis of the evidence that is tendered at the trial. Therefore, an irregularity occasioned by a Sub-Inspector investigating into an offence instead of an inspector, is curable by S. 537 Cr. P. C. and does not by itself vitiate the trial. AIR 1928 Bom. 162 and AIR 1931 Pat.



150 Rel. on. AIR 1944 PC 73 Ref.

(Para 8)

Anno: Cr. P. C., S. 156 N. 4; S. 537 N. 14.

(c) Criminal P. C. (1898) S. 157 — Failure to send report to Magistrate — Amounts to serious breach of duty on part of police officer — Does not vitiate trial if there is no prejudice to accused — (Criminal P. C. (1898), S. 537). AIR 1931 Pat. 150 Ref. (Para 9)

Anno: Cr. P. C., S. 157 N. 6; S. 537 N. 14.

(d) Evidence Act (1872), Ss. 114 and 133 — Approver — Evidence by — Corroboration — Necessity — (Criminal P. C. (1898), S. 337).

A conviction based upon the uncorroborated testimony of an accomplice is not illegal, though it is highly dangerous to base a conviction upon his uncorroborated evidence. It is a wholesome rule of practice that an approver must be corroborated before he is treated as worthy of credit. The question of corroboration, however, is not an easy one, and in every case the Court has got to see that the corroboration forthcoming is not only in general terms but must specifically connect each accused with the actual commission of the offence. AIR 1932 Lah. 204 Foll. Case law Ref. (Paras 11, 12)

Anno: Ev. Act, S. 114 N. 3, 4, S. 133 N. 4, 6; Cr. P. C., S. 337 N. 17.

(e) Evidence Act (1872) Ss. 133 and 114 — Accomplice — Who is — Evidence by, must be corroborated by independent witness.

The word accomplice has not been defined in the Evidence Act and must be taken in its ordinary sense. Ordinarily an accomplice means a guilty associate or a partner in a crime or who in some way or the other is connected with the offence in question. The test that can be laid down, in order to see as to whether a particular witness is an accomplice or not is as to whether he can be jointly indicted with the other accused in a particular case.

The evidence of one accomplice cannot be corroborated by that of another accomplice and in order to connect each accused with the offence, corroboration must be by independent evidence. (Para 14)

Anno: Ev. Act, S. 114 N. 2; S. 133 N. 2, 4, 8.

M. A. Hafiz and M. A. Latif, for Applicants; Assistant Advocate General, for the State.

REFERENCES: Courtwar/Chronological/ Paras

('44) AIR 1944 PC 73: (46 Cri LJ 119) 8

('28) AIR 1928 Bom 162: (29 Cri LJ 551) 8

('74) R. v. Sadhu Mandal: 11

(21 WR Cr 69) 11

('24) AIR 1924 Cal 701: (25 Cri LJ 1000) 11

('30) AIR 1930 Lah 731: (11 Lah 694) 14

('32) AIR 1932 Lah 204: (33 Cri LJ 242) 12

('31) AIR 1931 Pat 150: (32 Cri LJ 638) 8, 9

('37) 1937 Rang LR 110: (AIR 1937 Rang 209: 38 Cri LJ 785) 11

(1861) 9 Cox CC 32: (30 LJQB 301) 11

(1916) 2 KB 658: (86 LKJB 28) 11

ORDER: Eighteen persons by name Ghulam Nabi Bazaz, Rashid Mir, Iqbal Bhat, Mohy Din Pandit, Gulam Mohd Kar, Ali Mohd Vakil, Sh. Iftikhar Ahmad, Dost Mohd. Khan, Gani Magre, Sadiq Bat, Aziz Bat, Ghulam Ahmad Karnay, Q. Gulam Hassan, Ahmad Bhat Tangaban, Karam Din, Sultan Bat, Rasul Khan and Ghulam Naqi have been convicted by the learned Special Judge, Srinagar for offence under S. 3 of the Enemy Agents Ordinance, and

Ss. 4, 5 and 6 of the Explosive Substances Act and also under S. 120-B, Ranbir Penal Code. They have been sentenced to various terms of imprisonment. There were about 37 accused in this case out of whom 13 accused are absconding. Two have turned approvers. The remaining 22 were sent up for trial, out of whom four namely Inayat Ullah Khan, Raja Habib Ullah Khan, Mohy Din Pukhta and Dr. Abdul Majid have been acquitted.

(2) The case for the prosecution has arisen out of the following facts: It is alleged that one Maraj Din Pandit, who is accused No. 25 in the Challan, was league minded and wanted some how or other to bring about the failure of Indian troops operating in Kashmir. This he hoped to achieve by creating as much of internal turmoil as was humanly possible for him to do and thereby he hoped to create what has been termed as an internal front so as to facilitate the coming in and contribute to the success of the Pakistan invaders. With this object in view he is said to have acted as the master mind in the organisation of a conspiracy which it is alleged by the prosecution was given a practical shape in the month of Baisakh 2005, when accused Nos. 1, 2, 3, 4, 5, 6, 7, 23, 26, 27, 28, 29, 30, 31 and 32 assembled at his house for formulating a programme and giving a practical shape of the ideas harboured by Maraj Din. It is alleged that in this meeting it was resolved that a centre be opened where Muslims of the League persuasion would be given training in the use of daggers and dangs. Besides that, not being content with these homely weapons, it was further decided that steps be taken for the importation of arms and ammunition from the Pakistan side. Narpur Gali from the Badgam side & Tutmar Gali from the Handwara side were chosen as routes for importation of arms & ammunition. Two batches, one consisting of accused Jahangir (No. 26), Mohd. Maqbool Sheikh (No. 27), Rashid Mir (No. 2) and Iqbal Bhat (No. 3) and the other of accused Ali Mohd. Vakil (No. 6), Ehsan Ullah (No. 31), Atta Ullah (No. 30), Ghulam Mohd. Kar (No. 5) and Mohud-Din Pandit (No. 4) were selected for operating on the Badgam and Handwara sides respectively.

(3) Over and above the persons who joined the first conspiratorial meeting, there were others who were taken into confidence by these persons and their cases will also be dealt with at the proper time. In the month of Jeth 2005, the importation business was taken up in right earnest. It is alleged by the prosecution that Jehangir who was deputed along with some other accused towards the Badgam side, came one day to Meraj Din Pandit and informed him that they had succeeded in persuading the Pakistani Leaders to supply them with the much needed arms and ammunition. Accompanied by one Capt. Manna who remained as a guest with Maraj Din Pandit for some time Jehangir came to Srinagar. Sidiq Bat and Aziz Bat (accused No. 10 and 11)—two servants of Meraj Din Pandit—were detained with Jehangir for the purpose of carrying information from him to the head-quarters of the party. After all the ammunition did arrive it had to be carried and for this purpose some Pahari people were engaged. They had to conceal their identity and for this purpose both Sadiq Bat and Aziz Bat carried from Srinagar some clothes to be worn by them so as to make them appear



as Kashmiris. When these articles of ammunition arrived within the State, Ghulam Nabi Lala (approver), Gani Magree, Sadiq Bat and Aziz Bat (accused Nos. 23, 9, 10 and 11) went to a jungle situate at a short distance from Dudhathari, but at a fairly good distance from Badgam, and brought two boxes with themselves containing hand grenades. After some time these articles were carried to a garden at Hakahal by Jehangir and Gulam Nabi Lala approver and some other persons from Pakistan. This garden once belonged to one Col. Rehmat Ullah Khan but was later seized by the Government and was placed in charge of Dost Mohd. Khan accused. Why these articles of ammunition were taken to the garden can be explained by the fact that Jehangir accused was the purchaser of the fruit of this garden & he had sold this fruit to Ghulam Nabi Lala approver and as such they had the whole garden at their disposal. The latter procured some wooden boxes generally used for carrying fruit. These boxes were used as a cover to hide the hand-grenades which were placed in them. The boxes were concealed in the garden at Hakahal. For the time being all, it seems, went well with the conspirators, but some how or other the news leaked out and the Badgam police put itself on the track. The police arrived on spot and apprehended Dost Mohd. who it appears was made of a weaker clay and at once pointed out to the police the place where hand grenades were stored. This place was dug out and the hand grenades found. The result was that the activities of the conspirators on that side proved abortive.

(4) While disaster overtook the conspirators on Badgam side, the Handawara party was well on its mission. The Handawara party was headed by Ali Mohd. Vakil accused No. 6. He took into his confidence one Ghulam Ahmad Ganai who later on turned as approver. Both of them went to the house of Rajas of Zachaldara, namely Rajas Inayatullah, Habibullah, Ehsanullah, & Attaullah (accused Nos. 14, 15, 30 and 31). With the Rajas Ali Mohd and his party had a free and frank discussion about the aims and objects of the conspiracy. The discussion having lasted for the whole night, on the succeeding morning Ali Mohd, Raja Atta Ullah, Aziz Sheikh and Ahmad Tangaban (accused Nos. 6, 30, 33 and 16) went to see Brigadier Khalid of the Pakistan Army. After three days Ali Mohd came back, bringing with himself a box containing hand grenades and a letter for one Abdul Ghaffar of Amira Kadal in which the latter was asked to hand over the wireless set to Ali Mohd Vakil. Ghulam Ahmad Ganai approver was instructed that the box should be sent over to Meraj Din through Mohy Din Pandit. For some time this box remained with Aziz Sheikh (accused No. 33) and Mohd Khan (accused No. 35) wherefrom it was brought by them to Gamapura and kept there with Q. Ghulam Hassan (accused No. 13). Finally this box reached the house of one Ghulam Ahmad Karnayi (No. 12) at Doabgah. To avoid unnecessary suspicion, Ali Mohd Vakil, Meraj Din and others decided that this box should not be carried to the town of Sopore and, therefore, it was sent across the river to Sangrama road and was carried there by Shaban Tante, a servant of Ghulam Ahmad Karnayi. From there Ali Mohd, Meraj Din and two other men got it to Srinagar. The car

in which Mehraj Din had gone to Sopore was out of order and it was through one Mistri Ali Mohd, who was carried from Srinagar to the house of one Ali Mohd Hajam, that the car was repaired. At Srinagar Meraj Din opened the boxes and found 12 hand grenades in it, out of which one was kept by him with himself and the remaining 11 were kept with Sultan Bhat accused.

(5) Again in the month of Bhadon 2005 Ali Mohd renewed his activities and this time accompanied by Ehsanullah, Aziz Sheikh and some others went to Muzaffarabad and from there he went to Rawalpindi, wherefrom he brought arms and ammunition in fairly large quantities. This quantity of ammunition was dumped in the house of one Sultan Gojar. There it remained for some time when Ali Mohd. Vakil, Raja Ehsanullah, Dr. Nazir-ul-Islam, and Ghulam Ahmad Ganai started discussing as to what would be a safe place for keeping these explosives. Later on it was carried out of the house of Sultan Gojar and kept on a walnut tree covered by grass. By this means they hoped to ward off suspicion. Besides the importation of arms and ammunition, a number of scurrilous posters and cartoons were brought which were sent to the house of Dr. Nazir-ul-Islam. The police who was on the track reached Handawara side also. The houses of the Rajas were searched and arms and ammunition recovered. The ammunition dumped on the walnut tree, after it was removed from Sultan Gojar's house was also found out and searches were started at Srinagar and from the house of Dr. Nazir-ul-Islam a number of posters and pamphlets etc. were recovered. Meanwhile a great deal of disturbance was caused in the ranks of the conspirators some of whom went underground and some were arrested. The accused were then challaned under S. 3 of the Enemy Agents Ordinance, Ss. 4, 5 and 6 of the Explosive Substances Act and S. 120-B Ranbir Penal Code. This in brief is a synopsis of the case for the prosecution.

(6) The prosecution has produced 51 witnesses to prove its case. These witnesses narrate the proceedings of the meetings of the conspirators, recoveries and other activities of the accused. On behalf of the accused statements of about 144 witnesses have been recorded. This evidence will be dealt with when the cases of the individual accused are gone into by me. The case mainly hinges upon the evidence of two approvers Ghulam Nabi Lala and Ghulam Ahmad Ganai and also on that of Mohd. Hus-sain.

(7) The learned Special Judge has written a well-reasoned judgment, though rather lengthy and the case has been argued at very great length by both the Learned counsel for the accused and also by the Learned Assistant Advocate General. A number of preliminary objections were raised by the Learned counsel questioning not only the jurisdiction of the Court trying the accused but also the competence of the investigating officer to hold investigation in the case. His argument is that it was under the provisions of Ordinance No. 8 of 2005 that the Court of the Special Judge was brought into existence. He further argued that this ordinance had ceased to have any force on the date when the judgment was pronounced, the judgment having been pronounced six months after the passing of this ordinance. In



other words the Learned counsel argues that this ordinance could remain in force only for six months. In support of his argument he has drawn my attention to S. 38 of the Constitution Act of 1996 which lays down that in case of emergency or where immediate legislation is required in any manner affecting peace or good government of the State, the Council may submit to His Highness an ordinance and such ordinance on being assented to by His Highness shall have the force of law for a period not exceeding six months from the date of its promulgation. But this argument of the Learned Counsel does not hold water. The ordinance in question has not been passed under S. 38 of the Constitution Act of 1996. On the contrary the preamble to Ordinance No. 8 of 2005 would make it clear that this ordinance was passed by His Highness in exercise of powers reserved in him under S. 5 of the Constitution Act. Under S. 5 of the Constitution "nothing contained in this Act would affect the right and prerogative of His Highness to make laws or issue proclamations, orders and ordinances by virtue of his inherent authority." True, that a time limit of six months is prescribed for an ordinance that may be passed by His Highness on the recommendation of the Council, but as regards the laws and ordinances that are passed by His Highness by virtue of the powers reserved in him under S. 5 of the Constitution Act no time limit has been prescribed in the Act. The result is that any such ordinance that has been passed under S. 5 by His Highness would continue to exist as long as it is on the Statute Book and has not been repealed by the authority promulgating the same. Under these circumstances this argument of the Learned Counsel cannot hold water and it is, therefore, held that the ordinance is still in force and will continue to remain in force till it is repealed and that the Court that has been constituted under the provisions of this ordinance is a competent Court to deal with any case coming within the purview of the said ordinance.

(8) There is yet another objection raised by the Learned Counsel. He argues that Sheikh Qadir was not a competent person to start an investigation in the case. Reference has been made by him to S. 156, Criminal P. C., in which it has been laid down that any officer in charge of a police station may investigate any cognizable offence. The argument of the Learned Counsel is that as S. Ghulam Qadir was not an officer in charge of a police station, as such he could not have investigated the present offence. But sub-s. (2) of S. 156 Criminal P. C. lays down that

"no proceedings of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate."

As a matter of fact a conviction or an acquittal does not depend upon the question as to which particular officer actually conducted the investigation which resulted in the trial. That is to be determined mainly on the basis of the evidence that is tendered at the trial. A case may arise in which an investigation may appear to have been conducted under circumstances which may be called as suspicious. This shall certainly be a circumstance which will be taken into consideration by a Court trying the case,

but this by itself would not vitiate the trial. In — 'Hafiz Mohamed v. Emperor', AIR 1931 Pat 150 it has been held that ".....failure properly to conduct an investigation into an offence cannot vitiate a trial which was started on the final report after the investigation." In — 'Shivbhat Manjunathbhat v. Emperor', AIR 1928 Bom 162 it has been held that

".....the question whether that evidence has, in the first place, been elicited by an inspector or by a Sub-Inspector is of very minor importance and does not really affect the result of a trial, except to this extent that the theory is that the higher the rank of the police officer investigating, the more careful and unimpeachable his inquiry is likely to be. Therefore, an irregularity occasioned by a Sub-Inspector investigating into an offence, which investigation should have been made by an inspector, is curable by S. 537 Cr. P. C."

In a Privy Council case reported as — 'Parbhu v. Emperor', AIR 1944 P.C. 73, the contention of the accused was that his arrest having been effected in the Jind territory by a British Indian Officer was illegal and that the illegality of his arrest vitiated the whole of the subsequent proceedings. It was held by their Lordships of the Privy Council that "..... the proceedings before that Court were regular and in order, and the validity of the trial and conviction of the accused could not be affected by any irregularity in his arrest." I am in respectful agreement with the view enunciated in the above rulings and hold that even if there was any irregularity in the investigation proceedings taken by the Sub-Inspector Sh. Ghulam Qadir, that irregularity by itself is of very minor importance for the decision of the present case and that the trial cannot be impugned on the ground of such an irregularity.

(9) The learned Counsel has further argued that the investigating Sub-Inspector (S. Ghulam Qadir) has failed to comply with the mandatory provisions of S. 157, since he has omitted to send a report to the magistrate which is necessary under S. 158. He has also referred me to — 'AIR 1931 Pat 150' (referred to already) in which it has been held that "a police officer will be deemed to have failed to comply with the provisions of S. 157 if he has omitted to send a report to the magistrate. But in the same judgment on p. 152 it has been laid down by their Lordships that "There can be no doubt that the Sub-Inspector in his procedure disobeyed certain provisions of the law, and for that he could be punished, if the authorities deemed it fit, but I cannot find that his failure was to the prejudice of the petitioners. Nor can I see how failure properly to conduct an investigation into an offence can vitiate a trial which was started on the final report after the investigation". All this would make it amply clear that if there was some thing irregular in the investigation started by S. Ghulam Qadir, that would not in any way vitiate the trial of the accused that was conducted by a duly constituted Tribunal.

(10) The Learned Assistant Advocate General has met this argument in a very ingenious, and I should think, in an original manner too. His contention is that under S. 157 of the Criminal P. C., from information received, an officer of the police station shall forward a report of the



same to a magistrate empowered to take cognizance of such offence upon a police report. But he argues that the present case was not cognizable by any magistrate and as such no report could be sent or needed being sent to a magistrate. It is true that the present case was within the cognizance of the Special Judge specially constituted under Ordinance No. 8 of 2005. Since no magistrate was empowered to take cognizance of this case, therefore, the necessity of sending a report to a magistrate did not arise at all.

(11) The preliminary objections of the Learned Counsel having been thus disposed of, let us see what is the evidence in this case. As already stated this case hinges mainly upon the evidence of two approvers and one other witness by name Mohd. Hussain. The question has frequently arisen before Criminal courts as to whether an approver is a competent witness so as to base a conviction upon his uncorroborated testimony. According to S. 133 of the Evidence Act "An accomplice shall be a competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice." But illustration (b) of S. 114 Evidence Act lays down "that a Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars." In England the uncorroborated evidence of an accomplice is admissible in law but it has long been a rule of practice at common law for the Judge to warn the jury of the danger of convicting a person on the uncorroborated testimony of an accomplice, and in the discretion of the Judge he may recommend them not to do so. Nevertheless in England it is within the legal province of the jury to convict upon such unconfirmed evidence, if after proper caution by the Judge the jury finds the evidence of the accomplice without corroboration worthy of credit. The rule in India is exactly the same. In — *Emperor v. Jamaldi Fakir*, AIR 1924 Cal 701 the dictum of Reading C. J. in — *R. v. Baskerville*, (1916) 2 K B 658 has been quoted with approval by the learned bench which is to the effect that

"there is no doubt that the uncorroborated evidence of an accomplice is admissible in law. But it has long been a rule of practice at common law for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices and, in the discretion of the judge, to advise them not to convict upon such evidence, but the judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence".

But in considering whether the testimony of an accomplice should or should not be believed, illustration (b) to S. 114 which says that an accomplice needs corroboration in material particulars, cannot be lost sight of. In India in practice the courts have invariably started with the presumption against the trustworthiness of the accomplice unless corroborated in material particulars. The considered opinion in this country as also in England is that a conviction based upon the uncorroborated testimony of an accomplice is not illegal, though it is highly dangerous to base a conviction upon his uncor-

roborated evidence. In England the law has been summed up in the following words:

"There is no absolute rule of law that accomplice evidence must be corroborated. But as Martin B. said in — *R. v. Boyes*, (1861) 9 Cox C. C. 32 there is a rule of practice which has become so hallowed as to be deserving of respect..... It deserves to have all the reverence of law."

This rule of guidance is to be found in illus. (b) S. 114. (of the Indian Evidence Act). Both the sections (S. 133 and S. 114 Illus. (b)) are parts of one subject and should always be considered together. In — *Nga Aung Pe v. Emperor*, 1937 Rang LR 110, Roberts C.J. said:

"The rule of law says that he (accomplice) is competent to give evidence, and the rule of practice says that it is almost always unsafe to convict upon his testimony alone."

So also has Phear J. remarked in — *R. v. Sadhu Mundul*, 21 W R Cr 69 that the combined result of the two sections (S. 133 and 144 Illus. B) appears to be that the Legislature has laid it down as a maxim or rule of evidence resting on human experience that an accomplice is unworthy of credit against an accused person, unless he is corroborated in material particulars in respect to that person. The reason for requiring corroboration of the testimony of an accomplice is that an approver on his own admission is a Criminal, and a man of the lowest character who has thrown to the wolves his own erstwhile associates and friends in order to save his own skin. It has been held therein that his evidence must be received with very great caution.

(12) There is no use referring to all the rulings on the subject. Suffice it to say that the rule of practice that an approver must be corroborated before he is treated as worthy of credit is almost of universal applicability and in the present case I do not find any reason to make a departure from this most wholesome practice. This court, so also the Board of judicial advisers, have in a number of cases followed this rule and as already stated I would also follow the lead given to by my illustrious predecessors in a number of cases. But then it has to be borne in mind that the question of corroboration is not an easy one, and in every case the court has got to see that the corroboration forthcoming is not only in general terms but must specifically connect each accused with the actual commission of the offence. It has been held in — *Ranbir Singh v. Emperor*, AIR 1932 Lah 204 that

"Corroboration falls under two heads: (1) general corroboration and (2) special corroboration connecting each of the accused with the offence. The first shows or is meant to show that the man is truthful and has a good memory. With regard to the second it is settled law that additional corroboration is required connecting accused individually with the actual commission of the offence. Prudence requires that the connexion of each individual with the crime should be proved and corroborated by independent evidence; the real point being that precaution must be taken against the possibility of substitution. A story may be meticulously true on every detail with the all important exception that the name of A has been inserted instead of the name of B. The correctness of the story is not affected by this all-important change".



This dictum has been passed by Harrison J. who delivered the judgment on behalf of the Bench in a case in which an attempt was made on the life of the Governor of the Punjab and one Sub-Inspector who was in attendance was killed. A number of accused were tried and sentenced to death for conspiracy along with one Hari Krishen who was captured on spot. The law on the subject has been very lucidly detailed in this judgment and I propose to follow the lead given by it.

(13) This proposition of law has been conceded very frankly by the learned Assistant Advocate General who appeared on behalf of the State. Now we have got to see whether there is general corroboration for the conspiracy. Both the approvers have described the various courses through which the conspiracy ran and have given a very detailed description of the whole affair. That there was a conspiracy is proved not only by the statements of the approvers but by the ample corroboration which it has received from a Khal, Nila Dugar and other places. Hundreds of hand grenades and other weapons and posters, pamphlets and cartoons were literally unearthed at the instance of some accused. From many individual accused hand grenades and sten guns etc. were also recovered. Under these circumstances, I am definitely of the opinion that there existed a conspiracy in which a number of people took part and which was hatched for the purpose of subverting the present Government and facilitating a successful attack by the Pakistan hordes.

(14) This having been established that conspiracy did exist with the aforesaid purpose, now the point that we have got to see is as to which of the accused have been proved to have participated in this conspiracy and other acts in its furtherance. The approver as also Mohd. Hussain witness say that Ghulam Nabi Bazaz (accused No. 1) Rashid Mir (No. 2) Iqbal Bhat (No. 3), Mohy-din Pandit (No. 4), Ghulam Mohamad Kar (No. 5) Ali Mohamad, Wakil (No. 6), Sh Iftikhara Ahmad (No. 7), Ghulam Nabi Lala (No. 23) Meraj-din Pandit (No. 25), Iqbal Khan (No. 28) Mohd. Maqbul Jhenger Khan (No. 26) Sheikh (No. 27), Mohd Amin Faktoo (No. 29), Raja Atta Ulah (No. 30), Raja Esan Ullah (No. 31) and Dr. Nazir-ul-Islam (No. 32) participated in the meetings wherein these fateful decisions which later on proved abortive, were taken. Before proceeding further, I think it is necessary to decide as to what is the position of Mohd Hussain in this case. The learned assistant Advocate General has argued that Mohd Hussain is an independent witness and that his evidence can be used for corroborative purposes. But I am afraid I cannot agree with the view pressed by him. True it is that Mohd. Hussain has not been given king's pardon, but admittedly he was present in both the meetings which did take place in the house of Meraj Din accused. The question is: Is Mohd Hussain an independent witness or an accomplice? Unfortunately the word accomplice has not been defined in the Evidence Ordinance and in my opinion it must be taken in its a guilty sense. Ordinarily an accomplice means who is associated or a partner in a crime or with the offender or the other is connected and offence in question. In — 'Punjab Char Bank Ltd., Gujranwala v. Amir Char', AIR 1930 Lah 731 a wife, who was

cognizant of the fact that the accused intended to kill her husband and did not disclose that fact to him was recorded as an accomplice. The test that can be laid down, in order to see as to whether a particular witness is an accomplice or not, is as to whether he can be jointly indicted with the other accused in a particular case. Applying this test to Mohd. Hussain, I am of the opinion that he cannot rid himself of the position which can be assigned to an accomplice. He was present in both the meetings. Fateful decisions were taken in his presence, I mean decisions if carried into practice would have meant death and disaster to many a person and destruction of much valuable property. This man kept these secrets hermetically sealed in his own bosom. Besides that the mere fact that the organization of the meeting allowed him to participate and be present in the meeting shows that he was a trusted colleague of the conspirators. Under these circumstances, bearing in mind the test laid above, the evidence of Mohd Hussain cannot be given greater credit than that of an accomplice. The mere fact that the police has not secured pardon for him, would not in any way improve his position. Therefore, the evidence of Mohd. Hussain cannot be treated as corroboration of the statement of the other approvers. The corroboration of an approver must be corroboration by independent evidence i.e., by the evidence of a person other than that of an accomplice. It should not be lost sight of that tainted evidence cannot be made better by being doubled in quantity. Therefore, the evidence of one accomplice cannot be corroborated by that of another accomplice and in order to connect each accused with the offence, corroboration must be by independent evidence. The present position is that the evidence of Mohd Hussain would also require corroboration.

(15) Having laid down the principles that should guide me in dealing with the evidence in the case, let us now deal with each individual accused.

(16) (After discussing the evidence on record relating to each of the accused the order continues as follows:) The result of the above is that the convictions of Rashid Mir (accused No. 2) Iqbal Bat (No. 3) Mohd-Ud-Din Pandit (No. 4), and Ghulam Mohd. Kar (No. 5) are set aside. They are acquitted and ordered to be released forthwith. The convictions and sentences recorded against Ali Mohd. Wakil are maintained, excepting that under S. 3 of the Enemy Agents Ordinance the imprisonment of ten years is reduced to that of seven years. The convictions of the remaining accused, i.e., Ghulam Nabi Bazaz (accused No. 1) Sh. Iftikhar Ahmad (No. 7) Dost Mohd Khan (No. 8) Ghani Magre (No. 9), Sidiq Bat (No. 10), Aziz Bat (No. 11), Ghulam Ahmad Karnavai (No. 12), Q. Ghulam Hassan (No. 13) Ahad Bat Tangaban (No. 14), Karam Din (No. 15), Sultan Bat (No. 16), Rasul Khan (No. 17), and Ghulam Naqi (No. 18) are upheld and their sentences maintained. The sentences of fine and imprisonment in default thereof are also maintained. The sentences of imprisonment in each case shall run concurrently.

(17) This Revision application is accepted to the extent indicated above.

B/D.R.R.

Order accordingly.



A.I.R. 1953 J. AND K. 9 (Vol. 40, C. N. 3)

JANKI NATH WAZIR C. J. AND  
SHAHMIRI J.Piara Lal, Plaintiff-Appellant v. Hirdey Nath  
and others, Defendants-Respondents.

First Appeal No. 50 of 2007, D/- 15-12-1952.

**(a) Hindu Law — Joint family — Partition  
— Evidence — Recitals in document.**

Annoyed on account of his strained relations with his son who after the death of his mother had started living separately, if the father prepares a record in writing stating that certain properties were taken away by his son and that he was living separately from him, the mere recitals of this nature do not go to show that partition had been effected between members of a joint Hindu family. (Para 10)

**(b) Hindu Law — Joint family — Partition  
— Mother's share.**

On partition of the joint family property by the sons after their father's death, the widow is entitled to get a share equal to that of each of the sons, and if she has received any property either by gift or legacy from the father, she is entitled to so much only as with what she has already received would make her share equal to that of each of the sons. At the time of partition the widow should not be in a worse position merely because she has received stridhan from her husband or from her father-in-law. 12 Cal 165, Foll. (Para 17)

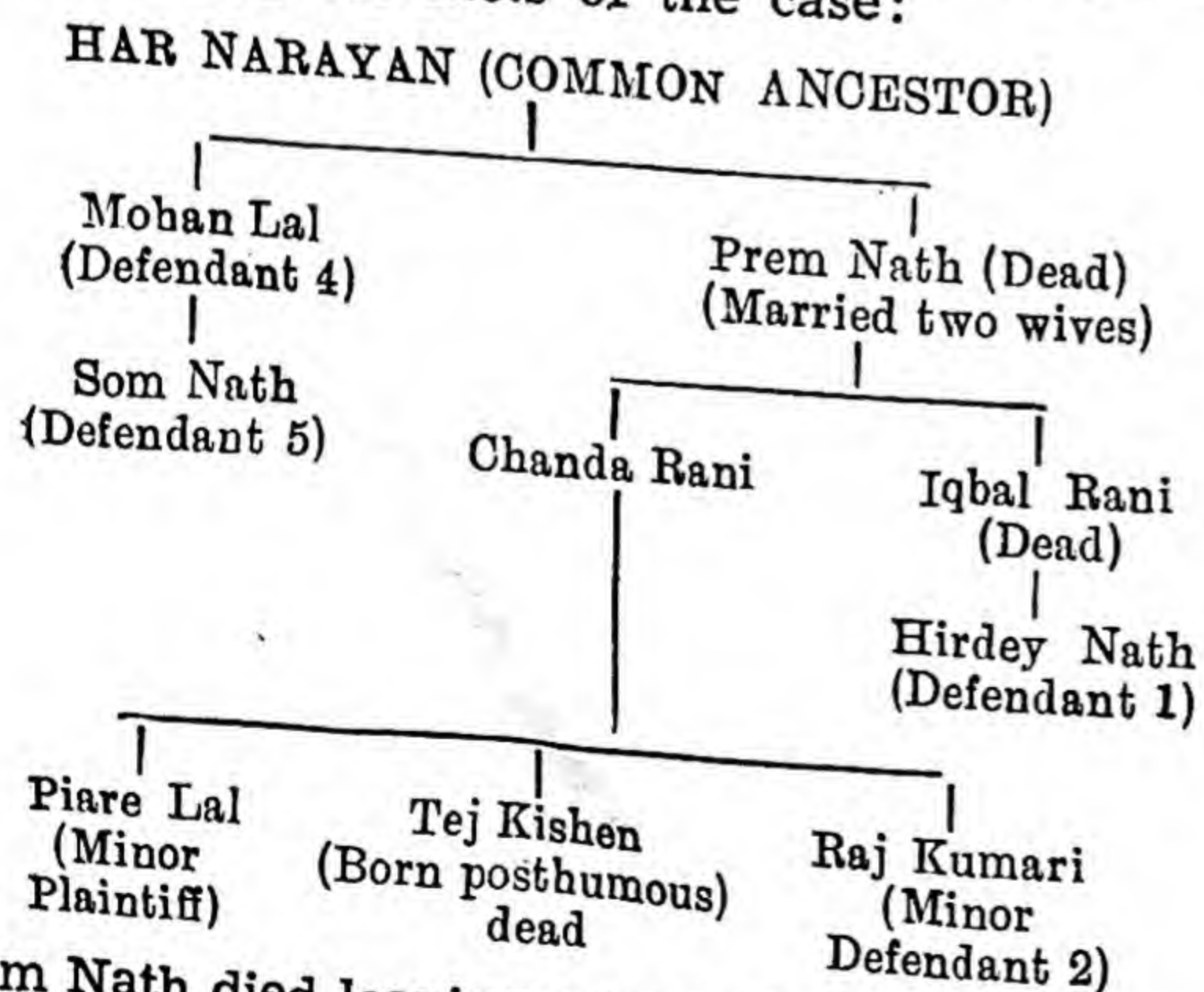
L. N. Sharma, for Appellant; Sunder Lal and M. S. Kak, for Respondents.

**CASE CITED:**

(A) ('86) 12 Cal 165

**JUDGMENT:** This appeal arises out of a suit for partition and possession of the property described in para. 2 of the plaint and for declaration that defendant 1 had no claim to the property which was acquired separately by the father of the plaintiff after partition.

(2) The following pedigree table will help in understanding the facts of the case:



Prem Nath died leaving one son Hirdey Nath by his deceased wife Iqbal Rani and a widow Mst. Chanda Rani and two minor children Piare Lal and Rajkumari. Piare Lal minor is the plaintiff in the suit. He has brought a suit for partition and possession through his next friend Pt. Babbar Koul against his brother Hirdey Nath

defendant 1, his uncle Mohan Lal defendant 4 and his son Som Nath defendant 5 and has also impleaded his sister Raj Kumari as defendant 2 and Mst. Chanda Rani his mother as defendant 3.

(3) The plaintiff's case is that his father Pt. Prem Nath separated from his son Hirdey Nath defendant 1 in the year 1989 and lived joint with the plaintiff, his mother and his sister till his death. Mohan Lal, his uncle, separated from his father in S. 1996 and executed a document by which some of the ancestral property was partitioned and some of it remained joint. It is alleged in the plaint that as Hirdey Nath had separated from his father in the year 1989 he had no claim over any property which Prem Nath had acquired subsequent to the partition and a declaration was sought that Hirdey Nath Defendant 1 had no claim to the property which was acquired by the plaintiff's father after partition.

(4) Hirdey Nath defendant resisted the suit on the grounds that he had not separated from his father; that the widow defendant 3 and the daughter Raj Kumari defendant 2 were not entitled to any share in the ancestral property; that the plaintiff had not included some of the ancestral property in the list mentioned in the plaint, and therefore, his suit was not maintainable. It was further averred that his father, Prem Nath had gifted some portion of the land to deft. 3 his wife out of the ancestral property which he could not do and the gift made in favour of defendant 3 was invalid.

(5) Defendant 2 claimed maintenance and her marriage expenses while defendant 3 claimed her share in the property left by her husband and stated that the gift of land made by her husband was in lieu of some ornaments which her husband had sold and utilised the amount on his illness.

(6) Mohan Lal and his son claimed one-half of the ancestral property left by the common ancestor Har Narayan and also claimed a portion of the rent of the land which had been realised by Prem Nath, the father of the plaintiff.

(7) The following material issues were struck by the trial Court:

- (1) Had the entire property belonging to the parties been put into the hotch-potch? If not, what other property ought to have been included in the ancestral property?
- (2) Had defendant 1 separated during the lifetime of Pt. Prem Nath?
- (3) Is the stridhan property belonging to defendant 1 in the hands of defendant 3 and is defendant 1 entitled to claim it in the present suit?
- (4) In case of partition what are the respective shares to which the parties to the suit are entitled?

(8) The trial Court of District Judge, after considering the evidence — oral and documentary — adduced by the parties came to the conclusion that the entire ancestral property had been included by the plaintiff in the plaint for the purpose of partition; that defendant 1 had not separated from the plaintiff's father in his lifetime; that the widow defendant 3 was not in possession of any stridhan belonging to Mst. Iqbal Rani, mother of defendant 1. Mohan Lal defendant 4 and his son



Som Nath were entitled to one-half share in the ancestral property, the remaining one-half was to be partitioned between the plaintiff, Hirdey Nath defendant 1 and Mst. Chanda Rani defendant 3. Defendant 2 Raj Kumari was allowed maintenance allowance of Rs. 30/- p.m. till her marriage and also her marriage expenses.

(9) The plaintiff Piare Lal has come up in appeal against this preliminary decree passed by the District Judge. On behalf of the plaintiff-appellant it is argued that the District Judge has erred in holding that no partition took place between Hirdey Nath and Prem Nath in S. 1989.

(10) We have been taken through the evidence produced by the plaintiff in regard to the alleged partition. Great reliance is placed by the appellant's counsel on the will alleged to have been executed by Prem Nath dated 15th Poh 1996 and it is argued that in the will there is a clear mention of the fact that partition of the property has been effected between Hirdey Nath and Prem Nath. It may be pointed out at the outset that the document dated 15th Poh 1996 referred to by the appellant's counsel is not a will but is a mere recital of what Prem Nath had spent on his son defendant 1. It appears that after the death of his first wife Prem Nath's relations became strained with his son Hirdey Nath and Hirdey Nath lived separately from his father after the death of his mother. It is in evidence that Hirdey Nath defendant 1 removed some furniture to the house of his sister where he was residing after his mother's death. This fact annoyed his father and on account of his strained relations with his son he executed a deed in which he stated that certain properties were taken away by his son defendant 1 and that he was living separately from him. Mere recitals of this nature would not go to show that partition had been effected between members of a joint Hindu family and that defendant 1 had received his share out of the joint property.

(11) Another circumstance has been brought to our notice to show that partition was effected between the father & the son. Our attention has been drawn to a written statement dated 29th Jeth 1997 filed by Bakshi Prem Nath in a suit which was instituted by one Dina Nath against Hirdey Nath defendant and his father Bk. Prem Nath. This suit was for the recovery of the price of a butter churning machine which was purchased by Hirdey Nath from Dina Nath. This suit was brought for the recovery of the price against Hirdey Nath and his father as they were considered to be the members of the joint Hindu family. In that suit Prem Nath, father of Hirdey Nath, stated in the written statement that his son was living separate from him and he was not responsible for the debt due from his son. The suit was decreed against Hirdey Nath defendant. The counsel for the appellant argues that as the suit was decreed against Hirdey Nath alone it clearly showed that there was a disruption of the joint family and Hirdey Nath had already separated from his father. We do not see any force in this contention. There was no definite issue raised by the trial Court in that suit in regard to the jointness or otherwise of the family and merely because the suit was decreed against Hirdey Nath alone would not show that he had separated from his father. Moreover a revision was preferred against the decree passed by the

Judge Small Causes and the judgment of the High Court in that revision application does not show that any disruption of the joint family had taken place.

(12) The learned counsel has laid great stress on the testimony of Sarva Nand, a domestic servant of Prem Nath, and wants us to hold on the basis of this evidence that Hirdey Nath had taken away his share of the property and had separated from his father. We have gone through the evidence of Sarva Nand and we find that his evidence is vague and indefinite and does not establish the partition between Hirdey Nath and his father Prem Nath. He has not been able to give the details of the property which is alleged to have been taken away by Hirdey Nath after his mother's death. If Hirdey Nath had already separated from his father the latter would not have deposited Rs. 400 in the name of Hirdey Nath's daughter at the time when partition took place between Prem Nath and his brother Mohan Lal.

(13) After going through the documentary and oral evidence we are satisfied that the finding arrived at by the trial Court that Hirdey Nath and Prem Nath had not separated in S. 1989 is quite correct.

(14) Counsel for defendant 3 has pointed out a mistake committed by the District Judge in calculating the share of his client. The District Judge has remarked on p. 12 as follows:

"According to para. 316 of Mulla's Hindu Law a widowed mother is entitled to a share equal to that of a son in the joint property and according to sub-s. (2) of the same para the value of Istridhan received from her husband is to be deducted from her share. The daughter is not entitled to a share but is only entitled to maintenance and marriage expenses. Therefore, at the time of partition between sons these 70 Kanals and 19 marlas received by Chanda Rani are to be deducted from her share in the joint Hindu family property."

(15) The trial Court has divided one-half of 435 kanals and 15 marlas of land in village Palampura into three equal shares of 72 Kanals and 12 marlas each. Out of the share of Chanda Rani he has taken 70 Kanals and 19 marlas leaving 1 kanal and 13 marlas to her which she has to get over and above the land which she has already received as a gift. The learned counsel for defendant 3 has argued that the method adopted by the District Judge is erroneous inasmuch as the widow is getting not equal share with her sons but much less than the share of the sons which is not the intention of the law. He has drawn our attention to para. 316 of Mulla's Hindu Law which reads as under:

- (1) A mother cannot compel a partition so long as the sons remain united. But if partition takes place between the sons, she is entitled to a share equal to that of a son in the coparcenary property.
- (2) If the mother has received stridhana from her husband or father-in-law, its value should be deducted from her share.

(16) It is argued that if the mother has received stridhana she cannot be placed in a position of disadvantage and get a share which is much less than the shares received by her sons.



The mother according to the learned counsel should get along with the stridhana equal share with the sons. In support of this contention reliance is placed on a quotation in Hindu Law by Trevelyan on p. 317 in which it is laid down that if the wife has previously had separate property given to her by her husband or father-in-law, she takes so much as with such property would amount to that of one of the sons. In S. 136 of Hindu Law by Gour it is laid down that subject to any local law or usage to the contrary, the following female relations are each entitled to a share on partition :

(1) On a partition between the father and his sons, or between the sons, their mother and their grand-mother are entitled to a share which with the stridhan received from their husband or the father-in-law must equal a son's share.

(17) It is, therefore, clear that the mother on partition gets share in the joint family property equal to that of her son and in case she has already received stridhan that has to be accounted for in order to make up her share equal to that of the son. It stands to reason that at the time of partition the mother should not be in a worse position merely because she has received stridhan from her husband or from her father-in-law. The share of the mother together with stridhan should be equal to that of her sons. The same view has been taken in a Calcutta case reported as — '*Kishori Mohun v. Moni Mohun*', 12 Cal 165 (A), wherein it has been laid down that on partition of the joint family property by the sons after their father's death, the widow is entitled to get a share equal to that of each of the sons, and if she has received any property either by gift or legacy from the father, she is entitled to so much only as with what she has already received would make her share equal to that of each of the sons.

(18) The District Judge has deducted from the share of the mother stridhan which she has already received from her husband and allotted to her only the balance of 1 Kanal and 13 marlas over and above the land which she has received as a gift. This calculation is erroneous. The widow, defendant 3, is entitled to one-third of 217 kanals and  $17\frac{1}{2}$  marlas which comes to 72 kanals and  $12\frac{1}{2}$  marlas. She has already received 70 kanals and 19 marlas as stridhan. The land received by her as stridhan is to be deducted out of the share allotted to her leaving 1 kanal and  $13\frac{1}{2}$  marlas. The deducted portion of 70 kanals and 19 marlas of coparcenary property which has been taken away from the share of the mother will have to be divided again equally between the mother & her sons, each coparcenary will receive 23 kanals & 13 marlas as one-third share. The sons, therefore, will get 72 kanals and  $12\frac{1}{2}$  marlas plus 23 kanals and 13 marlas i.e., 96 kanals and  $5\frac{1}{2}$  marlas each whereas the widow will get 70 kanals and 19 marlas which she has already got by way of gift and 25 kanals and  $6\frac{1}{2}$  marlas (comprised of 1 kanal and  $13\frac{1}{2}$  marlas plus 23 kanals and 13 marlas) out of the coparcenary property making her share equal to that of the sons i.e., 96 kanals and  $5\frac{1}{2}$  marlas.

(19) With the above modification in the shares, the plaintiff's appeal is dismissed. In

view of the circumstances of the case the parties shall bear their own costs in this Court.  
B/V.S.B. Order accordingly.

A.I.R. 1953 J. AND K. 11 (Vol. 40, C. N. 4)

KILAM J.

Wazir Jagat Ram, Plaintiff-Applicant v. Salam Joo and others, Defendants-Non-Applicants.

Civil Revn. No. 85 of 2008, D/- 12-9-1952.

Civil P. C. (1908), S. 115 and O. 9, R. 13 — Order setting aside ex parte decree — Revision — Interference in.

It is true that before an ex parte decree is set aside the Court must come to a definite finding that there was sufficient cause for making such an order. But the discretion primarily for setting aside of the decree vests in the court and unless and until it is made to appear that the exercise of the discretion is arbitrary or unreasonable, the High Court will not ordinarily interfere in revision. AIR 1944 Lah 397, Rel. on.

(Para 2)

Anno: Civil P. C., O. 9, R. 13 N. 30.

Hirday Nath Dhar, for Applicant; S. I. Padroo Vakil, for Non-applicants.

CASE CITED:

(A) ('44) AIR 1944 Lah 397: 46 Pun LR 230

ORDER: This is a revision application directed against an order of the learned City Munsiff Srinagar dated 23rd Phagon 2008 whereby an ex parte decree passed against the defendant-applicant was set aside.

(2) Pandit Hirday Nath Dhar Advocate who argued this application with great ability and clarity made reference to a number of rulings in which it has been held that before an ex parte decree is set aside the Court must come to a definite finding that there was sufficient cause for making such an order. With this principle of law to which the learned counsel has drawn my attention, one will have no quarrel. Rather I am in respectful agreement with this principle enunciated therein. But there is one feature of this case which distinguishes it from the facts of the cases relied upon by Mr. Hirday Nath. In this case the discretion primarily for setting aside of the decree vested in the Munsiff. He has exercised the discretion and unless and until it is made to appear that the exercise of the discretion was arbitrary or unreasonable, I think this Court will not ordinarily interfere.

(3) Mr. Shyam Lal Defendant non-applicant's learned counsel has drawn my attention to — '*Hari Singh v. Moinuddin Khan*', AIR 1944 Lah 397 (A) in which it has been held that:

"The exercise of the powers in revision is discretionary and it has been a long established practice of the High Courts in India that where substantial justice has been done between the parties powers of revision should neither be invoked nor exercised. Where the order of the trial court setting aside the ex parte decree and permitting the parties to fight out the case on its merits on payment of costs was eminently a just order the power of revision cannot be exercised to reverse that order".

(4) So far as the present case before me is concerned, I prefer to follow respectfully the



Lahore ruling. But the costs that have been awarded in this case are very meagre. The applicant's learned counsel has shown to me that during the absence of the defendant-non-applicants he had to make as many as four appearances in the Court. I think a sum of Rs. 15/- as costs that has been awarded by the trial Court is much too small. I raise the amount of costs to Rs. 30/-. The decree will be set aside on condition that a sum of Rs. 30/- is paid by the defendant-non-applicants to the plaintiff-applicant. The parties will bear their own costs in this Court.

C/V.B.B.

Order accordingly.

A.I.R. 1953 J. AND K. 12 (Vol. 40, C. N. 5)

KILAM J.

Mst. Barkati v. State.

Criminal Misc. Petn. No. 99 of 2006, D/- 16 Jeth 2007.

**Abducted Persons' Recovery and Restoration Act (1949) S. 1 — Applicability — Does not apply to Jammu and Kashmir State — Detention by officer in charge of camp in State not legal — (Criminal P.C. (1898) S. 491).**

The Abducted Persons' Recovery and Restoration Act, 1949, has no application so far as the State of Jammu and Kashmir is concerned though camps for the reception and restoration of abducted persons have been established in that State also. The result is that there is no law which can authorise the officer in charge of a Receiving Camp in the State to keep an abducted person in detention and hence any such detention is illegal.

(Paras 4, 5 &amp; 6)

Anno: Cr. P. C., S. 491 N. 7.

Sultan Ali, Petitioner in Person; Mrs. Dhar, in charge Receiving centres for abducted women in Person; Asst. Advocate General, for the State.

**ORDER:** On 10-12-2006 Sultan Ali submitted a petition to this Court to the effect that on 30th Phagon 2006 the Special police staff raided his house in his absence and illegally carried away his wife Mst. Barkati against her will and kept her in detention in the Refugee Camp Mohalla Ustad Jammu. A prayer was made in the petition that the person of Mst. Barkati be removed from the custody of the Camp officer and brought before this court and set at liberty.

(2) A notice was issued by me to the officer-in-charge Muslim Refugee Camp Mohalla Ustad Jammu to produce before me Mst. Barkati daughter of Shukur Din. Barkati appeared before me on 15th Baisakh 2007 along with Mrs. Dhar who describes herself as in charge of the Receiving Centres. I took down her statement. In her statement Barkati deposed that Sultan Ali was her husband to whom she was lawfully married. She further stated that she lived with Sultan Ali as wife for a period of two months when she was forcibly separated from him. She has categorically declared her unwillingness to go to Pakistan and has expressed her firm resolve to reside in the Jammu & Kashmir State along with her husband Sultan Ali. It was also stated by her that she has attained majority and was free to go anywhere she pleased.

(3) Mrs Dhar, who is in charge of the Camp, has in her statement admitted that she was not cognizant of any law which authorised her to keep

Mst. Barkati in detention in the camp, but she has added in her statement that in the Indian Union an Act is in force which authorises officers-in-charge of Receiving Centres in India to detain recovered abducted women. She wanted time to produce copy of the Act which was granted to her. The case was fixed for the 13th of Jeth 2007 when a telegram was received from Mrs Dhar praying for adjournment, as she could not come to Kashmir on account of bad weather. The case was fixed up for hearing today.

(4) Mrs Dhar has produced the Act of the Indian Legislature before me today. This Act is called the Abducted Persons' Recovery and Restoration Act of 1949. This Act has a slight history behind it. On 23-9-1948 (as modified on 11-11-1948) an inter-Dominion agreement between India and Pakistan was made for the recovery and restoration of the abducted women in the two dominions. In implementation of this agreement the Indian legislature passed an Act known as the Abducted Persons' Recovery & Restoration Act of 1949. It received the assent of the Governor General on 28th December 1949. This Act makes provision for the establishment of camps, powers of the police to recover abducted persons and maintenance of discipline in Camps etc. According to s. 8 of this Act the detention of any abducted person in a camp in accordance with the provisions of this Act shall be lawful and cannot be called into question in any court; so far so good; but the question is: can this Act apply to this State? This aspect of the case requires some discussion. In the Union List this matter (Entering into treaties, agreements with foreign countries and implementing of treaties agreements & conventions with foreign countries) is covered by No. 14 & this has been included in the List of matters which under Art. 370 of the Constitution of India the President in consultation with the Government of Jammu & Kashmir has declared to correspond to matters specified in the instrument of Accession governing the accession of the State (to the Dominion of India, and with respect to which the Indian Legislature can make laws for this State.) (Vide S. 2 of the Constitution (Application to Jammu & Kashmir) O. 1950). Now the Indian Legislature, as already stated, has passed an Act (Abducted Persons' Recovery and Restoration Act), but according to S. 1 Sub-S (2) its extension has been limited to the United Provinces (Uttar Pradesh), the provinces of East Punjab States Union and the United State of Rajasthan. The State of Jammu & Kashmir does not figure in this list. It is therefore obvious that the Act known as the Abducted Persons' Recovery & Restoration Act of 1949 has no application so far as this State is concerned.

(5) A camp for the reception and restoration of abducted persons having been established in this State also, one would have expected a consequential amendment in the said Act, so as to have brought the establishment of such camps in the State within the purview of this Act. But this has not been done.

(6) The result is that at the present moment there is no law which can authorise the officer-in-charge of the Receiving Camp at Mohalla Ustad Jammu to keep Barkati in detention. I have asked the Learned Assistant Advocate General to show me if there is any law as in force in this State which can authorize the officer-in-charge of the camp at Ustad Mohalla to detain any person. He has frankly declared his inability to produce one, but he has in a faint-hearted manner argued that the detention cannot be said to be improper or illegal, as Barkati is very well looked after in the camp and has been detained there in implementa-



tion, of the Inter-Dominion Agreement. In bureaucratic days such an argument, as that the detenu is looked after well and should not therefore complain of his detention, might have passed for a good argument, but in these days of democracy and social freedom this Court has, in the absence of a law to the contrary designed to meet the peculiar requirements of a particular class of cases, to presume and to hold that everybody is born free and is entitled to pass his days in freedom and cannot be subjected to any restrictions, howsoever sweet the restrictions may be, as long as the person imposing the restrictions is not authorised to do so by any specific Law. Barkati may be very well looked after in the camp; she may be getting better food than she would have got at her home, but that by itself can be no reason to deprive her of the most precious object in life i. e., freedom. In this case the only freedom she wants is freedom to live with the choice of her life I mean her husband Sultan Ali.

(7) I, therefore, hold that the detention of Barkati is illegal and order that she be forthwith released and set at Liberty.

B/D.R.R.

Petition allowed.

**A.I.R. 1953 J. AND K. 13 (Vol. 40, C. N. 6)**

**JANKI NATH WAZIR C. J. AND KILAM J.**

Ganga Ram, Defendant Appellant; v. L. Madan Lal Kapur, Plaintiff Respondent.

Revenue First Appeal No. 28 of 2008 D/- 25-9-1952.

**Suits Valuation Act (1887), S. 8 — Suit for accounts — Appeal — Forum.**

For determining the appellate forum in account suits, wherein the plaintiff has the right to value his suit tentatively, the appellate forum will be determined not by the amount found due to the plaintiff or the defendant, but by the value which the plaintiff puts on the subject-matter of his suit in the plaint. Case law discussed. (Para 5) Anno: S. V. Act S. 8 N. 33.

Jaswant Singh and M. S. Kak, for Appellant; Sunder Lal, for Respondent.

**REFERENCES:** Courtwise/Chronological/ Paras

('25) AIR 1925 All 376: (47 All 534) 4

('96) 20 Bom 265 4

('98) 22 Bom 963 4

('07) 34 Cal 954: (6 Cal LJ 255 (FB)) 4

('25) AIR 1925 Cal 1076: (53 Cal 14 FB) 4

('34) AIR 1934 Lah 488: (15 Lah 151 (FB)) 4

('36) 38 Pun LR (J & K) 88: (AIR 1936 Lah 280) 4

('18) AIR 1918 Mad 998 (2): (40 Mad 1 FB) 4

**KILAM J.:** This is a first appeal against a decree passed by the Learned City Judge Srinagar on 18th Katik 2008 and arises out of the following facts:—

(2) The plaintiff brought a suit for accounts against the defendant-appellant, L. Ganga Ram. For purposes of Court-fee and jurisdiction he valued his suit at Rs. 1100/-. The learned City Judge after going through the accounts, passed a decree in favour of the plaintiff for a sum of Rs. 6938/10/. The defendant-appellant has now come up in first appeal to this Court.

(3) On behalf of the plaintiff-respondent a preliminary objection is taken that the defendant-appellant has chosen a wrong forum of appeal and that the appeal does not lie to this

Court and should have been preferred in the District Court. He has based his objection on the fact that the plaintiff has valued the suit for purpose of Court fee and jurisdiction at Rs. 1100/-. Under these circumstances the forum of appeal, in his submission, would be the District Court and not the High Court.

(4) The question to be determined by us now is as to what is, to be taken as the value of the suit for purpose of determining the appellate forum in such cases as the one before us in which the suit has been valued for purposes of court fee and jurisdiction at Rs. 1100/-, but in which the value as found by the trial Court is more than Rs. 6000/-. It is not denied by either side that in suits for accounts the plaintiff has liberty to put a tentative valuation upon his suit for purpose of court fee and this will be its value for purpose of jurisdiction as well. But in this case in which the Court finds that a larger amount is due to the plaintiff, we have got to see as to whether the appellate forum will be determined by the original valuation of the suit or by the value as found by the trial court. On this point, so far as the Indian High Courts are concerned, there is a conflict. According to the Lahore High Court the amount found due and decreed is the value of the suit and determine the appellate forum when it exceeds the amount of which relief sought in the plaint is valued. Reference may in this connection be made to — 'Kalu Ram v. Hanwant Ram', AIR 1934 Lah 488 which is a Full Bench judgment. In this case it has been laid down that if the Court finds in an account suit that a higher amount is due to the plaintiff than the one at which he has valued his relief in the plaint, the value of the subject matter found by the Court will be the value of the subject matter for purpose of determining the appellate forum.

The Bombay High Court in an earlier judgment — 'Ibrahimji Issaji v. Benjanji Jamsedji', 20 Bom 265 also took the same view. This was an account suit in which the plaintiff had valued his claim at Rs. 600/- and the Subordinate Judge had passed a decree for Rs. 30,830/9/2. The defendant appealed to the High Court and the objection that the appeal should have been preferred with the District Judge was over-ruled. The Bombay judgment — '20 Bom 265' was considered in a later ruling of the same High Court — 'Kavasji v. Dinshaji', 22 Bom 963. In the latter case the plaintiff had valued the suit at Rs. 130/-, but the Sub-Judge found the property in suit worth over a Lakh of rupees. The Sub Judge drew up a preliminary decree and directed that the defendant should pay this amount in Court within two weeks. Against this order the defendant appealed to the District Court. The District Judge returned the appeal for presentation to the High Court on the ground that the subject matter of the suit was found to exceed Rs. 5000/-. The High Court held that the appeal lay to the District Judge. The correctness of the decision in — '20 Bom 265' was doubted in — '22 Bom 963' (a Division Bench judgment) as would become evident by the learned observations of Parson J. who delivered the main judgment. His Lordship observed that:

"I have some doubt of its — '20 Bom 265' correctness, and would point out what seems to me an anomaly, viz., that though a plaintiff is allowed to place any value he pleases on his claim in order to select the forum in which he may file his suit, the permission



does not extend beyond decree, the forum of appeal being governed not by that value but by the value decreed."

This point has been considered in a Division Bench judgment of this Court. In — *Manohar Dass v. Birandari Sheiklupurain*, 38 Pun L R (J & K) 88 it has been held that

"The value of the subject-matter of a suit must be its valuation at the time of its institution and the amount or value of the subject matter as fixed in the plaint should determine the Court to which the appeal lies."

There are other Indian High Courts which have taken a similar view as this Court. In — *Putta Kannayya Chetti v. Venkata Narasayya*, AIR 1918 Mad 998 (2) (FB) which is a Full Bench judgment it has been held that

"Where a suit for accounts is instituted in a District Munsiff's Court, the plaintiff valuing the subject matter of the suit at an amount within the pecuniary jurisdiction of the District Munsiff, and a decree is passed for more than Rs. 5000/- the appeal from that decree lies to the District Court and not to the High Court."

The Allahabad High Court is also of the same view. In — *Abdul Majid v. Ala Bux*, A I R 1925 All 376 it has been held that

"In order to determine the proper appellate court what has to be looked at is the value of the original suit, i.e., the amount or value of the subject matter of the suit. The word 'Value' must be taken to be the value assigned by the plaintiff in his plaint and not the value as found by the Court unless it appears that, either purposely or through gross negligence, the true value has been altogether misrepresented by the Plaintiff."

In this case a Full Bench judgment of the Calcutta High Court — '34 Cal 954' which has been relied upon by the learned counsel for the appellant in the case before us was discussed and dissented from. In — *Ijjatulla v. Chandra Mohan*, 34 Cal 954 it was held that if the amount actually due exceeds Rs. 5000/- though the value of the suit was fixed at a lesser amount — an appeal would lie to the High Court and not to the District Court. But quite a different view has been taken in a later Full Bench case of the same High Court — *Bidyadhar Bachar v. Manindra Nath Das*, AIR 1925 Cal 1076 (FB). In this case it has been laid down that the forum of appeal in cases in which the plaintiff has the right to put in a tentative value of the subject matter of the suit is determined with reference to the value of the suit and not the amount decreed. Somehow or other, the previous judgment — '34 Cal 954' has not been referred to in — 'AIR 1925 Cal 1076'.

(5) From the above discussion it becomes clear that the weight of authority is in favour of holding that for determining the appellate forum in account suits wherein the plaintiff has the right to value his suit tentatively, the appellate forum will be determined not by the amount found due to the plaintiff or the defendant, but by the value which the plaintiff puts on the subject matter of his suit in the plaint. We, therefore, hold that the present appeal is not entertainable by the Court. The appeal will be returned to the plaintiff for presentation in a proper Court. The defendant-appellant shall pay Rs. 50/- as costs to the plaintiff-respondent in this Court.

B/V.B.B.

Appeal dismissed.

A.I.R. 1953 J. AND K. 14 (Vol. 40, C. N. 7)

KILAM J.

Mohd. Baba and others, Defendants-Appellants v. Mt. Mukhti and others, Plaintiffs-Respondents.

Revenue Appeal No. 31 of 2009, D/- 24-10-52.

(a) **Tenancy Laws — Jammu and Kashmir Tenancy Act (2 of 1980, as amended by Act 7 of 2005), Ss. 15-C and 15-A — Applicability and scope of S. 15-A — Section does not apply to lands mortgaged with possession.**

Section 15-C of the Jammu and Kashmir Act, 2 of 1980 as amended by Act 7 of 2005 provides that the provisions of S. 15-A, Tenancy Act cannot apply to lands mortgaged with possession. Section 15-A deals with the definition of a protected tenant and also details the reasons on the basis of which a tenant can claim the status of a protected tenant. Therefore if a tenant has been admitted into cultivating possession of some land by a mortgagee landlord, such a tenant cannot claim the status of a protected tenant. (Para 1)

(b) **Tenancy Laws — Jammu and Kashmir Tenancy Act (2 of 1980) as amended by Act 7 of 2005, S. 15-A — Person cultivating land and becoming tenant after the commencement of the Amendment Act 7 of 2005 — No question of his getting rights of protected tenant arises — He can at best be a mere tenant at will.**

(Para 1)

(c) **Transfer of Property Act (1882), S. 63-A — Claim for improvements — Party allowing decree ex parte — Claim cannot be entertained in appeal.**

Where the defendants allowed the decree to be passed ex parte against them, their submission that some improvements have been effected by them in the land in dispute cannot be entertained in appeal. Improvement may or may not be a fact, but if the lower Court has not started any inquiry into that matter the defendants need thank themselves only and none else. They should not have allowed the decree to go ex parte against themselves.

(Note: But somehow or the other, it appeared to the High Court that the defendants may have made some improvements in the land. Taking into consideration all the factors involved in the case, Rs. 20/- were allowed as a compensation.) (Para 2) Anno: T. P. Act, S. 63-A N. 1 and 1a.

S. L. Padroo, for Appellants; Samsar Chand Kaul, for Respondents.

**JUDGMENT:** This is a defendant's first appeal in a Revenue matter. The land in dispute belonged to one Lassi Guru who in his turn had mortgaged it to one Arundatti. During the period when the mortgage was in force, Arundatti admitted the defendants into cultivating possession of this land. In the meanwhile, an Act by name 'The Restoration of Mortgaged Property Act, 2006' was enacted and brought into force, according to which power was given to the mortgagors to redeem their mortgaged land before the period fixed by the mortgage deed. Lassi Guru, taking advantage of the provisions of The Restoration of Mortgaged Property Act brought a suit and got a decree for redemption of this land. In fact, during the pendency of this suit, Arundatti and Lassi Guru entered into a compromise whereby a decree for redemption was



passed in favour of Lassi Guru. The defendants Mohd. Baba and others who were in the cultivating possession of this land as tenants of Arundatti, refused to give possession of the land in dispute to the plaintiffs in whose favour a decree for redemption was passed. The defendants resisted the suit on the ground that they had acquired the rights of protected tenants in the said land. But, in this case, the status of a protected tenant could not be claimed by the defendants. Reference may in this connection be made to S. 15-C of the Jammu and Kashmir Tenancy (Amendment) Act in which it has been provided that the provisions of S. 15-A of the Tenancy Act cannot apply to lands mortgaged with possession. Section 15-A deals with the definition of a protected tenant and also details the reasons on the basis of which a tenant can claim the status of a protected tenant. From this it would follow that if a tenant has been admitted into cultivating possession of some land by a mortgagee landlord, such a tenant cannot claim the status of a protected tenant. So far as the present plaintiffs are concerned, the defendants became their tenants only last year. No question of their getting rights of a protected tenant therefore arises. The defendants are at their best mere tenants at will.

(2) The defendants in this case have allowed the decree to be passed *ex parte* against them. Their learned counsel, however, made a submission that some improvements have been effected by the tenants in the land in dispute. This may or may not be a fact, but if the lower Court has not started any inquiry into this matter, the defendants need thank themselves only and none else. They should not have allowed the decree to go *ex parte* against themselves. But somehow or the other it appeared to me that the defendants may have made some improvements in the land. Taking into consideration all the factors involved in the case, I order that Rs. 20/- may be paid as compensation to the defendants-appellants. This money has been paid to the defendant-appellant, Mohd. Baba, in open Court. The appeal is rejected, but in view of the peculiar circumstances of the case, parties will bear their own costs in this Court.

B/H.G.P.

Appeal rejected.

A.I.R. 1953 J. AND K. 15 (Vol. 40, C. N. 8)

JIA LAL KILAM J.

Vishwa Nath, Plaintiff-Appellant v. Bishen Dass, Defendant-Respondent.

Second Appeal No. 42 of 2009, D/- 2-2-1953.

Houses and Rents — J. and K. House Rent Control Order, R. 7, Proviso — Notice to quit — (T. P. Act (1882), S. 106).

Where "the local law to the contrary" provides six months' notice in place of 15 days' notice to be given by a landlord to a tenant, for the latter's ejectment from the house, it does not relieve the landlord from that condition which is provided by S. 106, T. P. Act and which is that the notice must expire with the end of the month of tenancy. AIR 1923 Lah 659; AIR 1938 Cal 656; AIR 1943 Bom 306, Rel. on. (Para 3)

Anno: T. P. Act, S. 106 N. 40.

Inder Dass, for Appellant; Rup Chand Nanda, for Respondent.

## CASES CITED:

- (A) ('23) AIR 1923 Lah 659: 79 Ind Cas 957  
(B) ('38) AIR 1938 Cal 656: ILR (1938) 2 Cal 261  
(C) ('43) AIR 1943 Bom 306: ILR (1943) Bom 553

JUDGMENT: This appeal arises out of an ejectment suit which has been concurrently dismissed by the Courts below. The defendant had taken the house in dispute on rent on 11th Jeth 2000 on a monthly rental of Rs. 15/-. The plaintiff brought the present suit with the allegations that he required the house for his personal use, and that he had served a six months' notice upon the defendant to vacate the house as required by the provisions of the Rent Control Order. The defendant pleaded that the notice served upon him was not in order. The lower Court found in favour of the defendant and dismissed the plaintiff's suit. This order was upheld by the Senior Subordinate Judge in appeal. The plaintiff has now come in second appeal to this Court.

(2) Notice by the landlord plaintiff has been given on 6th Katik 2005, and by this notice the defendant-respondent was required to vacate the house within six months, i.e., on or before 6th Baisakh 2006. Both the Courts below are concurrent in the finding that six months should have ended with the end of the month of tenancy, i.e., on 11th Jeth 2006 and not on 6th Baisakh 2006, as has been done in the present case. The argument in a nutshell is that though "a local law to the contrary" has lengthened the period of notice, yet this period of notice must expire with the end of the month of tenancy as is laid down in S. 106, T. P. Act. In support of this proposition, the respondent's learned counsel has referred me to — 'Chuni Lal v. Chuni Lal', AIR 1923 Lah 659 (A), in which it has been held that:

"Where there is no contract, S. 106 (T. P. Act) applies to such cases. Section 106 merely lays down in a codified form what in fact has always been understood to be the general law on the subject. A condition in the lease that the landlord should give one month's notice if he wanted to have the premises vacated does not mean that notice could be given at any time and that it was not to expire with the end of the month of tenancy as required by S. 106".

A similar view has been taken in some other judgments also. Such as — 'Baidyanath Basak v. Onkar Mul', AIR 1938 Cal 656 (B), and — 'Utility Articles Manufacturing Co. v. Motilal Bombay Mills Ltd', AIR 1943 Bom 306 (C). Reference may in this behalf be made to S. 106 T. P. Act, which runs as follows:

"In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by 15 days' notice expiring with the end of a month of the tenancy."

According to the rulings which have just now been referred to above, it is clear that even if



there is a contract between a lessor & a lessee that the notice should be of a shorter or a longer period than the one provided by S. 106, T. P. Act, yet the notice must expire with the end of the year or the month of tenancy as the case may be. In the case before me, there is nothing contrary to S. 106 in the contract of lease, but then we have a 'local law to the contrary' which increases the period of notice from fifteen days to six months. I mean proviso to R. 7 of the House Rent Control Order which lays down:

"Provided that the Court shall make an order for the recovery of possession if the landlord satisfies the Court that six months' notice to quit or notice of such period as may be required under the contract of tenancy, whichever be longer, has been served on the tenant."

(3) The question now before us is as to whether this proviso to R. 7 of the House Rent Control Order relieves a landlord from issuing a notice, the period of which shall expire with the end of the month or year of tenancy, as required by S. 106, T. P. Act. We have just seen that according to the Lahore and Bombay rulings referred to above, despite the fact that there is a contract to the contrary with regard to the period of a notice, yet the notice should end with the month or year of the tenancy as the case may be. In this case there is no provision in the contract of lease lengthening or shortening the period of notice, but there is "a local law to the contrary" which makes it necessary to give a six months' notice. The learned counsel appearing on behalf of the appellant argues that the only obligation which a landlord is placed under is that he should give a six months' notice according to the terms of the House Rent Control Order, and that the condition of a notice expiring with the end of a month of tenancy as laid down by S. 106, T. P. Act, has been abrogated by R. 7 of the House Rent Control Order. I am afraid I cannot agree with him. The House Rent Control Order does not abrogate S. 106, T. P. Act. It has only made provision for giving some relief to the tenants such as lengthening the period of notice etc. Beyond this it does nothing, and for other purposes not dealt with in proviso to R. 7 it leaves S. 106, T. P. Act, unaffected. Therefore if "the local law to the contrary" provides six months' notice in place of 15 days' notice to be given by a landlord to a tenant, for the latter's ejectment, it does not relieve the landlord from that condition which is provided by S. 106, T. P. Act and which is that the notice must expire with the end of the month of tenancy. The result of the present notice is that the defendant-respondent was required to vacate the house earlier than the law would otherwise entitle him to occupy it. This clearly makes the notice bad in law.

(4) I, therefore, do not find any force in this appeal which is rejected. In view of the fact that an important law point is involved in this case, I order that the parties shall bear their own costs in this Court.

B/V.S.B.

Appeal dismissed.

A.I.R. 1953 J. AND K. 16 (Vol. 40, C. N. 9)

JANKI NATH WAZIR C. J.

Bakshi Nonihal, Plaintiff-Appellant v. Mst. Ram Lubhai, Defendant Respondent.

Criminal Revn. No. 55 of 2009, D/- 23-10-2009.

Criminal P. C. (1898), S. 488 (1) — "Child unable to maintain itself."

The word "child" in S. 488 (1) means the son or the daughter without reference to the age. The deciding consideration is whether the child is or is not able to maintain himself or herself. AIR 1951 Cal 66, Foll.; AIR 1932 Rang 94; AIR 1950 Mad 394, Not foll. (Para 5)

Anno: Cr. P. C., S. 488 N. 10 Pt. 2.

J. L. Sehgal, for Appellant; D. N. Mahajan, for Respondent.

#### CASES CITED:

- (A) ('32) AIR 1932 Rang 94: 33 Cri LJ 495
- (B) ('50) AIR 1950 Mad 394: 51 Cri LJ 931
- (C) ('51) AIR 1951 Cal 66: 52 Cri LJ 882

ORDER: This is a revision application directed against the order of the Sessions Judge dismissing the application of Bk. Nonihal petitioner against the order of the City Magistrate, Jammu dated 16th Chet 2008.

(2) The facts which gave rise to this application briefly are these. On 4th Sawan 2006 Mst. Ram Lubhai applied in the Court of City Magistrate, Jammu for the grant of maintenance allowance for herself and for her daughter Mst. Shakuntala. The City Magistrate by his order dated 9th Jeth 2007 granted Rs. 50/- as maintenance allowance to Mst. Ram Lubhai and her daughter Mst. Shakuntala, against Bk. Nonihal the husband of Mst. Ram Lubhai. He came up in revision before the Sessions Judge but was unsuccessful. He came up in further revision to this Court and on 21st Baisakh 2008 the parties entered into a compromise by virtue of which Bk. Nonihal agreed to pay Rs. 25 to his wife, as maintenance allowance. He further stipulated that he will go on paying Rs. 20 to his daughter for a period of six months within which he would arrange to get his daughter married and will incur all the marriage expenses himself. On the basis of this compromise an order was passed by this Court modifying the order passed by the trial Court in terms of the statement made by the applicant. On 8th Sawan 2008, an application was made by Mst. Ram Lubhai and her daughter claiming maintenance allowance from 4th Sawan 2006 to 4th Sawan 2008. A notice was issued to Bk. Nonihal and he filed objections to the application made for the recovery of the arrears of maintenance allowance. The main objections taken by Bk. Nonihal are that he was not liable to pay maintenance allowance prior to the order passed by the High Court and that he had to pay maintenance to his daughter only for six months from the date of the High Court order. These objections were overruled by the executing Court of City Magistrate and he allowed Mst. Ram Lubhai and her daughter maintenance allowance from the date the maintenance allowance was granted by the City Magistrate and subsequently notified by the High Court. Against this order Bk. Nonihal went up in revision to the Court of Sessions Judge, Jammu but was unsuccessful. He has come up in further revision to this Court.

(3) The learned Counsel for the applicant has argued that his client did not get opportunity



in the Court of City Magistrate to file all the objections against the claim for arrears of maintenance allowance. His main objections are that Mst. Shakuntala was more than 18 years old and could not come within the meaning of the word "child" as mentioned in S. 488, Cl. (1), Criminal P. C. He has further argued that the City Magistrate did not give any opportunity to his client to show sufficient cause for non-payment of the arrears of maintenance allowance.

(4) The first question for consideration is whether or not the applicant had opportunity to raise all the objections he wanted to take before the City Magistrate. From the perusal of the interlocutory orders it is abundantly clear that the case came up before the City Magistrate for a number of times. The counsel for the applicant had not put in any other objection except those which he took during the first hearings of the case. He had not asked for any opportunity for adducing any evidence to show that he had sufficient cause for non-payment of the arrears of maintenance allowance. The objection now taken by the learned counsel that he was not afforded opportunity to put in objections against the claim of maintenance allowance is without any force.

(5) The next question for consideration is whether Mst. Shakuntala, being over 18 years of age, is entitled to any maintenance allowance or not. My attention has been drawn to S. 488, Cl. (1), Criminal P. C. and it is argued that Mst. Shakuntala being more than 18 years of age was competent to maintain herself and so would not come within the meaning of the word "child" as mentioned in the above section. The word "child" mentioned in S. 488 (1) is not defined in the Criminal Procedure Code. In — 'U Ba Thaung v. Ma Aye', AIR 1932 Rang 94 (A) and — 'Subamma v. Venkata Reddi', AIR 1950 Mad 394 (B) it has been held that the word "child" in S. 488 is used to mean a minor child and if the child has attained majority he is not entitled to maintenance. If the Legislature meant minor child alone to be entitled to maintenance the word minor would have been specially mentioned along with the child in S. 488, Criminal P. C. The words used are "child unable to maintain itself" no matter whether that child is a minor or major. What the Courts, in my opinion, have to see is whether the child who claims maintenance is capable of maintaining itself or not. In case he is unable to maintain himself he is entitled to maintenance. In this case Mst. Shakuntala is a young girl and unable to maintain herself. There is nothing on the record to show that she has any other income out of which she can maintain herself. In these circumstances she is fully entitled to claim maintenance allowance from her father irrespective of the fact that she is more than 18 years of age. In support of this view reliance can be placed on a recent ruling of the Calcutta High Court reported as — 'W. L. Faria v. Anita Merlene Faria', AIR 1951 Cal 66 (C) in which it has been held that the word "Child" in S. 488 (1) has been used simply to mean the son or the daughter without reference to the age. The deciding consideration is whether the child is or is not able to maintain himself or herself.

(6) The contention of the Counsel for the applicant that Mst. Shakuntala being more than 18 years of age is not entitled to maintenance allowance is without any force.

(7) I see no reason to interfere with the order passed by the Sessions Judge, in revision and dismiss this application.

B/V.S.B.

Revision dismissed.

A.I.R. 1953 J. AND K. 17 (Vol. 40, C. N. 10)

KILAM J.

Ali Kitchlu, Plaintiff-Appellant v. Masjid Bolia Kak Through Habib Sheikh, Defendant-Respondent.

Revenue First Appeal No. 82 of 2008, D/- 22-9-1952.

**Limitation Act (1908), S. 14 — Suit must be based on same cause of action.**

One of the requisites of S. 14 is that the former and the latter proceedings must be founded upon the same cause of action. In this view, the time spent by a person claiming as full owner without avail in trying to eject the holder of certain land as trespasser through the Revenue Court cannot under S. 14, be excluded in a subsequent suit filed by the same person in civil Court basing his rights as a tenant: AIR 1916 Oudh 155, Rel. on. (Para 4)

Anno: Limitation Act, S. 14 N. 17.

Sansar Chand Kaul, for Appellant; D. N. Fotedar Vakil, for Respondent.

CASE CITED:

(A) ('16) AIR 1916 Oudh 155: 36 Ind Cas 770

**JUDGMENT:** This is a revenue first appeal against an order of the Collector Srinagar dated 8 Magh 2008, and arises out of the following facts:

(2) As early as 1st Magh 1999 the plaintiff appellant brought a suit in a revenue Court with the allegation that he was wrongfully dispossessed from the suit land of which he was the full owner though shown as a cultivator thereof in the revenue records. He prayed for the return of possession under S. 56, Tenancy Act. He succeeded in getting a decree from the Revenue Assistant on 9th Sawan 2001. The defendant preferred an appeal before the then Collector (Pandit Maharaj Krishen Dhar). The Collector set aside the decree of the trial Court on 23rd Chet 2001 and ordered that the plaint be returned to the plaintiff-appellant (respondent in that appeal) for presentation to a Court of competent jurisdiction. The then learned Collector (Pandit Maharaj Krishen Dhar) has based his order for the return of the plaint on the following facts which may be given in his own words. Says he:

"The plaint is clear that the plaintiff-respondent asserts his proprietary rights. He has re-affirmed this by means of an application and a clear statement today before me. A proprietor forcibly ousted by a trespasser cannot obtain any redress from a revenue Court. If he had admitted himself from the very start — i.e., in the plaint — to be a mere tenant, the revenue Courts could take cognisance of the case. But this is not what the respondent says. In view of these facts the only order that I can make is that the appeal be accepted and the case be sent back to the Revenue Assistant with the direction that the plaint be returned to the plaintiff-respondent for presentation in a Court of competent jurisdiction".

The plaintiff-appellant did not feel satisfied with the Collector's order dated 23rd Chet 2001 and he went in revision to the Revenue Commissioner. The Revenue Commissioner by his order dated



19th Har 2002 rejected his revision. Having failed in the revenue Courts, the plaintiff-appellant brought the present suit on 30th Sawan 2002. In this suit the plaintiff has claimed the status of a tenant and not that of a proprietor as in the previous suit and has prayed that possession of the suit land be restored to him under S. 56, Tenancy Act. The defendants-respondents resisted the suit on the ground of limitation. The present learned Collector (Kh. Ghulam Nabi) found in favour of the defendant and dismissed the plaintiff's suit. The plaintiff has now come up in first appeal to this Court.

(3) The plaintiff-appellant's learned counsel has argued that the trial Court should have given the plaintiff the benefit of the provisions of S. 14, Limitation Act according to which the time during which the plaintiff had been prosecuting with due diligence another civil proceeding whether in a Court of first instance or in a Court of appeal against the defendant shall be excluded in computing the period of limitation prescribed for any suit. The argument of the appellant's learned counsel is that the plaintiff appellant prosecuted in good faith another proceeding in a Court which from defect of jurisdiction was unable to entertain it, and as such the time spent in prosecuting the earlier proceeding should be excluded for computing the period of limitation. Concretising the argument of the learned counsel it comes to this: that the former suit of the plaintiff-appellant failed because the Revenue Court had no jurisdiction to adjudicate upon a suit which was based upon and involved the question of ownership and title, and as such his failure was due to the fact that the former Court was unable to entertain his suit because of defect of jurisdiction, and therefore the time spent by the plaintiff-appellant in prosecuting the former proceeding should be excluded in computing the period of limitation in the present suit. But the learned counsel has not taken into consideration another requisite of S. 14, Limitation Act which is to the effect that the former and the latter proceeding must be founded upon the same cause of action. It is true that if the cause of action is the same, the parties are the same, and the other conditions given in S. 14 are fulfilled, then in computing the period of limitation the time spent in another Court will be excluded if that "another Court" was, because of a defect of jurisdiction, unable to entertain it. Now let us see if the cause of action in the two proceedings is the same.

(4) It has been found in the former suit by both the Collector and the Revenue Commissioner that the plaintiff had based his suit upon his proprietary rights. But the plaintiff in the present suit does not assert his proprietary rights, nor does he base his suit on them, but comes forward on quite a different basis, i.e. upon his rights as a tenant. This would show that the cause of action is totally different in the present case from the one in the former, and if the cause of action is different, S. 14, Limitation Act, can in no way be invoked in support of the position taken by the plaintiff. Reference may in this connection be made to — 'Dondoo Singh v. Sheo Nara-in Singh', AIR 1916 Oudh 155 (A) in which it has been held that

"The time spent by the landlord without avail in trying to get the holder of some of his lands ejected through the revenue Courts as tenant cannot under S. 14, Limitation Act, be excluded in a subsequent suit filed by the landlord in the civil Court for the purpose of having that ejected as trespasser."

From this it would become abundantly clear that the time spent by the appellant in carrying on an independent litigation founded on a different cause of action cannot be excluded in computing the period of limitation in the present suit.

(5) According to S. 56, Tenancy Act

"A tenant who has been ejected from his tenancy without his consent or otherwise than in execution of a decree, may within one year from the date of his dispossession or ejectment institute a suit for recovery of possession."

Now in this case the allegation is that the plaintiff-appellant was dispossessed of the suit land on 12th Poh 1999. He should have brought the present suit within one year from 12th Poh 1999, but then the present suit has been brought as late as 13th Sawan 2002, that is to say, much after one year. We have just found that the plaintiff in view of the fact that the former suit was founded on a different cause of action, cannot seek or derive any benefit from S. 14, Limitation Act. The present suit is, therefore, clearly barred by limitation.

(6) In view of the above, I do not find any reason to disagree with the view taken by the learned Collector. This appeal is rejected with costs.

C/V.B.B.

Appeal dismissed.

A.I.R. 1953 J. AND K. 18 (Vol. 40, C. N. 11)

KILAM J.

Dina Nath, Applicant v. State.

Criminal Misc. Appln. No. 72 of 2009, D/- 31st Bhadon 2009.

**Criminal P. C. (1898), S. 491 — "Illegally or improperly detained" — (Public Safety — (Jammu and Kashmir Defence Rules (1996 S), R. 24 (1) and (2) ) — (Constitution of India (1950), Art. 226).**

Any order passed by the District Magistrate for the detention of any person, beyond his jurisdiction, under R. 24(1) and (2), Jammu and Kashmir Defence Rules, is ultra vires of the powers delegated to him by the Government in Council Order No. 281-C. of 1942. AIR 1949 Bom 37, Rel. on. (Para 4)

Anno: Criminal P. C., S. 491 N. 7.

Pandit Lok Nath Sharma, for Applicant; Asst. Advocate General, for the State.

CASES CITED:

- (A) ('49) AIR 1949 Bom 37: 50 Cri LJ 129
- (B) ('47) Cri. Applns. Nos. 660 to 662 of 1947, D/- 2-12-1947 (Bom)

**ORDER:** This is an application under S. 491, Criminal P. C. submitted by one Dina Nath who is this time detained in the Central Jail Srinagar in pursuance of an order of detention passed by the District Magistrate Udhampur on 15th Sawan 2009.

(2) The main ground on which the learned counsel appearing on behalf of the detenu has based his prayer is that the order of detention is mala fide and without jurisdiction. In his application the detenu has stated that his detention is the result of some reasons other than those mentioned in the order of detention. In particular he says that he had already undergone a term of detention pursuant to an order of the District Magistrate Udhampur and was released therefrom on 13th Sawan 2009. On 15th



Sawan 2009 he appeared in a case as an accused before the same District Magistrate where the detenu put in an application for the stay of proceedings on account of some adverse remarks made by the District Magistrate against a witness of the detenu who appeared in his (detenu's) defence. The application proceeds that no sooner was the application for stay submitted than the District Magistrate Udhampur who perhaps did not look with favour on the said application, passed the present order of detention.

(3) In order to convince myself as regards the truth or otherwise of the allegations made in the application, I ordered that concerned file in which the detenu figured as an accused be sent for. But in view of another argument which has been advanced today, I think no useful purpose will be served by waiting for the file, as the objection taken now goes to the very root of the order of detention, sufficient by itself for quashing the order. The argument advanced by the learned counsel for the detenu is that the order of detention made by the District Magistrate Udhampur is without jurisdiction as the order of detention has to take effect at a place beyond the jurisdiction of the District Magistrate, i.e., Central Jail Srinagar. The learned counsel has drawn my attention to council order No. 281-C of 1942 in which it has been laid down that

"the Government are pleased to direct that the powers vested in the Government by sub-rr.

(1) and (2) of R. 24 of the Jammu and Kashmir Defence Rules shall, subject to the control of the Government, be exercised by all District Magistrates within their respective jurisdictions."

From this it would become abundantly clear that, firstly, the powers delegated to the District Magistrates by the Government are only under Sub-rr. (1) and (2) of R. 24 of the Jammu and Kashmir Defence Rules, and secondly, that these powers can be exercised by the District Magistrates only within their respective jurisdictions and not beyond them. Now Sub-rr. (1) and (2) of R. 24 deal only with the detention of a person or internment within a specified area or externment from one district to another or imposing of such other restrictions upon a person which the Government or the District Magistrates (if such powers are delegated to them) may think fit to pass.

(4) In this case the detenu was ordered to be detained under Sub-r. (1) of R. 24 of the Jammu and Kashmir Defence Rules. This the District Magistrate could certainly do. Under sub-r. 5 (b) of Rule 24

"It is the Government that can by any general or special order provide for the removal of any person and for the detention of such person in any area in the State."

As already stated, this power has not been delegated to the District Magistrate Udhampur. Therefore any order that is passed by the District Magistrate for the detention of any person beyond his jurisdiction is ultra vires of the powers delegated to him.

(5) The detenu's learned counsel has drawn my attention to — 'Bashan Madar v. Emperor', AIR 1949 Bom 37 (A) in which it has been found that where the District Magistrate of Sholapur passed an order under S. 2 (4) detaining a person in the Yaravade Jail in the Poona District, "the order is without jurisdiction, in view of the Notification No. 671, dated 26-4-47,

under which the powers have to be exercised by the District Magistrates (of Bombay) within their jurisdiction." In this case a reference is made to another Bombay case — 'In re Baboo-rao Sripat Deshmukh', Cri. Applns. Nos. 660 to 662 of 1947 (B) which was decided on 2-12-47 by Chagla Ag. C. J. and Gajendragadkar J. In that case an order of detention was passed by the District Magistrate of East Khandesh and a copy of the order of detention was sent to the Superintendent of Nasik Jail. But it was held in that case that such an order was beyond the jurisdiction of the District Magistrate and that he had no power to detain him (the detenu) outside the territorial limits of his district. With great respect I quote in full a passage from their Lordships' judgment:

"In all these three cases the detenus have been detained by an order of the District Magistrate at the Nasik Jail. Nasik is not within the jurisdiction of the District Magistrate, East Khandesh, and therefore, in ordering their detention outside his jurisdiction he has exercised a power which was not delegated to him under the notification of 26th April 1947. There is no doubt that the Provincial Government can detain a person anywhere within the Province, but when that power is exercised by an authority to whom that particular power is delegated, the delegation is circumscribed by territorial considerations and the detention can only be within his own jurisdiction."

(6) Applying these principles to the facts of the present case, I find that the order made by the District Magistrate Udhampur for the detention of the detenu at a place beyond his jurisdiction makes his order obviously an illegal order. The learned Assistant Advocate General has frankly conceded that the order of detention made by the District Magistrate Udhampur is without jurisdiction. Taking all this into consideration, I find that the detention of Dina Nath s/o Kanshi Ram of Chenani is improper and invalid. I order that he be set at liberty forthwith unless required in some other case.  
C/M.K.S.

Application allowed.

#### A.I.R. 1953 J. AND K. 19 (Vol. 40, C. N. 12)

KILAM J.

Parsi Dass and another, Applicants v. State. Criminal Revn. No. 62 of 2009, D/- 19-12-52.

**Jammu and Kashmir Defence Rules, Rr. 68 (4) and 118 — Attempt to export ghee outside Jammu and Kashmir, when it was prohibited — Accused caught inside State far away from border, while carrying ghee tins in truck — Held though there might be intention and preparation, there was no attempt — Accused held entitled to benefit of doubt — (Penal Code (1860), S. 511). AIR 1932 Mad 507, Relied. AIR 1952 J and K 55 Applied. (Para 5)**

Anno: Penal Code, S. 511 N. 1.

Bhakshi Ishwar Singh, for Applicants; Assistant Advocate General, for the State.

#### CASES CITED:

(A) ('52) AIR 1952 J & K 55: 1953 Cri LJ 166  
(B) ('32) AIR 1932 Mad 507: 33 Cri LJ 582

**ORDER:** Six persons were proceeded against under Rr. 68 (4), 118 of the Jammu & Kashmir Defence Rules in the Court of the Addl. District Magistrate Kathua, who after trial convicted all the six persons to six months' rigorous



imprisonment and to a fine of Rs. 100/- each. On appeal, the learned Sessions Judge Jammu acquitted two accused persons, by name, Chhaju Ram and Babu Ram, but maintained the conviction of the other four accused and reduced their sentence of imprisonment to the one already undergone. The learned Sessions Judge also remitted the sentence of fine in regard to Dharam Singh. As regards the remaining three accused, the learned Sessions Judge maintained their sentence of fine and he also maintained the order with regard to confiscation and forfeiture of ghee.

(2) The facts of the case, as found by the learned Sessions Judge are, that the accused persons with a view to smuggle out of the State certain quantity of ghee in contravention of the orders prohibiting export of this commodity, carried 64 tins of ghee in a truck No. J & K 1803 towards Jammu side and unloaded them at a place 8 or 9 miles from Lakhanpur towards Jammu side. There the tins were kept hidden underneath some bushes growing around. The finding further is that at about 4 o'clock in the morning of 15th Katik 2008 an empty military vehicle was seen coming from the Basantpur canal road and going towards Jammu side. Dewan Jia Lal Deputy Superintendent Customs who saw the military truck going towards Jammu side, suspected that this truck might be used for smuggling out ghee. Dewan Jia Lal, believing that the truck might return back with the tins of ghee, blocked the road with the idea that the vehicle carrying the ghee if at all it comes, would not be able to proceed further. In the meanwhile information was carried to Dewan Jia Lal that a number of tins of ghee that were kept hidden underneath the bushes at a distance of 8 or 9 miles towards Jammu side were being loaded on a military truck. After some time at about 5-30 A. M. he saw that a military truck was coming at a very high speed from Jammu side which in spite of signal being given, did not stop, but proceeded further and only stopped when it found its way blocked. The result was that the truck was brought back to Lakhanpur wherefrom 64 tins of ghee were recovered. A complaint was lodged against the accused persons with the above result.

(3) So far as the facts found in the case are concerned there can be no dispute. But the question is as to whether these facts constitute an offence under Rr. 68/118 of the Defence Rules. Rule 68 of the Defence Rules lays down that

"taking out of the State any goods the export of which has been stopped is an offence punishable under sub-rule (4) of the same rule."

Now export of ghee has been stopped under the Ghee Control Order of 1999. Under R. 118 of the Jammu and Kashmir Defence Rules any person who attempts to contravene the provisions of R. 68 or any other defence rule shall also be deemed to have contravened that provision. Now in this case we find that the ghee was not taken out of the State, and as such the offence of exporting cannot be said to have been committed. It is, however, argued that the action of the accused persons comes within the mischief of R. 118 of the Jammu and Kashmir Defence Rules which makes an attempt at contravention punishable. The question then arises as to whether the action of the accused persons comes within the purview of the definition of an attempt.

In this behalf I might with advantage quote from a judgment of mine reported as — 'Mt. Noor Bibi v. State', AIR 1952 J & K 55 (A) wherein I have held that

"Before the commission of an offence, an accused has got to go through three preliminary stages: first that of intention to commit the offence, secondly preparation to commit and thirdly, attempt to commit it. Mere intention to commit an offence is not punishable. Nor is the preparation to commit it. It is only when the preparation merges itself in attempt that the act becomes punishable by law."

(4) The learned Assistant Advocate General argues that this action of the accused persons was clear attempt on their part to commit an offence under R. 68. I am afraid I cannot agree with him. The accused may have an intention to commit an offence of exporting ghee out of the State territory, but, as already stated, mere intention is not punishable at law.

(5) Then we have found that the accused persons were apprehended very far away from the Ravi Bridge, by crossing over which they would have reached the Punjab territory. They had not attempted to cross the border or even the bridge, & as such their going towards the bridge was merely a preparation to cross the bridge. Before they had reached the bridge, the possibility cannot be excluded that the accused might have repented of their intention and changed their mind and never attempted to carry the ghee across the forbidden line. Under these circumstances the accused are clearly entitled to benefit of doubt.

(6) In — 'Narayanaswami Pillai v. Emperor', AIR 1932 Mad 507 (B) the accused was found travelling in a bus to Tranquebar carrying 165 tolas of opium which somebody had given to him at Chidambaram with instructions to meet him at a place in French Territory and to give it to him. The accused in this case was charged under S. 7 read with S. 20, Dangerous Drugs Act. In this case it was held by Walsh J. that "there was no attempt to commit the crime but mere preparation for its committal." The learned Judge in the concluding portion of his judgment states that

"It seems to me that he (accused) must be given the benefit of doubt that he might have repented of his intention before reaching the French Territory."

(7) This case is quite on all fours with the present case. The accused persons along with the ghee were apprehended in the State territory and not a step was taken by them towards crossing the border. The case would have been however, different if they were apprehended while crossing the border.

(8) I, therefore, have no hesitation in extending the benefit of doubt to the accused persons. I accept this Revision application and order that the accused persons be acquitted. Fine if paid, must be refunded. The order of forfeiture of ghee is also set aside.

B/R.G.D.

Revision allowed.

A.I.R. 1953 J. AND K. 20 (Vol. 40, C. N. 13)

JIA LAL KILAM J.

Ghulam Mohd. and others, Plaintiffs-Appellants v. Mohamdoo, Non-Applicant-Respondent. Second Appeal No. 33 of 2009, D/- 22-2-1953.



**Malicious prosecution — Essentials — Effect of dismissal of Criminal case.**

There is no presumption with respect to criminal proceedings that they were wrongly taken, if the proceedings fail in a Court of law. It is therefore, necessary for the plaintiff in a suit for malicious prosecution to prove not only that he has been declared innocent, but that he must also show that there was no probable or reasonable cause for the complainant to have started proceedings in the case. (Para 3)

Ishwar Singh, for Appellants; Rupchand Nanda, for Respondent.

**JUDGMENT:** This is a plaintiff's second appeal directed against an order of the Sub-Judge Udhampur dated 29th Har 2009. The plaintiff had brought a suit for a sum of Rs. 100/- as damages for malicious prosecution. The trial Court of Munsiff Rassi granted a decree of Rs. 100/- in favour of the plaintiff. Against this order the defendant went in appeal to the Sub-Judge Udhampur who by his order referred to above upset the judgment of the trial Court and dismissed the plaintiff's suit. The lower appellate Court has found that the judgment in the criminal case out of which the suit for malicious prosecution has arisen "was not satisfactory in regard to the question of possession over the land" which is the bone of contention in this litigation. The defendant's case both as complainant in the criminal Court and in the civil Court has been that the land was in his possession from a very long time, and when on the relevant date he visited the land, he found the accused already there, who abused him and assaulted him. The learned appellate Judge also found that the Munsiff had allowed himself to be guided by the findings of the criminal Court to come to the conclusion that the appellant was never in possession of the land.

(2) In an action for malicious prosecution the plaintiff has to prove that he was innocent and was held so by the Court before whom charge was made against him. He has also got to show that there was want of reasonable and probable cause for the prosecution, and that the proceedings were started against him in a malicious spirit with an indirect and improper motive and not for the purpose of vindicating law. In view of the finding of the lower appellate Court that the criminal Court's conclusions with regard to the possession over the land were not satisfactory, I think that the plaintiff's suit has been rightly dismissed. I agree with the finding arrived at by the lower appellate Court which is based upon sound reasoning and material on record. All that has been proved by the plaintiff in this case is that he was acquitted of the charge by a criminal Court. He has not been able to show in the present case that the defendant had no reasonable cause for bringing the complaint against him.

(3) It has to be taken into consideration that there is no presumption with respect to criminal proceedings that they were wrongly taken if the proceedings fail in a Court of Law. It might be for a number of causes that a complainant might not have been able to prove his case, but if every complainant whose complaint is dismissed were to be proceeded against with an action for malicious prosecution, it would mean a great deal of hardship for all those who fail to prove their complaint. It is, therefore,

necessary for the plaintiff in a suit for malicious prosecution to prove not only that he has been declared innocent, but that he must also show that there was no probable or reasonable cause for the complainant to have started proceedings in this case. I therefore, do not find myself in disagreement with the view taken by the lower appellate Court. This appeal is rejected. Taking into consideration the peculiar circumstances of the case, parties shall bear their own costs in this Court.

B/D.R.R.

Appeal dismissed.

**A.I.R. 1953 J. AND K. 21 (Vol. 40, C. N. 14)**

**WAZIR C. J. AND KILAM J.**

*Illamdin, Appellant v. State.*

Criminal First Appeal No. 5 of 2009, D/- 18/2/1953.

**Penal Code (1860), Ss. 363 and 376 — Offence under.**

Charges under Ss. 363 and 376 — Sessions Judge finding that girl was not an unwilling agent in going away with accused — Also that sexual intercourse was not against her will — Age of girl found more than 14 years but less than 16 years when rape was committed — Offence held did not come under S. 376 — Offence under S. 366, however, held proved. (Paras 11 and 12)

Anno: Penal Code, S. 363 N. 1; S. 376 N. 1.

Asst. Advocate General, for the State.

**KILAM J.:** Illam Din, accused appellant, has been convicted under Ss. 363 and 376, R. P. C. by the learned Sessions Judge Jammu. Under S. 363, R. P. C. he has been sentenced to undergo three years' rigorous imprisonment and under S. 376 to five years' rigorous imprisonment. Both the sentences have been ordered to run concurrently.

(2) The charge against Illam Din has been that he kidnapped a minor girl by name Atri and committed rape on her. The accused has denied the charge.

(3) The case of the prosecution is that Mst. Atri was kidnapped by Illam Din accused on 15th Jeth 2007. It is further alleged that he kept Atri with himself for two nights when Atri, taking advantage of the fact that the accused had fallen fast asleep, gave him a slip and ran away. The F. I. R. was lodged on 18th Jeth 2007. Mst. Atri was examined by Dr. Bodh Raj who stated that in his opinion she was between 10-13 years of age and that rape had been committed on her some time a week before she was examined by him. Besides Dr. Bodh Raj, the prosecution has produced the following witnesses:

(4) Mst. Atri, Puro, Somraj, Jalalud-Din and Amarchand.

(5) Atri describes as to how she had gone to a water mill on the evening of 15th Jeth 2007, when she was accosted by the accused and carried away. She also states that later on he committed rape on her.

(6) Puro P. W. 3 who is the owner of the water mill states that Atri came to his mill one day in the month of Jeth 2007 along with the accused. The mill was at that time closed and Atri left some grain there to be ground later on. Thereafter both the accused and Atri went away.



(7) Somraj states that both Atri and Illam Din came to his shop one day in the month of Jeth and purchased some cigarettes and matches from him.

(8) Jalal-ud-Din simply states that the mother of Atri had told him that her daughter was lost somewhere. According to this witness Atri's mother had suggested to him that she was taken by Illamdin.

(9) Amar Chand states that in the month of Jeth 2007 the accused and Mst. Atri came near his shop and busied themselves in preparing fire for cooking their meals, on the vacant site lying before his shop. Atri approached the shopkeeper Amar Chand for some Gur and while she was in the act of purchasing Gur from him, she told him that she was decoyed by the accused and further requested him to conceal her in his shop. The shopkeeper told her to wait and he himself went to call the Chowkidar who, however, was not to be found in the village. When he came back, he found both the accused and Atri gone.

(10) From the evidence — a synopsis of which has been recorded above — it becomes abundantly clear that the accused and Atri were together for a number of days and were seen going from one place to another. This also is proved by the statements of both Atri and the doctor that sexual intercourse was committed by the accused with Atri just a week before her medical examination had been conducted by the doctor.

(11) The learned Sessions Judge, has after discussing the evidence come to the conclusion that Atri was not an unwilling agent in having gone with the accused. He is also of the opinion which he formed after considering the evidence and the various circumstances of the case that even sexual intercourse was not had with Atri against her will. Such being the finding of the trial Court which has not been challenged by the learned Asst. Advocate General, the question of settling the age of the girl in definite terms became really very imperative. We were not at all satisfied with the statement of the doctor who had given quite a vague sort of statement when he had stated that the age of the girl was probably between 10-13 years. We therefore thought it proper to get this girl (Atri) examined by an X-Ray expert. She was examined by Dr. Ranjit Singh who is of the opinion that the age of the girl on the day when he conducted her examination was between 16½ and 17½. The X-Ray examination of the girl had taken place on 30th Assuj 2009 and the offence is said to have been committed on 15th Jeth 2007. If we take the average of the two age limits given by the Radiologist we might take the age of the girl as 17 on the day she was examined by him. Judging from all this, the age of the girl would be a trifle less than 15 years on the day when she is alleged to have been kidnapped. Even if we take her age at the lowest limit given by the Radiologist, i.e. 16½ years on the date of her examination, even then she would be more than 14 years on the day when rape is alleged to have been committed on her. Taking into consideration the finding of the learned Sessions Judge with which we are in agreement, we find that the offence of rape cannot be brought home to the accused. It is only in such cases where the age limit is less than 14 years that sexual intercourse will be rape even though it was with the consent of the girl. But if sexual

intercourse takes place with a willing girl who is of more than 14 years of age, such sexual intercourse cannot come within the definition of rape. If, however, the girl is an unwilling agent, sexual intercourse will become rape irrespective of the age of the girl. The accused is therefore acquitted of the charge under S. 376 and the sentence passed on him under this section is set aside.

(12) But that the girl Atri was less than 16 years on the date of the alleged offence is amply proved. As such we are of the opinion that the offence of kidnapping under S. 363, R. P. C. is proved against the accused. We therefore maintain his conviction and sentence of three years under S. 363, R. P. C.

(13) The result is that the conviction and sentence of the accused under S. 376, R. P. C. are set aside, while his conviction and sentence of three years' rigorous imprisonment under S. 363, R. P. C. are maintained.

(14) The appeal is accepted to the extent indicated above.

C/H.G.P.

Order accordingly.

A.I.R. 1953 J. AND K. 22 (Vol. 40, C. N. 15)

KILAM J.

Devia Ram and another, Applicants v. L. Ram Chand, Non-Applicant.

Appln. No. 105 of 2009, D/- 25/2/53.

Penal Code (1860), S. 420 — Intention — Proof of — Breach of Contract.

Where a complaint of an offence of cheating is made on the ground that the accused has entered into a contract with the complainant to work for the latter and that he had not commenced work in spite of complainant making two payments as agreed, the complainant has to establish a preconceived intention on the part of the accused of not carrying out the terms of the agreement. Such an intention cannot be presumed from the mere receipt of money and not working subsequently according to the terms of the agreement. Mere receipt of money would not be cheating unless it is shown that it was received with the preconceived intention of denying it later on. If the intention is changed subsequently it would not be cheating. 159 Ind Cas 167 (1) (Pat) and AIR 1923 Lah 621, Rel. on. (Para 3)

The whole transaction may amount to a breach of contract, might involve a breach of faith, a betrayal of confidence, and might arouse moral indignation. But that would not convert it into a criminal offence. AIR 1938 Mad 129, Rel. on. (Para 6)  
Anno: I. P. C., S. 420 N. 4, 11.

Suraj Prakash, for Applicants; H. R. Janak Lal Gehgal, for Non-Applicant.

CASES CITED:

- (A) ('35) 159 Ind Cas 167(1) (Pat)
- (B) ('23) AIR 1923 Lah 621: 25 Cri LJ 1311
- (C) ('38) AIR 1938 Mad 129: 39 Cri LJ 261

ORDER: This is an application under S. 561-A, Criminal P. C. with the prayer that the criminal proceedings pending against the accused applicants in the Court of Sub-Judge Magistrate first class Jammu be quashed. The



following facts have given rise to this application :

The accused applicants, Ths. Devia Ram and Beli Ram are alleged to have entered into an agreement with the complainant, L. Ram Chand, stipulating that they would engage 100 well-trained sawyers for sawing logs in Mar-mat jungle. It was further stipulated that by 15th Chet 2008 the work will be commenced which was to be completed by Maghar 2009. At the time of executing the agreement, the complainant advanced to the accused applicants a sum of Rs. 1000/-. According to the agreement, Rs. 2000/- more were to be paid to the accused-applicants in the month of Phagan 2008. The second instalment of Rs. 2000/- which was stipulated to be paid in the month of Phagan 2008 was however paid on 26th Chet 2008. It is alleged by the complainant that in spite of the fact that an advance of Rs. 3000/- was made to the accused applicants, they did not at all commence work as well stipulated by them. The complainant further affirms that the accused had fraudulent intentions from the very beginning pursuant to which they made false representations and thereby induced the complainant to part with a sum of Rs. 3000/-. It is further alleged by the complainant that in case he had known about the fraudulent intentions of the accused, he would not have parted with the money. On these facts a complaint was submitted on 3rd Bhadon 2009. Before proceeding further, it might be conducive to the right understanding of the dispute to give below a brief analysis of the facts on which the present complaint is based.

(a) A reference to the agreement would show that it has been signed only by Beli Ram accused applicant. Devia another accused applicant has not affixed his signature to this agreement. Beli Ram who styles himself as the Karta of the joint family of which Devia is also a member appears to have signed the agreement on Devia's behalf, as well. The sum of Rs. 2000/- which was advanced by the complainant was received by Beli Ram alone, as would become evident by a reference to the receipt of 26th Chet 2008 which too has been signed by Beli Ram alone. Under these circumstances I wonder how criminal liability could be fastened upon Devia at least. If any false representation has been made or if any fraudulent inducement has been held out, it was by Beli Ram. By no stretch of imagination can Devia be involved in an affair with which ostensibly he had no concern.

(b) Again a reference to the agreement would show that Beli Ram or Devia were not unknown figures to the complainant. Clause No. (6) of the agreement would show that Beli Ram and Devia were working for the complainant even before. Beli Ram in this agreement has stipulated that whatever amount from previous accounts will be found due from him to the complainant, he will get credit for that and that sum will be deducted from the amount found due to the applicants under the present agreement.

(c) Then again according to the agreement the applicants were to be paid Rs. 2000/- in the month of Phagan 2008. As against this, admittedly this amount has been paid to Beli Ram on 26th Chet 2008. This appears to be a clear breach on the part of the complainant

(d) According to the agreement, the work was to be started from 15th Chet 2008. The second instalment of Rs. 2000 was advanced to Beli Ram accused applicant on 26th Chet 2008 that is to say a month after it was due to be paid and 11 days after the work was to commence. The inference is obvious that in case the accused persons had not started work on 15th Chet 2008, there was no reason as to why an advance of Rs. 2000/- should have been made by the complainant to Beli Ram on 26th Chet 2008.

(e) A reference to the complaint would show that it has been drafted and presented in Court on 3rd Bhadon 2009. In case the accused persons had not at all worked even after getting a huge sum of Rs. 3000/-, there is no reason as to why the complainant should have remained silent for nearly six months. According to the agreement the third instalment of Rs. 7000/- was to be paid much earlier than the date on which the complaint was lodged, i.e., 3rd Bhadon 2009. This amount was to be paid in the month of Jeth 2009. The least that one would have expected of the complainant was that he would have served the accused persons with a notice explaining the reasons for withholding the third instalment.

(2) The above analysis of the facts of the case would make it clear that the whole affair is a case of breach of contract, pure and simple. Breaches seem to have been made both by the complainant and the accused.

(3) The learned counsel appearing for the complainant (Non-applicant) has argued that since the accused persons had received money from the complainant with no intention to carry out the terms of the agreement, it was a clear case of cheating. But the learned counsel has forgotten that a preconceived intention of not carrying out the terms of an agreement has to be established and not to be presumed from the mere receipt of money and not working subsequently according to the terms of the agreement. Mere receipt of money would not be cheating unless it is shown that it was received with the preconceived intention of denying it later on. If the intention is changed subsequently it would not be cheating. In — *'Sheosagar Pandey v. Emperor'*, 159 Ind Cas 167 (1) (Pat) (A) it has been held that :

"Mere breach of a contract cannot give rise to a criminal prosecution. The distinction between a case of mere breach of contract and one of cheating depends upon the intention of the accused at the time of the alleged inducement which may be judged by his subsequent act but of which the subsequent act is not the sole criterion. Where there is no clear and conclusive evidence of the criminal intention of the accused at the time the offence is said to have been committed and where the party said to be aggrieved has an alternative remedy in the civil court, the matter should not be allowed to be fought in the criminal courts."

(4) In — *'Ram Saran v. Crown'*, AIR 1923 Lah 621 (B) a petitioner was convicted of cheating on the ground that in spite of receiving from his debtor, the complainant, cash and cattle in payment of what he owed him he gave him notice later on for payment of the debt originally due and denied what he had already received. On these facts it was held that "there was nothing to show that the petitioner received payment with the pre-



conceived intention of denying it later on. If he subsequently denied it, he cannot be said to have cheated the debtor though this conduct of him was highly reprehensible."

(5) Nor is there any explanation forthcoming as to why the second instalment was not advanced to the applicants in the month of Phagan 2008 as was stipulated. Again the significance of the fact can never be minimized that if the accused persons had not started work on 15th Chet 2008, why was an advance made to them on 26th Chet? Then again if after having taken this amount of Rs. 3000/- no work was done by them, why was not a notice given to them? Why did the non-applicant wait for six long months before the present complaint was brought? All these are very pertinent questions that cannot be lost sight of. It would also show that even complainants did not believe that the accused persons were guilty of cheating. I am, therefore, definitely of the opinion that the whole affair is a clear breach of contract. A breach of contract might involve a breach of faith, a betrayal of confidence, and might arouse moral indignation. But that would not convert it into a criminal offence. In — 'Chidambaram Chettiar v. Shanmugham', AIR 1938 Mad 129 (C) it has been held that:

"The High Court has inherent jurisdiction under S. 561-A, Cr. P. C. to pass any order necessary to prevent abuse of the process of any Court. In the world of business, things are often done which are betrayals of confidence and deceptions which arouse moral indignation, but are nevertheless civil wrongs which can be righted by Civil Courts and are not crimes which can be punished by a Criminal Court. Not every immoral act is criminal and it is an abuse of the process of a Court to attempt to create a new crime in order to compel men to conform to a high standard of probity in business dealings or to force them to execute their promises. And therefore the High Court, to prevent specious and spiteful criminal prosecutions for actions which, though strictly dishonourable yet do not amount to crimes, has jurisdiction to interfere."

(6) I am in respectful agreement with the enunciation of law made in these rulings.

(7) In the result this application has to be accepted, since the facts of the case do not disclose a criminal offence. Devia was a signatory neither to the agreement nor to any receipts. But even then he has been arraigned as an accused, which is a flagrant case of abuse of the process of court.

(8) I, therefore, order that the criminal proceedings pending in the Court of the Sub-Judge Magistrate First Class, Jammu against Ths: Devia Ram and Beli Ram be quashed. The order of the Sessions Judge, Jammu dated 15th Magh 2009 rejecting the revision application of the applicants is set aside. Bail bonds if any of the accused persons Devia and Beli Ram are discharged and they be set free.

B/D.R.R.

Application allowed.

A.I.R. 1953 J. AND K. 24 (Vol. 40, C. N. 16)

JANKI NATH WAZIR C. J.

Mohamad Yusuf and others, Plaintiffs-Appellants v. Jamal Baba and others, Defendants-Respondents.

Civil Revn. No. 28 of 2009, D/- 23-10-1952.

**Court-Fees Act (1870), S. 13 — Remand under inherent powers — Refund of Court fees — (Civil P. C. (1908) O. 41, R. 23 and S. 151).**

Where the lower appellate court finds that the suit was decided on insufficient material and therefore under its inherent powers remands the case for fresh trial the appellate Court should order the refund of the Court fees to the plaintiff-appellant. AIR 1939 Lah 257, Rel. on. (Para 2)

Anno: Court fees Act, S. 13 N. 3; Civil P. C., S. 151 N. 4; O. 41 R. 23 N. 33.

J. L. Chowdhari, for Appellants; J. N. Bhan and Asst. Advocate General, for Respondents.

CASE CITED:

(A) ('39) AIR 1939 Lah 257: 41 Pun LR 796

ORDER: Mohd. Yusuf and others brought a suit for possession of certain immovable property against Jamal Baba and others. The suit was dismissed by the trial Court of Senior Subordinate Judge, Srinagar. On appeal the District Judge found that the trial Court had decided the case on insufficient material. Therefore the decree passed by the trial Court dismissing the suit was set aside and the case was remanded to the trial Court with the direction that it shall frame fresh issues and allow the parties to adduce fresh evidence in regard to the issues raised and dispose of the case according to law. No directions were given by the lower appellate Court in regard to the refund of Court-fees. The plaintiffs made an application before the lower appellate Court under S. 151, Civil P. C., read with S. 13, Court-Fees Act, for the refund of the Court fees. That application was dismissed on flimsy grounds.

(2) The plaintiffs have come up in revision to this Court and it is argued that as the suit was remanded to the trial Court for fresh trial the court-fees should have been refunded. Strictly speaking, this remand order does not come within the purview of O. 41, R. 23, Civil P. C. It is a remand order made by the lower appellate Court under its inherent powers. I have gone through the order passed by the District Judge and I find that the District Judge has come to the conclusion that the suit was decided on insufficient material before the trial Court. It has been held in — 'Firm Hari Ram & Sons v. H. O. Hay', AIR 1939 Lah 257 (A).

"Where there has been no real trial of the main issues involved in the case in both the Courts below, the appellant is entitled to refund of Court-fee paid by him in the lower appellate Court in memorandum of appeal."

In this case, as held by the District Judge, issue No. 1 was not properly decided by the trial Court and the case was remanded to it for fresh trial. In my opinion the District Judge should have ordered the refund of the court-fees to the plaintiff appellant.

(3) I, therefore, allow this application, set aside the order passed by the District Judge disallowing the prayer for the refund of Court-fees and direct that necessary certificate for the refund of court-fees should be issued in favour of the applicant.

C/H.G.P.

Application allowed.



A. I. R. 1953 J. AND K. 25 (Vol. 40, C. N. 17)

JANKI NATH WAZIR C. J.  
AND SHAHMIRI J.

Magher Singh and others, Appellants v. Principal Secretary, Jammu and Kashmir Govt., Respondent.

First Appeal No. 29 of 2008 and First Appeal No. 4 of 2009, D/- 25-3-1953.

**Jammu and Kashmir Big Landed Estates (Abolition) Act (2007), Preamble, Ss. 4 (4), 5 (5), 20, 26 and 35 — Act is not ultra vires the legislative powers of the Yuvraj — Jammu and Kashmir Constitution Act (1996), Ss. 4, 5, 72 — S. 5 is not abrogated by Proclamation of Yuvraj — Constitution of India, Arts. 370, 385, 254 and Part III — Applicability to Jammu and Kashmir — Repugnancy with Jammu and Kashmir Land Acquisition Act (10 of 1990), S. 6.**

Jammu and Kashmir Big Landed Estates (Abolition) Act (2007) is not ultra vires of the powers of Shree Yuvraj nor is it open to review by the Courts. (Para 28)

His Highness the Maharaja of Jammu and Kashmir's legislative, executive and judicial powers in relation to the State were not limited in the sphere outside the matters assigned to the Union. He could entrust all his rights and authority under Ss. 4 and 5 of the Jammu and Kashmir Constitution Act 1996 to any person whom he liked even to the extent of effacing himself altogether as the British Parliament can do and his proclamation dated 7th Har 2006 published in Extraordinary Gazette dated 20-6-1949 entrusting these powers to Yuvraj was perfectly valid and constitutional. (Para 3)

(Short background of the constitutional relationship that existed between the Jammu and Kashmir State and the British Crown before the partition of India and how it was affected by the Indian Independence Act of 1947 and by the subsequent execution of the Instrument of Accession by His Highness on the 26th October 1947, traced). (Para 3)

(Effect of Art. 370, Constitution of India in relation to the State of Jammu and Kashmir indicated.) (Para 3)

A Legislature whose powers are circumscribed by the superior authority which has created it can exercise legislative powers of the same nature as the superior authority itself and cannot be treated as its delegate or agent. Consequently, it cannot be contended that the Yuvraj, to whom full and plenary powers of legislation had been given by a sovereign authority which could do anything it pleased, was an agent or delegate of that sovereign authority and that there are any checks or restraints on his power. Therefore the Yuvraj is fully competent to exercise powers under S. 5 of the Jammu and Kashmir Constitution Act, 1996. (Para 4)

Article 385 does not in terms apply to the State of Jammu and Kashmir. It may also be observed that under Art. 370 only such provisions of the Constitution could be declared by the President, in consultation with the State Government to apply to the State of Jammu and Kashmir as related to matters specified in the Instrument of Accession. (Para 5)

1953 J. & K. /4 & 5

The Article has not been specifically excluded from the Second Schedule to the Constitution (Application to J. & K.) Order, 1950 only through an oversight or inadvertence. (Para 5)

The State Constitution Act is clearly saved under clause 8 of the Instrument of Accession and it remains materially unaffected by Art. 370 of the Indian Constitution. (Para 5)

The words in the Proclamation of 26-11-1949 by the Yuvraj that "the provisions of the said Indian Constitution shall, as from the date of its commencement, supersede and abrogate all other constitutional provisions inconsistent therewith which are at present in force in this State" can only be interpreted to mean such provisions of the Constitution as are really applicable to the State and not those provisions of the Constitution which were not and could not be applied to the State in accordance with the letter and spirit of Art. 370. The Yuvraj could make an Act inconsistent with Part III of the Constitution relating to Fundamental Rights. The Chapter on Fundamental Rights does not apply to the State of Jammu and Kashmir and no Act made by the Yuvraj can be questioned on this ground. In fact no legislation made by the Yuvraj outside the matters within the competence of Parliament can form the subject-matter of review in a Court of law just as no Act of British Parliament could be declared ultra vires by any Court. (Para 5)

Consequently, S. 5, Jammu and Kashmir Constitution Act, 1996 is neither abrogated nor superseded by the provisions of the Indian Constitution, by virtue of the Proclamation of 26-11-1949. (Para 5)

The provisions contained in the J. & K. Big Landed Estates (Abolition) Act do not relate to the acquisition of property for the State or for any other public purpose. They ordain extinguishment of the rights of the landlord, in the manner set forth in S. 4 of the Act and, therefore, these are not in conflict with S. 6, J. & K. Land Acquisition Act. (Para 6)

Even assuming that there is some clash between these Acts, Art. 254 of the Constitution cannot be invoked for the purpose. Article 254 is not really applicable to the State of Jammu & Kashmir. The condition precedent for the effective application of Art. 254 is that it should relate to a provision of law in the concurrent list with respect to which Parliament has power to make laws for the State. In the absence of such power and in the absence of the application of List III of the Seventh Schedule to the State, the question of any provision of law made by the State Legislature being repugnant to any provisions of a law made by parliament which parliament is not competent to enact for the State or to any existing law does not arise and the J. & K. Big Landed Estates (Abolition) Act cannot be held ultra vires of the powers of Yuvraj on this ground. (Para 6)

There is nothing whatsoever in the Jammu and Kashmir Constitution Act, 1996 which limits the legislative power of the Ruler or the Yuvraj within the residuary sovereignty of the State. The Jammu and Kashmir Constitution Act, 1996 did not



lay down any Fundamental Rights which could not be abridged or taken away by the sovereign Legislature, i.e., the Ruler or the Yuvraj and his powers of Legislation are as wide and as plenary as those of the British Parliament and they cannot form the subject-matter of judicial review, nor can they be impugned on any such ground as non-payment of compensation. (Para 7)

Since the Yuvraj was not the delegate of His Highness and had as full and as plenary powers as His Highness himself and, therefore, he could make any law in the State, he could also delegate his powers of legislation to any person or body whom he thought fit to do so. (Para 8)

Even then the delegations made in most of the provisions of the Big Landed Estates (Abolition) Act, (Ss. 4(4), 5(5), 20 and 35) relate to matters of detail permissible even under the Supreme Court ruling AIR 1951 SC 332 and do not part with essential legislative functions, namely, legislative policy & its formulation as a rule of conduct. Such delegation is perfectly valid. (Para 8)

But these restrictions which are implicit in the Constitution of India do not apply to the Ruler of the Jammu and Kashmir State who enjoyed full residuary sovereignty. (Para 8)

Section 26 of the Act, however, stands on a slightly different footing. Here the question of award of compensation has been left to be settled by the Constituent Assembly which could not be regarded as a subordinate authority. There was nothing wrong in leaving the decision of the question of payment of compensation to the expropriated landlords to a body which was to be convened for the purpose of drawing up the Constitution of the State. (Para 8)

B. N. Nehru, for Appellants; Jaswant Singh Acting Advocate General, for Respondent.

#### CASES CITED:

- (A) ('51) AIR 1951 SC 332: 1951 SCR 747
- (B) ('53) AIR 1953 Pepsu 1: ILR (1952) Patiala 461 (FB)
- (C) (1878) 3 AC 889: 4 Cal 172 (PC)
- (D) (1884) 53 LJPC 1: 9 AC 117
- (E) ('52) AIR 1952 J & K 7: 10 J & K LR 113
- (F) ('52) AIR 1952 SC 252: 31 Pat 565 (SC)
- (G) ('51) AIR 1951 All 44: 52 Cri LJ 1191
- (H) ('50) AIR 1950 SC 27: 51 Cri LJ 1383 (SC)
- (I) ('46) AIR 1946 Bom 216: 47 Cri LJ 594
- (J) ('39) AIR 1939 PC 36: 180 Ind Cas 538 (PC)
- (K) ('43) AIR 1943 All 379: 45 Cri LJ 491 (FB)
- (L) ('41) AIR 1941 FC 16: ILR (1941) Kar FC 72
- (M) ('50) AIR 1950 Mad 243: 51 Cri LJ 615

SHAHMIRI J.: This judgment shall dispose of two appeals — Civil First Appeal No. 29 of 2008 from the judgment and decree of Kilam J. dated 11th Magh 2008 and Civil First Appeal No. 4 of 2009 from the judgment and decree of the District Judge, Kashmir, dated 23rd Magh 2008. In the suit before the learned single Judge of this Court Magher Singh, appellant, prayed for a declaration that the Jammu and Kashmir Big Landed Estates (Abolition) Act, 2007 is ultra vires of the powers of Shree Yuvaraj and therefore in spite of the passage of this Act the plaintiff continues to be the lawful owner of 811 Kanals of land, situate in villages Kadyal and Kotli Arjansingh, Tehsil Ran-

birsinghpura, District Jammu. In the suit before the learned District Judge which was instituted by Badri Nath Munshi and another on their own behalf and on behalf of the Jammu and Kashmir Agricultural Association the appellants sought the declaration that the Jammu and Kashmir Big Landed Estates (Abolition) Act, 2007 was invalid and the appellants and other landowners (members of the J & K Agricultural Association) in the State are and still continue to be in peaceful possession and enjoyment of their lands of which they were admittedly owners in possession prior to the enforcement of the Act in the State without any limitation and restrictions imposed by the provisions of the Act. The declarations were refused, the Act was held intra vires and both the suits were dismissed.

(2) In both the appeals the point for determination is whether the Jammu and Kashmir Big Landed Estates (Abolition) Act 2007 is ultra vires of Shree Yuvaraj Karansingh who has made that Act in exercise of the powers vested in him under Section 5 of the Jammu and Kashmir Constitution Act, 1996 read with the proclamation issued by His Highness the Maharaja of Jammu and Kashmir published in an extraordinary issue of the Government Gazette dated 7th Har, 2006. Elaborate arguments have been addressed to us by the learned counsel for the parties. Section 4, Jammu and Kashmir Big Landed Estates (Abolition) Act, 2007 runs as follows:

- "4. Extinction of the right of ownership in certain land. (1) Notwithstanding anything contained in any law for the time being in force, the right of ownership held by a proprietor in land other than land mentioned in sub-s. (2) shall subject to the other provisions of this Act, extinguish and cease to vest in him from the date this Act comes into force.
- (2) Extinction of the right of ownership under sub-section (1) shall not apply to— (a) unit of land not exceeding 182 Kanals including residential sites, Bedzats and Safedzats;

.....

The learned counsel for the appellants has impugned the Act on the following main grounds:

(1) His Highness the Maharaja of Jammu and Kashmir was not an absolute sovereign and therefore he could not entrust his legislative authority to any other person.

(2) Shree Yuvaraj being a delegate of his Highness was not competent to enact the Act under Section 5 of the Jammu and Kashmir Constitution Act, 1996;

(3) At any rate after the Constitution of India came into force Section 5, Jammu and Kashmir Constitution Act, 1996 under which the Jammu and Kashmir Big Landed Estates (Abolition) Act, 2007 was passed by Shree Yuvaraj was abrogated or superseded by Art. 385 of the Constitution of India.

(4) The Act is invalid inasmuch as it is in conflict with Art. 254 of the Constitution of India.

(5) The Act is also void because it aims at extinguishment of ownership in private property without making any suitable provision for compensation.

(6) Furthermore it is urged that even if the Act is intra vires some parts of it which contain provisions for delegated legislation are void.

(3) (a) In regard to the first point that His Highness the Maharaja was not an absolute sovereign it is urged by the learned counsel for the appellants that before the partition he was under the paramountcy of the British Crown and after he executed the Instrument of Accession in



favour of the Dominion of India in 26-10-1947 he surrendered part of his sovereignty to the Dominion of India and therefore was a limited subordinated sovereign and consequently he could not delegate his legislative authority to Shree Yuvaraj.

In order to appreciate the position of His Highness it would be necessary to give a short background of the constitutional relationship that existed between the Jammu and Kashmir State and the British Crown before the partition of India, and how it was affected by the Indian Independence Act of 1947 and by the subsequent execution of the Instrument of Accession by His Highness on 26th October 1947. Previous to the partition there was no doubt that the Ruler of the Jammu and Kashmir State was under the suzerainty of the British Crown inasmuch as foreign relations were under the exclusive control of the Crown representative. But in so far as the internal sovereignty of the Ruler was concerned it was absolutely unlimited and there were no fetters on it. In this connection it would be relevant to reproduce Sections 4 and 5 of the Jammu and Kashmir Constitution Act, 1996 as they stood before the Act was amended in November 1951:

- "4. The territories for the time being vested in His Highness are governed by and in the name of His Highness, and all rights, authority and jurisdiction which appertain or are incidental to the Government of such territories are exercisable by His Highness, except in so far as may be otherwise provided by or under this Act, or as may be otherwise directed by His Highness.
5. Notwithstanding anything contained in this or any other Act, all powers, legislative, executive and judicial, in relation to the State and its Government are hereby declared to be and to have always been inherent in and possessed and retained by His Highness and nothing contained in this or any other Act shall affect or be deemed to have affected the right and prerogative of His Highness to make laws, and issue proclamations, orders and ordinances by virtue of his inherent authority".

(b) These provisions make it crystal clear that the territories comprised in the State of Jammu and Kashmir were vested in His Highness and governed by and in his name and all rights, authority and jurisdiction appertaining or incidental to the government of these territories was exercisable by His Highness except in so far as was otherwise provided under the Act or as it might otherwise be directed by him. Despite the fact that under the Act a Legislative Assembly, i.e. Praja Sabha, had been set up with certain circumscribed powers, all legislative, executive and judicial powers of His Highness in relation to the State and its Government were declared to be or to have always been inherent in and possessed by his Highness. In view of these clear provisions it is futile to argue that His Highness' powers to do what he pleased in relation to the State could be seriously questioned. So far as the internal sovereignty of the State was concerned the powers of the Ruler were similar to those of the British parliament. In this connection the following extract from the judgment of the late Chief Justice of the Supreme Court of India in *The Delhi Laws Act, (1912)*, AIR 1951 S C 332 at p. 337 (A) may be aptly quoted:

"The important question underlying the three questions submitted for the Court's consideration is what is described as the delegation of legislative powers. 'A legislative body which is sovereign like an autocratic ruler has power to do anything. It may, like a ruler, by an individual decision, direct that a certain person may

be put to death or a certain property may be taken over by the State. 'A body of such character may have power to nominate someone who can exercise all its powers and make all its decision'. This is possible to be done because there is no authority or tribunal which can question the right or power of the authority to do so".

There is no doubt whatsoever that the observations set out above fully apply to the powers of an Indian ruler like the Ruler of the State of Jammu and Kashmir.

In this connection reference may also be made to a Full Bench judgment of Pepsu High Court, — *Gurdwara Sahib v. Piyara Singh*, A. I. R. 1953 Pepsu 1 (B) cited by the learned Acting Advocate General. It is stated therein that sovereignty of a State has two aspects, i. e. "external" as independent of all control from without and 'internal' as paramount over all actions within. A State by ceding certain powers with regard to external affairs to another state does not cease to be sovereign if its powers with regard to internal matters remain unrestricted. It was held that the erstwhile Patiala State in the above sense was an independent and sovereign State, and its Ruler, so far as internal matters were concerned, exercised powers identical with those exercised by parliament in England. In short though in matters relating to external affairs and relations with states he was controlled by the British Government, and even in internal matters the paramount power had the right to interfere in certain contingencies, in internal matters his words had the weight and authority of law, and he exercised all the powers of a sovereign and discharged all his functions as such in matters judicial, executive and administrative. In his sovereign capacity he had the fullest control over his subjects and their property in his territories and could pass all kinds of orders. Therefore where in his capacity as the ruler of the Patiala State the Maharaja passed an executive order depriving a subject of his property and conferred the same on a Gurdwara Committee the Full Bench of the High Court held in the above case that the Civil Courts had no jurisdiction to question the legality of the order.

(c) While the Maharaja of Kashmir was under the Paramountcy of the British Crown before the partition of India from 15-8-1947 under Section 7, Indian Independence Act (10 & 11 Geo VI Ch. 30) passed by the British Parliament suzerainty of His Majesty over the Indian States lapsed and all functions exercisable by His Majesty at that date with respect to the State of Jammu and Kashmir, all obligations of His Majesty towards the Jammu and Kashmir State or the ruler thereof and all powers, rights, authority or jurisdiction exercisable by His Majesty at that date in relation to the State of Jammu and Kashmir by treaty or otherwise lapsed and the State became an independent and sovereign State in the full sense of the International Law. Thus whatever limits to the sovereignty of His Highness in relation to matters coming within the sphere of paramountcy existed before 15-8-1947, these ceased to exist and His Highness became an uncontrolled and absolute sovereign even in relation to such spheres from that. Now let us examine what was the effect of the execution of the Instrument of Accession by His Highness on 26-10-1947. This Instrument of Accession which was executed by the Ruler of the independent and sovereign State of Jammu and Kashmir was executed by him under Section 6, Government of India Act 1935, as adapted by the Indian (Provisional Constitution) Order, 1947.



By executing this Instrument of Accession the Ruler on behalf of the State acceded to the Dominion of India with the object that certain authorities specified in Section 6 (1) (a) shall, by virtue of the Instrument of Accession, 'but subject always to the terms thereof,' and for the purposes only of the Dominion, exercise in relation to the State such functions as would be vested in them by or under the Act. It is clear that, even if the Instrument of Accession had not made any specific reservations therein, the instrument read with Section 6, Government of India Act would leave the residuary sovereignty of the State entirely unaffected. But the Instrument of Accession does not leave this important matter to be determined by implication alone. Clause 8 of the Instrument of Accession runs as follows:

"8. Nothing in this Instrument affects the continuance of my sovereignty in and over the State, or, save as provided by or under this Instrument, the exercise of any powers, authority & rights now enjoyed by me as Ruler of this State or the validity of any law at present in force in this State".

In view of this clear and express reservation we see that no change whatsoever was affected in the residuary sovereignty of the State or the power of its Ruler so far as the succession of the State to the Dominion of India was concerned. It may not be out of place to mention here that on 5-3-1948 His Highness issued a proclamation by which he appointed a Cabinet to carry on the administration of the State. Sheikh Mohd Abdullah was appointed the Prime Minister and all other Ministers were appointed on his advice. The proclamation laid down that the Cabinet would act on the principle of joint responsibility. In the words of the Late Mr. Gopalaswami Ayyangar thus

"He instituted a kind of responsible government with a Prime Minister and colleagues who would own collective responsibility for their acts and regard themselves as jointly responsible for all the acts of the Government. (Vide Constituent Assembly debates dated 17-10-1949, Vol. X No. 10 at page 426).

This Proclamation did not in any way affect the sovereign powers vested in the Ruler. The only effect of this proclamation was that thenceforward His Highness exercised his executive and legislative powers in accordance with the advice given to him by his government, i. e. his Council of Ministers while he continued to exercise his judicial powers in accordance with the advice given to him by the Board of Judicial Advisers provided under Section 71, Jammu and Kashmir Constitution Act, 1996. The inherent powers of the Ruler remained unchanged.

(d) Now the question to be examined is whether Article 370 of the Constitution of India which was embodied in the Constitution while the Indian Constituent Assembly was about to finalize its labours made any change in the constitutional relationship of the State as it existed between the State of Jammu and Kashmir and the Dominion of India. Article 370 of the Constitution of India runs as follows:

"370. (1) Notwithstanding anything in this Constitution, (a) the provisions of Article 238 shall not apply in relation to the State of Jammu and Kashmir; (b) the power of parliament to make laws for the said State shall be limited to—

(i) those matters in the Union list and the concurrent List which, in consultation with the Government of the State, are declared by

the President to correspond to matters specified in the instrument of Accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and

(ii) such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.

Explanation: For the purposes of this article, the Government of the State means the person for the time being recognized by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja's Proclamation dated the fifth day of March, 1948;

(c) the provisions of article 1 and this article shall apply in relation to that State;

(d) such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify:

Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub-clause (b) shall be issued except in consultation with the Government of the State:

Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with concurrence of that Government.

(2) If the concurrence of the Government of the State referred to in para. (ii) of sub-cl. (b) of cl. (1) or in the second proviso to sub-cl. (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the state is convened, it shall be placed before such Assembly for such decision as it may take thereon.

(3) Notwithstanding anything in the foregoing provision of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify.

Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification."

A careful examination of this article would show that it in no way altered the basis of relationship between the State and the Union of India. The residuary sovereignty of the State and the powers of its Ruler in matters other than those specified in the Instrument of Accession remained unaffected. The purpose for which Art. 370 was incorporated in the Indian Constitution is clear from the language of the article itself. This is also apparent from the speeches made by the prominent members of the Government of India who were responsible for drafting this article and piloting it through the Constituent Assembly. On 12-10-1949 this is what the late Sardar Patel, Deputy Leader of the Congress Party, Deputy Prime Minister and the Minister for States said in the Constituent Assembly on this subject:—  
"In view of the special problem with which the Jammu and Kashmir Government is faced, we have made special provision for the continuance of the relationship of the State with the Union on the existing basis."

Reference may also be made in this connection to the following extracts from the speech of the



late Mr. Gopalaswami Ayyangar which was delivered by him while moving Art. 370 (then Art. 306-A) in the Constituent Assembly:—

- (i) X X X X The States have been integrated with the Federal Republic in such a manner that they do not have to accede or execute a document of Accession for the purpose of becoming units of the Republic, but they are mentioned in the Constitution itself; and in the case of practically all states other than the State of Jammu and Kashmir, their constitutions also have been embodied in the Constitution for the whole of India. All those other States have agreed to integrate themselves in that way and accept the Constitution provided.
- (ii) In the case of the other Indian States or Unions of States there are two or three points which have got to be remembered. They have all accepted the Constitution framed for States in part I of the new Constitution and those provisions have been adapted so as to suit conditions of Indian States and Unions of States. Secondly, the Centre that is the Republican Federal Centre, will have power to make laws applying in every such State or Union to all Union and Concurrent Subjects. Thirdly a uniformity of relationship has been established between those States and Unions and the Centre. Kashmir's conditions are, as I have said special and require special treatment.
- (iii) At present, the legislature, which was known as the Praja Sabha in the State is dead. Neither that legislature nor a constituent assembly can be convoked or can function until complete peace comes to prevail in that State. We have therefore to deal with the Government of the State which, as represented in its Council of Ministers, reflects the opinion of the largest political party in the State.
- (iv) The second portion of this article relates to the legislative authority of Parliament over the Jammu and Kashmir State. This is governed primarily by the Instrument of Accession. Broadly speaking, that legislative power is confined to the three subjects of defence, foreign affairs and communications but as a matter of fact these broad categories include a number of items which are listed in the Instrument of Accession. I believe they number some twenty to twentyfive. Now, these items have undergone a change in description, in numbering, in arrangement, as amongst themselves, in List I and List III of the new Constitution, it is therefore necessary that the items mentioned in the Instrument of Accession should be brought into line with the changed designations of entries in Lists I and III of the new Constitution. So, clause (1) (b) of Art. 306-A says that this listing of the items as per the terms of the new Constitution should be done by the President in consultation with the Government of the State.
- (v) Clause (b) (ii) refers to possible additions to the List in the Instrument of Accession, and these additions could be made according to the provisions of this article with the concurrence of the Government of the State
- (vi) Then, there is the explanation, which defines what the Government of the State

means. The Government of the State is defined both in the Constitution which is now supposed to be in force in the Jammu and Kashmir State as well as in the Proclamation which the Maharaja issued on the 5th March 1948. The terms of the Proclamation, to the extent that they are inconsistent with the provisions of the Constitution Act of the State, will prevail over that Constitution Act and therefore it is that in this Explanation it is the proclamation which is referred to. Under the terms of that proclamation, the Maharaja constituted an interim popular Government, and he said—

'I hereby order as follows:

- (I) My council of Ministers shall consist of the Prime Minister and such other Ministers as may be appointed on the advice of the Prime Minister. I have by Royal Warrant appointed Sheikh Mohd. Abdullah as the Prime Minister with effect from the 1st day of March, 1948.

He proceeds—

The Prime Minister and other Ministers would function as a Cabinet and act on principle of joint responsibility.

Then there was no Legislature functioning and so he instituted a kind of responsible Government with a Prime Minister and colleagues who would own collective responsibility for their acts and regard themselves as jointly responsible for all the acts of the Government. Now, that is brought out in this Explanation.....

- (vii). "Clauses (a) and (d) refer to the provisions of the Constitution other than the matters listed in Lists I and III. These various provisions have been divided into certain categories. The first according to this draft is that Article 1 of the Constitution will automatically apply. As you know, it describes the territory of India, and includes amongst these territories, all the States mentioned in Part III, and Jammu and Kashmir is one of the States mentioned in Part III. With regard to the other provisions in the Constitution, these will apply to the Jammu and Kashmir State with such exceptions and modifications as may be decided on when the President issues an order to that effect. That order can be issued in regard to subjects mentioned in the Instrument of Accession only after consultation with the Government of the State. In regard to other matters the concurrence of that Government has to be taken.

- ....."
- (viii). "Then we come to clause (2). You will remember that several of these clauses provide for the concurrence of the Govt. of Jammu & Kashmir State. Now, these relate particularly to matters which are not mentioned in the Instrument of Accession, and it is one of our commitments to the people and Government of Kashmir that no such additions should be made except with the consent of the Constituent Assembly which may be called in the State for the purpose of framing its Constitution. In other words, what we are committed to is that these additions are matters for the determination of the Constituent Assembly of the State". (vide Constituent Assembly Debates, Vol. X No: 10. dated 17th October, 1949 at pages 424 to 427).

In relation to the State of Jammu and Kashmir in short the effect of this article to use the words



of the late Mr. Gopalaswami Ayyangar is that "the Union Legislature will get jurisdiction to enact laws on matters specified either in the Instrument of Accession or by later addition with the concurrence of the Government of State" which is of course subject to the ratification by the State Constituent Assembly and the State would continue to be governed in the residuary field by its own laws and by its own Constitution.

(e) Accordingly I find that there is no substance whatsoever in the contention urged by the learned counsel for the appellants that His Highness' legislative, executive and judicial powers in relation to the State were limited in the sphere outside the matters assigned to the Union. He could certainly entrust all his rights and authority under Sections 4 and 5 of the Constitution Act to any person whom he liked even to the extent of effacing himself altogether as the British parliament can do in the words of Kania C. J. referred to above and his proclamation dated 7th Mar 2006 entrusting these powers to Yuvaraj was perfectly valid and constitutional.

(4) The second contention urged by the learned counsel for the appellants is that Yuvaraj being a delegate of His Highness the Act passed by him under Section 5, J. & K. Constitution Act, 1996, was bad because the powers under Section 5 were inherent powers of His Highness and could not be entrusted to the Yuvaraj. The learned Acting Advocate General has repelled this contention by taking his stand on the position that the Yuvaraj was in no sense a delegate of His Highness. He has strongly urged that the words of the proclamation published in the Gazette extraordinary dated 20-6-1949 clearly show that the Ruler during his absence from the State had transferred all the powers and functions exercisable by him in relation to the State and its Government to Yuvaraj and, therefore, the Yuvaraj was the replica or manifestation of His Highness and had as full and as plenary powers as His Highness himself. In order to appreciate this point it is desirable to give below the words of the Proclamation itself:

"Whereas I have decided for reasons of health to leave the State for a temporary period and to entrust to the Yuvaraj Shree Karansinghji Bahadur for that period all my powers and functions in regard to the Government of the State."

"Now, therefore, I hereby direct and declare that all powers and functions, whether legislative, executive, or judicial which are exercisable by me in relation to the State and its Government in including in particular my right and prerogative of making laws of issuing proclamations. Orders and Ordinances, of remitting, commuting or reducing sentences, and of pardoning offenders, shall during the period of my absence from the State be exercisable by the Yuvaraj Shree Karansinghji Bahadur".

It fully bears out that His Highness the Maharaja transferred all his rights, powers and prerogatives as contained in Sections 4, 5 and 72, J. & K. Constitution Act, 1996, as it stood before its being amended and the Ruler did not reserve any power to himself for this period. The Yuvaraj was given all the powers by an authority as sovereign as the British Parliament. A reference to — 'Empress v. Burah', (1878) 3 A. C. 889 corresponding to 4 Cal 172 (P. C.) (C) would show that even in the case of a Legislature whose powers were expressly limited by an Act of the British Parliament and which could obviously act only within the ambit of the powers so conferred it was held that

in no sense it was an agent or delegate of the Imperial Parliament and within its scope it had plenary powers of legislation as large as those of the British Parliament itself. The following observations of their Lordships of the Privy Council in this case may aptly be quoted here:

"The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can of course do nothing beyond the limits which circumscribe these powers. But when acting within these limits it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation as large, and of the same nature, as those of Parliament itself."

In another case — 'Hodge v. The Queen', (1884) 9 A. C. 117 (D), similar observations were made in the case of the powers of the provincial Legislature of Ontario which has been created by the British North America Act. This runs as follows:

"It appears to their Lordships, however, that the objection thus raised by the appellants is founded on an entire misconception of the true character and position of the provincial Legislature. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a Legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in Section 92, it conferred powers, not in any sense to be exercised by delegation from or as agent of the Imperial Parliament, but authority as plenary and as ample, within the limits prescribed by Section 92, as the Imperial Parliament in the plenitude of its powers possessed and could bestow. Within these limits of subjects and areas the local Legislature is Supreme, and has the same authority as the Imperial Parliament."

From these authorities it would be clear that, while even a Legislature whose powers are circumscribed by the superior authority which has created it can exercise legislative powers of the same nature as the superior authority itself and cannot be treated as its delegate or agent, the contention that the Yuvaraj, to whom full and plenary powers of legislation had been given by a sovereign authority which could do any thing it pleased, was an agent or delegate of that sovereign authority and that there are any checks or restraints on his power, becomes groundless. In this connection the learned Acting Advocate General has also drawn our attention to — 'Deggamber Sain v. Lachhman Dass', AIR 1952 J. & K. 7 (E) in which the Board of Judicial Advisers have held:

"Under the Jammu and Kashmir Constitution Act, 1996, His Highness the Maharaja Bahadur has plenary power of Legislation. Under Section 5 of that Act all powers, legislative, executive & judicial in relation to the State and its Government are declared to be vested in His Highness. These powers have now devolved on Shree Yuvaraj Bahadur under the Proclamation above referred to. It is clear that the legislative machinery in the State is simple and legislation can be expeditiously made on the advice of those on whom the responsibility of day to day administration rests."

After this clear pronouncement on the subject by the highest Judicial authority in the State there can be no question that the Yuvaraj is not fully competent to exercise powers under Section 5, Jammu and Kashmir Constitution Act, 1996.

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(5) With regard to the point that Section 5, Jammu and Kashmir Constitution Act, 1996 is abrogated or at least superseded by the provisions of the Indian Constitution it is urged on behalf of the appellants that the Yuvaraj by his proclamation dated 26-11-1949 has declared that the Constitution of India to be adopted by the Constituent Assembly of India shall in so far as it is applicable to the State of Jammu and Kashmir, govern the constitutional relationship between this State and the contemplated Union of India and that the provisions of the constitution shall as from the date of its commencement supersede and abrogate all other constitutional provisions inconsistent therewith which are at present in force in this State. Article 385 of the Constitution of India reads thus:

"Until the House or Houses of the Legislature of a State specified in Part B of the First Schedule has or have been duly constituted and summoned to meet for the first session under the provisions of this Constitution, the body or the authority functioning immediately before the commencement of this Constitution as the Legislature of the corresponding Indian State shall exercise the powers and perform the duties conferred by the provisions of this Constitution on the House or Houses of the Legislature of the State so specified."

This article has been made applicable to the State of Jammu and Kashmir by the President in consultation with the Government of the State under the Constitution (Application to Jammu and Kashmir) Order 1950. It is argued that as under this article the legislative authority functioning in the State before the commencement of the Constitution could exercise only the powers and perform the duties conferred by the provisions of the Constitution on the House or Houses of the Legislature of the State, the Yuvaraj or even the Ruler himself could not pass a Law which the State Legislature could not pass under the Constitution of India.

The contention is that the Big Landed Estates (Abolition) Act in fact expropriates lands in the State without making any provision for compensation or specifying the principle for doing so and no State Legislature in India can pass a law which takes away or abridges the right conferred by Part III of the Constitution and under Article 13 the same restrictions would be applicable to the Legislature in the State. In the first place it is not strictly correct that the Big Landed Estates (Abolition) Act, 2007, did not provide any compensation for proprietors whose lands had been expropriated. Under Section 26 of the Act some payment to the expropriated Landlords was provided until the Constituent Assembly of the State settled the question of compensation. After the institution of suits the State Constituent Assembly decided that no compensation was to be paid to the persons whose lands had been expropriated under the Act. It may, therefore, be assumed for the sake of argument that the Big Landed Estates (Abolition) Act did not make any real provision for compensation. Is this Act under these circumstances ultra vires of the then State Legislature, that is to say, the Yuvaraj? The learned Acting Advocate General has argued that the application of Article 385 to the State to quote his words is "imaginary and not real". He stressed that the whole history of the constitutional relationship of the State with the Union and the provisions of Article 370, which has been quoted in extenso in the earlier part of the judgment show that Article 385 does

not "in terms apply to our State". He contends that it is clearly provided in Article 370 that the provisions of Art. 238 shall not apply in relation to the State of Jammu and Kashmir. This means that the provisions contained in Part VI of the Constitution of India, which provides for a constitution of what were formerly known as Indian States as distinguished from the provinces do not apply to our State. Article 168 which makes a provision for State Legislatures in all these States & is contained in Part VI has no application to our State. Not only this but List II—State List & List III—Concurrent List—of the Seventh Schedule of the Constitution are omitted from the Constitution (Application to Jammu and Kashmir) Order, 1950 and even cls. (2) and (3) of Art. 246 do not apply to this State. Clause (2) of Art. 246 refers to the Concurrent List and gives power to Parliament and the State Legislatures specified in part A and Part B of the First Schedule to make laws with respect to any of the matters enumerated in the Concurrent List—List III. Clause (3) of Art. 246 gives exclusive power to the State Legislatures to make laws with respect to List II. Provisions of Art. 370 read with the Constitution (Application to Jammu and Kashmir) Order, 1950, which has been made under it, clearly shows that the Instrument of Accession executed on 26-10-1947 is still the real basis of relationship between the Union and the Jammu and Kashmir State and the power of Parliament to make laws for the State is confined to matters which the President, in consultation with the State Government, declares to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India and in addition to Arts. 1 and 370 those provisions of the Constitution of India are to apply to the State which the President, in consultation with the Government of the State, declares as related to the matters specified in the Instrument of Accession of the State. The remaining matters outside those to which the power of Parliament to make laws for the State extends continue to remain within the exclusive power of the State Legislature and the residuary sovereignty of the State thus remains entirely unaffected. Of course the President can extend the power of Parliament to make laws with respect to a matter not specified in the Instrument of Accession with the concurrence of the Government of the State which has to be subsequently ratified by the Constituent Assembly. Similar provision is made with regard to the other provisions of the Constitution of India (Vide Second proviso to sub-cl. (d) of cl. (1) of Art. 370). Article 370 which contains the basic provision of the structure of constitutional relationship between the State and the Union leaves the State Constitution and the state sovereignty in relation to matters other than those specified in the Instrument of Accession and not covered by the provisions of Art. 370 entirely unaffected. No provision has, therefore, been made or was necessary to be made so far as the Constitution of the State was concerned. The State was to be governed by its own constitution till the Constituent Assembly of the State framed a Constitution for the State. That this was the basis of the relationship between the State and the union will be amply clear by what has been stated in para. 3 (d) of this judgment. The Constituent Assembly of the State was to have plenary powers inasmuch as it had to determine the Constitution of the State as well as the sphere of the Union jurisdiction over the state.

In this connection a further reference may be made to the speech of the Late Mr. Gopalaswami



Ayyangar in the Indian Constituent Assembly on 17-10-1949 when Art. 370, then Art. 306-A, was adopted by it. The relevant passage is as under:

"Again the Government of India have committed themselves to the people of Kashmir in certain respects. They have committed themselves to the position that an opportunity would be given to the people of the State to decide for themselves whether they will remain with the Republic or wish to get out of it. We are also committed to ascertaining this will of the people by means of a plebiscite provided that peaceful and normal conditions are restored and the impartiality of the plebiscite could be guaranteed. We have also agreed that the will of the people, through the instrument of a constituent assembly will determine the constitution of the State as well as the sphere of Union jurisdiction over the State."

Article 385 is an interim provision for the recognition of legislatures in States in Part B of the First Schedule till new Legislatures in these States are duly constituted & summoned under the provisions of the Constitution of India. As the Jammu and Kashmir State had to frame its own constitution and the new legislature in the State was to be summoned under the State Constitution till a new constitution was framed by the Constituent Assembly and a fresh legislature was set up under it, the question of the application of this article to the State could have no meaning whatsoever. Again the existing legislature could not exercise powers and perform duties conferred by the provisions of the Constitution of India on the houses of legislature in part B States, because Art. 370 specifically provides that the provisions of Art. 238 and consequently Part VI of the Constitution which confers powers and duties on legislatures in Part B States shall not apply to the State of Jammu and Kashmir. Application of Art. 385 to the State of Jammu and Kashmir would, therefore, lead to the absurd result of creating perfect vacuum in the legislative machinery of the State. It would be against the letter and spirit of Art. 370 of the Constitution and would also run counter to the pledge given by the responsible leaders of Indian Government that the relationship existing between the State and the Dominion of India was to be continued between the State and the Union of India. The application of Art. 385 is, therefore, to be construed according to the elementary rule of construction that a thing which is within the letter of a statute will, generally, be construed as not within the statute unless it be also within the real intention of the framers of the statute (vide Maxwell on Interpretation of Statutes, 1946 Ed. page 20), & every effort has to be made to harmonize this interpretation with the letter & spirit of Art. 370 which is the specific article in the Constitution providing basis of constitutional relationship between the State and the Union. The application of Art. 385 is further open to the objection that the framers of the Constitution of India could not have intended to exceed their jurisdiction. They had clearly admitted the right of the State to convene its own Constituent Assembly for the purpose of framing its constitution. They, therefore, could not have intended to provide an interim provision for a matter which was outside their purview and for which they could not and did not make any provision in the constitution. The Rulers of other Part B States had executed supplementary Instruments of Accession and had agreed to the application of Art. 238 to their States.

After a careful consideration of all the factors bearing on this matter I agree with the learned Acting Advocate General that Art. 385 does not in terms apply to our State. It may also be observed that under Art. 370 only such provisions of the Constitution could be declared by the President, in consultation with the State Government to apply to the State of Jammu and Kashmir as related to matters specified in the Instrument of Accession. Article 385 of the Constitution does not deal with any such matter. It clearly deals with a matter falling within the residuary sovereignty of the State which has been specifically reserved under cl. 8 of the Instrument of Accession. A provision of Constitution relating to a matter of this nature could only be applied with the concurrence of the State Government pending ratification by the Constituent Assembly. Its application to the State of Jammu and Kashmir under an Order of President in consultation with the Government is, therefore, not in accordance with the method provided by the Second proviso to sub-cl. (d) of cl. (1) of Art. 370. A reference in the judgment of the trial Judge, Kilam J. that the article has been applied to the State with the concurrence of the State Government is manifestly incorrect. A careful appraisal of the facts stated above would show that the article has not been specifically excluded from the Second Schedule to the Constitution (Application to J & K) Order, 1950 only through an oversight or inadvertence. Now assuming for the sake of argument that the article applied to the State, the only meaning it can have is that it recognizes that the Yuvaraj, i.e., the authority functioning immediately before the commencement of this Constitution as Legislature, continues to exercise his powers under the State Constitution, i.e., the Jammu & Kashmir Constitution Act, 1996. To place any other interpretation on this article would not be possible as it would lead to absurd conclusions. The State Constitution Act is clearly saved under cl. 8 of the Instrument of Accession and it remains materially unaffected by Art. 370 of the Constitution.

I will now turn my attention to the proclamation of the Yuvaraj dated 25-11-1949 Vide, (pages 371-372 of the white Paper on Indian States published in 1950). The operative and relevant paragraphs of the Proclamation are as under:

"That the Constitution of India shortly to be adopted by the Constituent Assembly of India shall in so far as it is applicable to the State of Jammu and Kashmir, govern the constitutional relationship between this State and the contemplated Union of India and shall be enforced in this State by me, my heirs and successors in accordance with the tenor of its provisions;

That the provisions of the said Constitution shall as from the date of its commencement, supersede and abrogate all other constitutional provisions inconsistent therewith which are at present in force in this State."

With regard to this proclamation the Acting Advocate General has stated that it has not been published in the State gazette. But whether it has been published in the State Gazette or not or whether it has the support of the State Government on whose advice the Yuvaraj was to act I do not think that it has any effect on the Jammu and Kashmir Constitution Act including S. 5 thereof. In the first operative paragraph it has been clearly stated that the Constitution of India shall in so far as it is applicable to the State of Jammu and Kashmir, govern the constitutional relationship between the State and the



contemplated union of India. In the second paragraph the words "that the provisions of the said Constitution shall, as from the date of its commencement, supersede and abrogate all other constitutional provisions inconsistent therewith which are at present in force in this State" can only be interpreted to mean such provisions of the Constitution as are really applicable to the State and not those provisions of the Constitution which were not and could not be applied to the State in accordance with the letter and spirit of Art. 370. Nor has the argument urged on behalf of the appellants any force that the Yuvaraj could not make an Act inconsistent with Part III of the Constitution relating to Fundamental Rights. The Chapter on Fundamental Rights does not apply to the State of Jammu and Kashmir and no Act made by the Yuvaraj can be questioned on this ground. In fact no legislation made by the Yuvaraj outside the matters within the competence of Parliament can form the subject-matter of review in a Court of law just as no Act of British parliament could be declared ultra vires by any Court. A reference may be made to the remarks made by Kania C. J. reproduced in para. 3(b) of this judgment. In the result I agree with the learned trial Judge, Kilam J. that Art. 385 has no effect on S. 5, Jammu and Kashmir Constitution Act, 1996, and that the Yuvaraj could certainly make laws in all matters other than those to which the power of parliament to make laws for the State extends. The matter in question is not one of the matters which are within the legislative competence of Parliament.

(6) With regard to the fourth point it is urged by the learned counsel for the appellants that the question of the payment of compensation arising out of the Big Landed Estates (Abolition) Act, 2007, falls within entry No. 42 of the concurrent List, i. e. List III of the Seventh Schedule of the Constitution. This entry reads as under: "42. Principles on which compensation for property acquired or requisitioned for the purposes of the Union or of a State or for any other public purpose is to be determined and the form and the manner in which such compensation is to be given."

It is submitted that under S. 6, Jammu and Kashmir Land Acquisition Act, 1990, no property can be acquired by the State for State purposes, unless compensation is paid for that property in the manner provided in the Act. It is urged that under Article 254 of the Constitution which has been made applicable to the State an existing law, i.e. section 6, Jammu and Kashmir Land Acquisition Act, 1990, must prevail and the Big Landed Estates Act should be declared void to the extent to which it is repugnant to that Act. In the first place it may be stated that the provisions contained in the Big Landed Estates (Abolition) Act do not relate to the acquisition of property for the State or for any other public purpose. They ordain extinguishment of the rights of the Landlord in the manner set forth in S. 4 of the Act and, therefore, these are not in conflict with S. 6, Land Acquisition Act. But assuming for the sake of argument that there is some clash between the two Acts, can Art. 254 of the Constitution be invoked for this purpose? For the sake of convenience the provisions of Art. 254 may be quoted here:

"254. (1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a Law made by parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one

of the matters enumerated in the Concurrent List, then subject to the provisions of clause (2), the Law made by Parliament, whether passed before or after the law made by the Legislature of such State, or as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall to the extent of the repugnancy be void.

(2) Where a law made by the Legislature of a State specified in Part A or Part B of the First Schedule with respect to one of the matters enumerated in the concurrent List contains any provision repugnant to the provisions of an earlier law made by parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State, shall if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State".

An examination of this article would show that this article appears to have been applied to the State only as an anticipatory provision. Article 370 left it open to the State of Jammu and Kashmir to agree to the extension of the power of Parliament to make laws in matters other than those specified in the Instrument of Accession, in the Union List or in the Concurrent List. At the time when Article 370 was framed the Union and Concurrent Lists could evidently not have been examined with a view to see which of the entries in them would correspond to matters specified in the Instrument of Accession. It must have been considered that some entries in the concurrent List might also be found to correspond to some matter contained in the Instrument of Accession. But when these Lists might have been examined at the appropriate time, the Constitution. (Application to Jammu and Kashmir) Order, 1950, shows that no entry in the Instrument of Accession was found to correspond to any entry in the Concurrent List and, therefore no entry in the Concurrent List was applied to the State. List II has been advisedly omitted from the Schedule appended to the Constitution (Application to Jammu and Kashmir) Order, 1950. Only certain entries of the Union List have been included in the Schedule. Furthermore, Article 246 (2) giving Parliament as well as State Legislature power to make laws with respect to any of the matters enumerated in List III Concurrent List does not apply to the State of Jammu and Kashmir. It has, therefore, been rightly contended by the learned Acting Advocate General that Article 254 is not really applicable to the State. It could apply to the State only if Parliament had power to make laws with respect to entry No. 42 in the Concurrent List. Not only Parliament has no power to legislate for the State in regard to that entry, but as we have seen it has no power to make any laws for the State in respect to any of the matters enumerated in that List. The condition precedent for the effective application of Article 254 is that it should relate to a provision of law in the Concurrent List with respect to which Parliament has power to make laws for the State. In the absence of such power and in the absence of the application of List III of the seventh Schedule to the State the question of any provision of law made by the State Legislature being repugnant to any provision of a law made by parliament which Parliament is not competent to enact for the State or to any existing law does not arise and I agree with



the trial Court that the impugned Act cannot be held ultra vires of the powers of Yuvaraj on this ground.

(7) The fifth point taken by the learned counsel for the appellants comes to this that even if Part III containing Fundamental Rights is not applicable to the State, the Yuvaraj could not take away natural right of property of a class of citizens without providing compensation. It is urged that the right to property is a sacred and inherent right of citizens and they could not be deprived of it without compensation. Reliance has been placed by the learned counsel for the appellants on certain observations made by the Supreme Court in — *State of Bihar v. Kameshwar Singh*, A. I. R. 1952 S. C. 252 (F). I have gone through this case and I find that it is not relevant as the case hinged on Article 31 (2) of the Constitution which declares that no property could be taken or acquired for public purposes under any law unless the law provides for the compensation of the property so taken. As Part III of the Constitution containing Fundamental Rights does not apply to the State, the case law arising out of the interpretation of that article is not germane to our purpose. The learned counsel for the appellants has failed to cite before us any authority in which a law made by a sovereign authority such as the British Parliament has been held to be open to judicial review.

On the other hand the learned Acting Advocate General has cited before us — *State v. Basdeo*, AIR 1951 All. 44 (G) and — *A. K. Gopalan v. State of Madras*, AIR 1950 S. C. 27 (H). In — *Tan Bug Taim v. Collector of Bombay*, A. I. R. 1946 Bom 216 at page 233 (I) the following observations have been made:

“The Imperial Parliament has got the power to deprive a subject of his liberty of person and also of his rights of property in any manner whatever without assigning any reason whatsoever or without making any compensation for the same.”

‘A. I. R. 1951 All. 44 (G)’ quotes with approval the following passage from Dicey’s Law of the Constitution Ed. 9, page 39:

“The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English Constitution, the right to make or unmake any law whatever; and further, that no person or body is recognized by the Law of England as having a right to override or set aside the legislation of Parliament.”

and after further discussion the ruling concludes thus

“Unless the Court can point its finger to a particular provision of Constitution Act which is violated by the Legislature through the enactment, it cannot rule out the enactment as ultra vires.”

In — ‘AIR 1950 S. C. 27 (H), *Kania C. J.* and Mahajan J. laid down:

“Courts are not at liberty to declare an Act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution but not expressed in words. Where the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the Legislature, Courts cannot declare a limitation under the notion of having discovered something in the spirit of the Constitution which is not even mentioned in the instrument. It is difficult upon any general principles to limit the omnipotence of the sovereign Legislative power by judicial interposition except so far as

the express words of a written Constitution give that authority.”

We have seen that there is nothing whatsoever in the Jammu and Kashmir Constitution Act, 1996, which limits the legislative power of the Ruler or the Yuvaraj within the residuary sovereignty of the State; Jammu and Kashmir Constitution Act, 1996, did not lay down any Fundamental Rights which could not be abridged or taken away by the sovereign Legislature, i. e. the Ruler or the Yuvaraj and his powers of legislation as indicated above in paragraphs 3 and 4 of this judgment are as wide and as plenary as those of the British Parliament and they cannot form the subject-matter of Judicial review, nor can they be impugned on any such ground as is urged by the learned counsel for the appellants:

(8) With regard to the last point urged on behalf of the appellants, it is argued that even if the Act is intra vires, certain provision in the Act, namely, Sections 4 (4), 5 (5), 20, 26 and 35 are void as they authorise delegated legislation. The learned Acting Advocate General has brought it to our notice that this point was neither raised in the plaint nor in the arguments before the trial Court. This is admitted by the counsel for the appellants but he urges that the point is raised in paragraph 12 of the memorandum of appeal though reference to the particular sections of the Act has not been made therein. Counsel for the appellants attacks these provisions because of the principle of ‘delegatus non potest delegare’ on the ground that the Yuvaraj was only a delegate of His Highness. This aspect of the question has been exhaustively dealt with in para. 4 above and it has been held that the Yuvaraj was not the delegate of His Highness and that he had as full and as plenary powers as His Highness himself and, therefore, he could make any law in the State and also delegate his powers of legislation to any person or body whom he thought fit to do so. Even then reliance is sought to be placed on some of the observations made by some of the Judge of the Supreme Court in — ‘A. I. R. 1951 S. C. 332’ corresponding to — ‘1951 S. C. R. 747 (A)’. The general effect of the Supreme Court ruling is that in the view of their Lordships the doctrine of separation of powers was not rigidly imported into the Constitution of India and the maxim ‘delegatus non potest delegare’ was not applicable inasmuch as the Legislatures of the Union and of the States were not delegates of any authority but were sovereign legislative bodies, subject, of course, to the limitations imposed by the Constitution. The majority of the Supreme Court also held that though delegation of the powers of legislation as to matters of detail was a necessity under modern conditions and was permissible, the intention of the Constitution was that the legislative function must be exercised by the legislative authority itself and there could be no delegation of legislative authority to the extent of abdicating its functions and the outside agency to whom delegation was made could not become a parallel legislature. This majority view is mainly based on the principle that the Constitution has made elaborate provisions as to how and by whom the legislative power was to be exercised and such power should be exercised accordingly. If we examined the delegations made in most of the provisions of the Big Landed Estates (Abolition) Act, we shall see that these relate to matters of detail permissible even under the Supreme Court ruling and do not part with essential legislative functions, namely, legislative policy and its formulation as a rule of conduct. But after a careful consideration of the relevant material I feel that



these restrictions which according to their Lordships of the Supreme Court are implicit in the Constitution of India do not apply to the Ruler of the Jammu and Kashmir State who enjoyed full residuary sovereignty regarding which a good deal of case Law has been quoted in paragraph 4 of this judgment.

In the case of a Ruler of an Indian State there is plenty of authority including the observations of the Late Chief Justice of the Supreme Court in the very case to which reference has been made in this paragraph for the proposition that he had an absolute power to do anything he pleased within his residuary field of legislation. Such a Ruler could either legislate himself or nominate some one else who could exercise all his powers and make all his decision (Vide para 3 (b) above). He could even efface himself altogether if he chose to do so. In the light of these observations it is hardly necessary to go into the details of the provisions of the Big Landed Estates (Abolition) Act which have been impugned on this ground. It may, however, be pointed out that the delegation covered by Sections 4 (4), 5 (5), 20 and 35 is made to subordinate authorities and relates to matters of detail which would be even covered by the majority view of the Supreme Court in—'AIR 1951 S. C. 332 (A)'. In any case it is fully covered by—'4 Cal 172 (P. C.) (C)', and other authorities mentioned in paragraph 4 of this judgment. With regard to Section 35 under which the Government could by notification further delegate its functions or powers to the Revenue Minister or any other officer of the Government to be specified in such notification, reference may be made to—'George Walkem Shannon v. Lower Main Land Dairy Products Board', A. I. R. 1939 P. C. 36 (J). Such delegation is perfectly valid and is covered by the following observation of their Lordships of the 'Privy Council at page 39':

"The third objection is that it is not within the powers of the Provincial Legislature to delegate so called legislative powers to the Lieutenant-Governor in Council, or to give him powers of further delegation. This objection appears to their Lordships subversive of the rights which the Provincial Legislature enjoys while dealing with matters falling within the classes of subjects in relation to which the Constitution has granted legislative powers. Within its appointed sphere the Provincial Legislature is as supreme as any other Parliament, and it is unnecessary to try to enumerate the innumerable occasions in which Legislatures both Provincial Dominion and Imperial have entrusted various persons and bodies with similar powers to those contained in this Act."

If such delegation of powers was permissible to a Provincial Legislature which was a creation of an Imperial Act of the sovereign authority, namely, the British Parliament, the Ruler (or his replica, Yuvaraj) of a State like Jammu and Kashmir which retained all its residuary sovereignty in full, could make such delegation. Section 26, however, stands on a slightly different footing. Here the question of award of compensation has been left to be settled by the Constituent Assembly which could not be regarded as a subordinate authority. In paragraphs 3 (d) and 5 above it has been indicated that the Constituent Assembly to be set up in the State was to have plenary powers which was to frame a Constitution for the State and define the sphere of the Union jurisdiction in the State. We have seen that Yuvaraj being a sovereign authority like the British Parliament could efface himself and could also obviously set up a parallel legislature for a particular

purpose. There was nothing wrong in leaving the decision of the question of payment of compensation to the expropriated landlords to a body which was to be convened for the purpose of drawing up the Constitution of the State.

(9) For the foregoing reasons the judgments and the decree of the trial Courts in the two cases are affirmed and the appeals are dismissed. The parties are, however, left to bear their own costs.

(10) WAZIR C. J.: These are two connected appeals and arise out of two suits, one instituted in the High Court in its original jurisdiction and the other before the District Judge, Srinagar, for declaration that the Jammu and Kashmir Big Landed Estates (Abolition) Act of 2007 is ultra vires of the powers of Shree Yuvaraj and does not affect the ownership rights of the plaintiffs over the lands in dispute. The single Judge of this Court in the case of Magher Singh plaintiff held that the impugned Act was intra vires of Shree Yuvaraj and dismissed the plaintiff's suit. The same view was taken in another case of Badri Nath Munshi and other plaintiffs by the District Judge and their suit was also dismissed. The plaintiffs in both these cases have filed separate appeals against the decrees of the trial Courts. As the points involved in these appeals are similar we heard these appeals together and this judgment shall dispose of both these appeals.

(11) The sole question for determination is whether or not the Jammu and Kashmir Big Landed Estates (Abolition) Act of 2007 is ultra vires of Shree Yuvaraj who passed that Act, in exercise of the powers vested in him under section 5 of the Jammu and Kashmir Constitution Act, 1996.

(12) It is contended on behalf of the appellants that His Highness the Maharaja Bahadur Hari Singhji was not an omnipotent sovereign but was a subordinate sovereign. His sovereignty, if any, was lost after the State's accession to India and he or his representative could not enact any Law under Section 5 of the Constitution Act and the impugned Act was, therefore, ultra vires of the powers of Shree Yuvaraj. This contention is based on a misconception of the true constitutional position of His Highness. An outstanding feature of our Constitution before Act No: 17 of 2008 was the transcendent supremacy of the Maharaja. He was the fountain of all powers, executive, legislative and judicial. He possessed all the essential attributes of absolute sovereignty and his position could well be compared to that of the British Parliament. He could make or unmake any law as he pleased and no person or body was recognised by law in the State as having any right to override or supersede any piece of legislation enacted by him. On account of his absolute supremacy no question of any constitutional invalidity of his enactments could be raised in any Court of law. A reference to Section 7 of the Indian Independence Act, 1947, will further make it clear that even the external sovereignty of His Highness reverted to him after the lapse of the paramountcy of the British Crown. His Highness thus became an omnipotent sovereign after the new Dominions (of India and Pakistan) came into existence.

(13) The contention of the learned counsel that His Highness lost his sovereignty after the State's accession to India has equally no force and cannot be accepted. A close study of Section 6, Government of India Act, 1935, (as adapted by the Indian Provisional Constitution Order, 1947) will reveal that the accession of Indian States which was made possible by Section 2 (4), Indian Independence Act, 1947, was subject always to the



terms of the respective Instruments of Accession and the functions that vested in the Governor General, the Federal Legislature and the Federal Court under the said Government of India Act were to be exercised by them subject to the terms of the said Instruments of Accession. The scheme of the section shows that a Ruler of a State while becoming a member of the federation could limit the subjects within which powers were to be exercised by the federal bodies and could also impose such conditions and limitation which he desired. In Clause 8 of Instrument of Accession executed by His Highness and accepted by the Governor-General of India it has been specially provided that 'nothing in this Instrument affects the continuance of my sovereignty in and over the State, or, save as provided by or under this Instrument, the exercise of any powers, authority and right now enjoyed by me as Ruler of this State or the validity of any law at present in force in this state'.

This position has also been recognised both in Article 370 of the Constitution of India and the Constitution (Application to Jammu and Kashmir) Order 1950. Article 370 of the Constitution does not affect the sovereignty of His Highness except to the extent to which he has himself surrendered a portion of the Sovereignty. It is, therefore clear that in spite of the State's accession to India His Highness retained his internal sovereignty & was free to do anything he liked within the sphere which was not covered by the ceded subjects. In this I am supported by a Full Bench ruling of the Pepsu High Court reported as — 'A. I. R. 1953 Pepsu 1 (F. B.) (B)', in which it has been held that a State by ceding certain powers with regard to external affairs to another state does not cease to be sovereign if its powers with regard to internal matters remain unrestricted.

(14) It has been argued on behalf of the appellants that Shree Yuvaraj could not legislate under Section 5 of the Jammu and Kashmir Constitution Act, 1996 inasmuch as His Highness did not & could not part with his inherent powers. His argument is that inherent powers are vested in His Highness alone due to his being a sovereign of the State and he could not part with those powers in favour of another person.

(15) It has been pointed out above that His Highness was an omnipotent sovereign and his sovereignty was not limited except in regard to those subjects which he had ceded. A perusal of Sections 4, 5 and 72, Jammu and Kashmir Constitution Act, 1996, as they stood before Act No: 17 of 2008 was passed, will make it clear that His Highness was supreme authority in the State and there was no limitation on his powers. His position was similar to that of the British Parliament. Section 4 of the Constitution Act provides that 'the territories for the time being vested in His Highness are governed by and in the name of His Highness, and all rights, authority and jurisdiction which appertain or are incidental to the government of such territories are exercisable by His Highness, except in so far as may be otherwise provided by or under this Act, or as may be otherwise directed by His Highness.' From this it is abundantly clear that His Highness could direct that the rights, authority and jurisdiction which appertain or are incidental to the Government of the territories of the State may be exercised by some one else as his regent. The expression 'all rights, authority and jurisdiction which appertain or are incidental to the Government' is wide enough to cover the legislative, executive and judicial functions of the Government. It may be pointed out here that His Highness by Proclamation of 7th Har 2006 which corresponds to 20-6-

1949, expressly ordained Shree Yuvaraj to carry on the Government of the State and entrusted all his powers, rights and prerogatives to the Yuvaraj for that purpose. Shree Yuvaraj was, therefore, fully competent to exercise powers and prerogatives which were exercisable by his Highness himself.

(16) Great stress was laid by the learned counsel for the appellants on the fact that His Highness being himself a delegate of the British Parliament could not further delegate his powers to the Yuvaraj. There appears some confusion in the mind of the learned counsel in regard to the principle 'delegatus non potest delegare'. This principle is not applicable to His Highness as he is not a delegate of the British Parliament but was supreme and enjoyed powers which were not limited by any legislation. His Highness was independent and powerful as British Parliament itself in so far as internal sovereignty of the State was concerned and he could direct anyone to carry out the same functions in respect of the Government as he could himself do. There have been some occasions previously when His Highness entrusted his powers to different persons or bodies for the purpose of carrying on his Government in his absence; for instance on 21-11-1944, when he went abroad in connection with his tour to the various war fronts he appointed a council consisting of three members and entrusted them with full powers to carry on the Government in his absence; (2) on 30-10-1947, when he appointed Sheikh Mohammed Abdulla to function as the Head of the Administration. Instances of such like entrustments of powers and prerogatives by the Crown are to be found in the English History as well. Reference in this connection may be made to Halsbury's Laws of England Vol. VI page 449 and Anson's Law and Custom of Constitution Vol. II part I.

(17) In a recent case reported as 'AIR 1952 J & K 7 (E)', in which it was held that all powers, legislative, executive and judicial in relation to the State and its Govt. have under His Highness' Proclamation devolved upon Shree Yuvaraj. This pronouncement of the Board of Judicial Advisers has set at rest all doubts and controversies on the point whether or not His Highness could entrust his inherent powers to Shree Yuvaraj. In a case which came up before the Supreme Court reported as 'AIR 1951 SC 332 (A)', the late Chief Justice Kania observed at page 337 as under:

"A legislative body which is sovereign like an autocratic ruler has power to do anything. It may, like a Ruler, by an individual decision, direct that a certain person may be put to death or a certain property may be taken over by the State. 'A body of such character may have power to nominate someone who can exercise all its powers & make all its decisions'. This is possible to be done because there is no authority or tribunal which can question the right or power of the authority to do so."

(18) It is, therefore, quite clear that by virtue of the proclamation made on the 7th Har 2006 Shree Yuvaraj became a replica of His Highness possessing rights, powers and prerogatives which were as ample and full as those enjoyed by His Highness himself.

(19) It is further contended by the counsel for the appellants that the impugned Act having been passed by Shree Yuvaraj under S. 5, Jammu and Kashmir Constitution Act, being abrogated by Art. 385 of the Constitution of India which according to the learned counsel had been wholly adopted by Shree Yuvaraj by his proclamation



dated 25-11-1949, is invalid. This contention of the learned counsel is again devoid of all force. The Constitution of India, it will be observed, has got only a limited application to the State of Jammu and Kashmir. The main provision of the said Constitution so far as the State is concerned is Art. 370 which lays down that only such of the provisions of the Constitution of India shall apply to the State of Jammu and Kashmir as the president of India may, in consultation with the State Government, declare to be applicable. Shree Yuvaraj's aforesaid proclamation has to be interpreted in the light of Art. 370.

In para 1 of the proclamation Shree Yuvaraj observes that the Constitution shortly to be adopted by the Constituent Assembly of India shall, in so far as it is applicable to the State of Jammu and Kashmir, govern the Constitutional relationship between this State and the contemplated Union of India and shall be enforced in this State by him in accordance with the tenure of its provisions. In second paragraph he says that 'the provisions of the said Constitution shall, as from the date of its commencement, supersede & abrogate all other constitutional provisions inconsistent therewith which are at present in force in this State.' Reading the two paragraphs together and bearing in mind the rule of harmonious construction it will be obvious that the express provisions of the said Constitution can mean only those provisions which apply to the State and not those which have no application. Moreover a perusal of the Constitution (Application to Jammu and Kashmir) Order, 1950 which was promulgated by the President on 26-11-1950 and which is, therefore, subsequent to Shree Yuvaraj's proclamation further makes it clear that the Constitution of India has only a restricted application to the State.

Reference has also been made by the counsel for the appellants to Art. 385 which is not quite germane. An analytical examination of Art. 370 of the Constitution of India and Constitution (Application to Jammu and Kashmir) Order will reveal that Art. 385 does not in terms apply to our State. It is provided in Art. 370 that the provisions of Art. 238 (which in turn makes the provisions of Part 6 of Constitution of India applicable to Part B States) shall not apply in relation to the State of Jammu and Kashmir. When Art. 238 itself is not applicable no Article contained in Part VI is applicable. Thus Art. 168 which provides for the legislatures of the State is also not applicable. The learned counsel for the appellants has argued that impugned Act could not have been passed by the Yuvaraj as legislature of the State was in existence and could be summoned to pass such an Act. There appears to be some confusion in the mind of the learned counsel in regard to this point. As pointed out above Art. 168 is not applicable; so the question of summoning the legislature under the provisions of Constitution of India as contemplated by Art. 385 could not arise. It will further be evident that Sch. 7 has been wholly omitted from applicability and cls. (2) and (3) of Art. 246 also do not apply to our State, i.e., there is no State list or concurrent list so far as our State is concerned. It is not, therefore, clear as to how the body or authority functioning as legislature in our State could exercise the powers or perform its duties when the Constitution of India did not confer any such powers. It appears that by some mistake or oversight Art. 385 has been included in Sch. 2 to the Constitution (Application to Jammu and Kashmir) Order, 1950.

(20) Even assuming that Art. 385 is applicable let us see what would be its effect. The term of the Praja Sabha (State Legislative Assembly) had expired long before the Constitution of India came into force. There was no legislative Assembly functioning immediately before the commencement of the Constitution. The only body or authority functioning immediately before the commencement of the Constitution of India was the authority exercising powers of legislation under S. 5, Jammu and Kashmir Constitution Act, i.e. Shree Yuvaraj. It bills down to this that Shree Yuvaraj who exercised the powers of legislation under the aforesaid proclamation of His Highness immediately before coming into force of the Constitution of India was to continue to legislate. Further Art. 372 of the Constitution of India provides that laws in force in any part of India will continue to remain in force until repealed by any enactment and it is to be noted that before Act No: 17 of 2008, Section 5 of the Jammu and Kashmir Constitution Act had not been repealed by any enactment. Thus there being no repugnance between our Constitution Act of 1996 and the Constitution of India, the former provision stood intact and Shree Yuvaraj continued to enjoy full powers of legislation.

(21) It is further contended that the impugned Act is invalid because it is repugnant to the Indian Land Acquisition Act and Jammu and Kashmir Land Acquisition Act. Reliance in this behalf is placed on Art. 254 of the Constitution of India which reads as under:

- (1) If any provision of a Law made by the Legislature of a State is repugnant to any provision of a Law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2) the Law made by Parliament, whether passed before or after the law made by the Legislature of such State, or as the case may be the existing law, shall prevail and the law made by the Legislature of the State, shall to the extent of repugnancy, be void.
- (2) Where a law made by the Legislature of a State specified in Part A or Part B of the First Schedule with respect of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier Law made by Parliament or an existing Law with respect to that matter, then, the law so made by the Legislature of such State, shall if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.

The argument with respect to repugnancy of the impugned Act to the Indian Land Acquisition Act is based on Article 254 Part (1). Article 254 (1) and (2) when examined in conjunction with other provisions of the Constitution of India will be found to have no real application to our State. The first sine qua non for the applicability of this Article is the competency of the Indian Parliament to enact a law to which the impugned Act is said to be repugnant, and secondly there must be a concurrent list so far as our State is concerned. The Indian Parliament has not got the same powers of legislation in relation to the State as it has got with regard to other Part B



States. The question of repugnancy can only arise if the law is repugnant to some other law which the Parliament is competent to enact, i. e., any law dealing with a matter contained in the First Schedule to the Constitution (Application to Jammu and Kashmir) Order, 1950. The Indian Land Acquisition Act, being a Law with respect to a matter that is not enumerated in the said Schedule and there being no Concurrent List, the impugned Act is not hit by Article 254 (1).

(22) The question of repugnancy of the impugned Act to the State Land Acquisition Act cannot also be raised. Under Article 254 (2) it is necessary that the impugned Act should be with respect to some provision of an existing law which also relates to one of the matters specified in the Concurrent List. As already seen Schedule 7 to the Constitution of India and Article 246 (2) & (3) do not apply to our State. There being no Concurrent List so far as our State is concerned, application of Art. 254 (2) can have no meaning and reference to this provision is wholly irrelevant.

(23) It has been argued that the impugned Act is void because it aims at extinguishing the rights of ownership in private property without providing for compensation. It is contended that no property can be acquired without compensation and no law could be enacted which is repugnant to the fundamental rights. It may be pointed out here that Part III of the Constitution wherein are placed the various fundamental rights has not been made applicable to our State. It follows, therefore, as a corollary that fundamental rights of the people of the State have not been recognised so far. As Part III of the Indian Constitution is not applicable to the State we have to see if there is any provision in our Constitution which corresponds to Article 13 of the Constitution of India or whether there was any other check on our erstwhile Ruler's power of legislation in regard to the private property. We have already examined the power of the Ruler of the State under the Constitution obtaining in the State. His Highness was omnipotent sovereign and there was no law which he could not make or alter. So there was no restriction on the powers of the Ruler to make laws in respect of the private property of his subjects.

Although it may be very hard on the subjects not to possess fundamental rights and to be deprived of the private property without compensation under a law enacted by a competent authority yet the Courts cannot afford any relief to the subjects in case they find that the law, whether good or bad, is made by a competent authority and the executive has strictly acted according to that law. The function of the Court is to interpret the law as it is and not to suggest what the law ought to be. Since the fundamental rights have not been recognised in our State either in the form of moral precepts or in the form of guarantee enforceable in law, the Courts in the State cannot declare any law as unconstitutional on the ground of contravention of any supposed fundamental or natural right. In support of this principle reliance may be placed on the following authorities: — 'A. I. R. 1950 S. C. 27 (H)', and AIR 1951 All. 44 (G)', wherein it has been held that an Act cannot be declared void if it is merely supposed to be against the spirit pervading the constitution. The effect of this pronouncement is that we must lay our hand on some specific provision of the Constitution which renders the enactment as void.

(24) The learned counsel for the appellants has relied upon — 'A. I. R. 1952 S. C. 252 at page 271

(F)', wherein it has been laid down that the obligation for payment of just compensation is a necessary incident of the power of compulsory acquisition of property, both under the doctrine of the English Common Law as well as under the continental doctrine of eminent domain, subsequently adopted in America. But this authority is not helpful to the appellants inasmuch as it is based on particular words of Article 31 Clause (2) of the Indian Constitution.

(25) Lastly it has been argued that certain provisions of the impugned Act such as Section 26 are delegated piece of legislation which Shree Yuvaraj could not enact as a delegate of His Highness. Section 26 of the impugned Act is as under:

"There shall, until the Constituent Assembly of the State settles the question of Compensation with respect to the land from which expropriation has taken place under this Act, be paid by the Government to every proprietor who has been expropriated from any land under the provisions of this Act, an annuity in the following manner, namely:

- (a) for the first year after expropriation an amount equal to 3/4th of the land revenue assessed on the land from which expropriation has taken place,
- (b) for the 2nd year 2/3rd of such land revenue; and
- (c) for the 3rd and subsequent years 1/2 of such land revenue.

Provided that the amount so payable shall not in any case exceed a sum of Rs. 3,000 per annum:

Provided further that no such amount shall be payable in respect of any area held or appropriated by the proprietor from lands recorded as Shamilat-Deh.

(26) A perusal of Section 26 makes it clear that the legislature has not denied compensation but has referred its settlement to the Constituent Assembly. The first question is whether Shree Yuvaraj was a delegate of His Highness and the next question is whether he could delegate the power to the Constituent Assembly to settle the question of compensation. We have noticed above that Shree Yuvaraj is not a delegate of His Highness but was a replica of His Highness enjoying powers which in their nature, scope and amplitude coincide with those of His Highness. Shree Yuvaraj thus did not act as an agent or delegate of His Highness and the contention of the learned counsel for the appellants is without force. Even with respect to the Indian Legislature which derived its power of Legislation from the British Parliament it has been held that while enacting within the spheres of its powers it does not act as a delegate. Reference in this connection may be made to '4 Cal 172 at page 180 (P. C.) (C)', — 'Madho Saran Singh v. Emperor', A. I. R. 1943 All. 379 (F. B.) (K) and — 'United Provinces v. Mt. Atiqa Begum', A. I. R. 1941 F. C. 16 at page 24 (L). In — 'AIR 1941 All 44 (G) and — 'Veera-bhadrappa In re', A. I. R. 1950 Mad 243 (M) it has been held that the principle of delegata potestas non potest delegare is inapplicable to the Indian Legislature. If this principle is not applicable to the Indian Legislature which derived its power from the British Parliament much less could it be applicable to His Highness or his replica Shree Yuvaraj. The Ruler was fully competent to frame any law in any fashion he liked through any agency he liked. His position in this respect was that of British Parliament. Reference in this behalf may be made to a Privy Council ruling reported as — 'A. I. R. 1939 P. C. 36 (J)', in which



it has been held that within its appointed sphere the provincial Legislature is as supreme as any other Parliament. It is within the power of the Provincial Legislature to delegate legislative powers to the Lieutenant-Governor in Council, or to give him powers of further delegation.

(27) We have also been referred by the counsel for the appellants to an authority reported as — 'AIR 1951 S. C. 332 (A)', in support of the contention that legislative powers in regard to compensation could not have been delegated by Shree Yuvaraj to Constituent Assembly but a reference to Para 39 of this ruling will show that it is based on principle of separation of powers and implied prohibition against delegation of legislative functions contained in Articles 245 and 357 of the Constitution of India. While there is an implied prohibition against delegation of legislative function in India we have in our State Constitution neither any affirmative limitation nor any negative prohibition against such delegation. Shree Yuvaraj, therefore, was fully competent to leave the question of determination of the compensation to the Constituent Assembly.

(28) For the reasons given above it is clear that the impugned Act is not ultra vires of the powers of Shree Yuvaraj nor is it open to review by our Courts. The Courts below have rightly dismissed the suits filed by the plaintiffs and these appeals are, therefore, dismissed. The parties are left to bear their own costs in this Court.

A/R.G.D.

Appeals dismissed.

**A. I. R. 1953 J. AND K. 39 (Vol. 40, C. N. 18)**  
**KILAM AND SHAHMIRI JJ.**

Mst. Safia, Appellant v. Mst. Fatima and others, Respondents.

Second Appeal No. 29 of 2009, D/- 10-3-1953.

(a) **Custom (Kashmir) — Succession — (Muhammadian Law — Custom).**

If a daughter failed to establish a custom under which she claimed as a Dukhtar Khana Nashin nominated by her mother, she is entitled to fall back upon Mohammedan Law and claim a share to which that law entitles her unless, of course it is proved that by custom she is excluded by some other heir and that Mohammedan Law has been superseded by such custom to that extent. 8 J & K L R 117. Followed.

(Para 5)

(b) **Limitation Act (1908), Arts 120, 123, 142-144 — Suit for distributive share of deceased's property.**

Father A a Muhammadan died in 1994 leaving behind a son W and a daughter S — Mutation of deceased's property effected in S. 2002 in favour of W ignoring S — On death of W, another mutation in S. 2005 recorded in favour of W's two daughters and S included in that mutation — S coming in possession of property mutated in her favour in the same year — Suit by S in S. 2006 for declaration that she was khana-nashin daughter of A and as such was entitled to one-half share with her brother W in their father's estate — Averment that her title was denied by heirs of W in 2006 — At its worst cause of action would have arisen in S. 2002 when first mutation was effected in 2002 and S was excluded — That being within 6 years suit held was within time — Even on point of possession, period between death of A in S. 1994 and S coming into possession of property in S. 2005 held

was much less than statutory period of 12 years.

(Para 8)

Anno: Limitation Act, Art. 120, N. 32: Art. 123 N. 4; Arts. 142-144 N. 45.

Jaswant Singh, for Appellant; R. C. Nania, for Respondents.

**CASES CITED:**

(A) 4 J & K L R 254

(B) ('49) 8 J & K L R 117

**KILAM J.:** This appeal pertains to Kishtwar tehsil and arises out of the following facts:

(2) One Ahmad Sheikh died in the year 1994 leaving behind him a son by name, Wali Sheikh, and a daughter, by name, Safia. Safia claimed that she was a resident daughter (Khana Nashin). After the death of Ahmad Sheikh, the landed property left by him remained unmutated in the name of anybody till the year 2002. We have it in evidence that after all mutation was effected in the year 2002 in the name of Wali Sheikh, and the claims of Safia were not taken notice of by the revenue authorities. It so happened that in the year 2004 Wali Sheikh also died. After his death, mutation was effected in the name of his two daughters and in the name of Safia, who as already stated, was ignored at the time of the previous mutation effected on the death of Ahmad Sheikh, her father. It is found by both the Courts below that Safia came into possession of the property left originally by Ahmad Sheikh, somewhere in the year 2005. In Jeth 2005, Safia brought a suit seeking a declaration to the effect that she was a Khana Nashin daughter of Ahmad Sheikh, & as such she had acquired the status of a son and was entitled to share half and half with Wali Sheikh, her brother, the property that was left by Ahmad Sheikh. She also had averred in her plaint that according to custom a Khana Nashin daughter acquired the status of a son & was entitled to succeed equally with her brother. The trial Court of Munsiff Kishtwar found that Safia was not a Khana Nashin daughter, nor was the custom of making a Khana Nashin daughter in presence of male heirs of the last owner proved in the case. But the trial court held that Safia was a Muslim and as such was governed by Mohammedan Law, and even though she had not been able to prove herself as a Khana Nashin daughter, she could not be deprived of her rights which vested in her as a Muslim according to Mohammedan Law. It therefore, passed a decree to the extent of 1/3rd share (to which a daughter is entitled according to Mohammedan Law) in favour of Safia in the property left by Ahmad Sheikh. On appeal, the learned Senior Subordinate Judge Jammu arrived at the conclusion that since Safia had based her suit upon custom which she had failed to establish, therefore her suit deserved dismissal. He therefore, ordered dismissal of the plaintiff's suit. He has based his finding upon a passage which occurs in a judgment of this court reported as — 'Mst. Zebi v. Reeha Mir', 4 J and K LR 254 (A) which runs as follows:

"It was further contended on behalf of the appellant that even if she were not a Khana Nashin daughter she would be entitled to a share under the Mohammedan Law. It was common case of the parties that succession was governed by custom under which a Khana Nashin daughter succeeded to the entire property. Succession could be governed either by a custom or by personal law because there cannot be two different and inconsistent rules of succession or inheritance. It was admitted by the



parties that a Khana Nashin daughter would succeed to the entire property. The plaintiff is not a Khana Nashin daughter and according to the custom stated above she would not inherit the property at all."

(3) We wish that the learned Senior Sub-judge had read the next following paragraph occurring in the same judgment. This paragraph runs as follows:

"It appears that some confusion exists as to whether a person who sets up a custom relating to succession can inherit under the Mohammedan Law. It is only when a custom is set up by a plaintiff which is not admitted by defendant and the plaintiff fails to prove the existence of the custom that the plaintiff would be entitled to succeed under the Mohammedan Law .....

(4) In this case the custom alleged by Safia was denied by the opposite party and the trial court itself came to the conclusion that no custom of the variety pleaded by Safia was proved. Therefore according to the very judgment upon which reliance has been placed by the learned Senior Sub-judge, there is no reason as to why Safia should not be allowed to fall back upon the provisions of ..... Mohammedan Law.

(5) It may be pointed out here that the custom of making a resident daughter is prevalent generally in Kashmir province. In Kashmir province the law of succession among agriculturist classes has been greatly modified by custom. According to the custom prevalent generally in Kashmir province "Daughters inherit only when they reside with their husbands in their father's house and are made Dukhtar Khana Nashin, otherwise not (Vide Code of Tribal Customs by Sant Ram Dogra). This custom has been recognized by courts, so far as Kashmir province is concerned all along. If in Kashmir province a daughter failed to prove herself that she was a resident daughter, she would fail to get any share in the property left by her father, since she would succeed only if she were made a Khana Nashin daughter according to the custom just referred to. But as already stated, no such custom has been proved to exist in Kishtwar as obtains in Kashmir whereby daughters are excluded from inheritance unless they are made Khana Nashin daughters. Nor has one been pleaded, much less proved in the present case. At the most that can be said, so far as the present case is concerned, is that Safia tried to establish that she had acquired by custom a better status of Khana Nashin daughter than that of an ordinary daughter as governed by Mohammedan Law. But though she has failed to prove her better status, i.e., failed to prove that she was a Khana Nashin daughter and equally failed to prove that there was a custom which would make it possible for a daughter to become a Khana Nashin daughter in the presence of a male issue of the last owner yet we are of the opinion that there is no reason as to why and how she could be deprived of her rights which accrued to her by virtue of her original status, i.e., that of a daughter governed by Mohammedan Law. There is ample authority for this proposition, and reference may in this connection be made to —'Lassi Ganai v. Reshi Mir', 8 J & K LR 117 (B) in which it has been held that "if a daughter failed to establish a custom under which she claimed as a Dukhtar Khana Nashin nominated by her mother, she is entitled to fall back upon Mohammedan Law and claim a share to which that law entitles her unless, of course it is proved that by custom she is excluded by some other heir and

that Mohammedan Law has been superseded by such custom to that extent."

(6) Taking all this into consideration, we hold that since the custom of making a Khana Nashin daughter in the presence of a male successor has not been established in the present case, the plaintiff is fully entitled to fall back upon Mohammedan Law.

(7) There is yet another ground on which the suit of the plaintiff has been ordered to be dismissed by the first appellate court. The lower appellate court has held that the suit is time barred. In the opinion of the lower appellate court the cause of action accrued to the plaintiff on 16th Chet 1993 which according to the lower appellate court is the date and the year in which Ahmad Sheikh, father of Safia, died. We may state here that Ahmed Sheikh has not died on 16th Chet 1993. 16th Chet 1993 is the date and year when Safia was married. In fact Ahmad Sheikh has died somewhere at the close of Chet 1994. This would show the slipshod manner in which the courts below go through the record of cases, with the result that glaring mistakes are committed with telling effects.

(8) Now we have already seen that from 1994 no mutation of the property left by Ahmad Sheikh was effected till the year 2002. It was in the year 2002 when Safia was excluded from mutation being effected in her name that a cloud appears to have been cast on her title, though it may not be lost sight of that Safia says that she had no notice of that mutation and the mutation record also does not show that Safia was present on spot. In the year 2005 another mutation was made by the revenue authorities and this time after the death of Wali Sheikh which took place in the year 2004. In this mutation Safia was also entered in the revenue records as one entitled to share the property with the daughters of Wali Sheikh. Again it is in evidence that Safia came into possession of the land in the year 2005. Under these circumstances the suit cannot be in any way barred by time. The case of Safia is that her title was denied by the heirs of Wali Sheikh in Baisakh 2006. So it is clear that according to the averment made by Safia the cause of action would arise in the month of Baisakh 2006. At its worst the cause of action would have arisen for Safia to bring a suit for declaration in the year 2002 when mutation was effected in the name of Wali Sheikh and Safia was excluded from inheritance. Even then the present suit is within six years which is the period of limitation prescribed for bringing a suit for declaration. The lower appellate court was, clearly wrong in holding that Safia's rights to the property had got extinguished since she was out of possession for more than the statutory period prescribed for bringing a suit for possession of immovable property, i.e., 12 years. Safia's father died in Chet 1994 and Safia came into possession of the property in Rabi 2005, that is to say, within a period of 11 years which is much less than the statutory period for which it is necessary to be out of possession, so as to bring about extinction of the right to seek possession. We, therefore, hold that Safia's suit is within time.

(9) The result of all this is that Safia is entitled to succeed to the property left by Ahmad Sheikh as a daughter entitled to get a share according to Mohammedan Law. We, therefore, accept this appeal, set aside the judgment and decree of the lower appellate Court and restore that of the trial Court. This appeal is accepted with costs.

B/H.G.P.

Appeal allowed.



**A.I.R. 1953 J. and K. 41 (Vol. 40, C.N. 19)**

(Board of Judicial Advisers)

**DAR AND IQBAL AHMAD, MEMBERS**

Badri Nath, Appellant v. State.

Criminal Appeal No. 1 of 1952, D/- 18-8-1952.

(a) **Evidence Act (1872), Ss. 101 to 103 — Criminal trial — (Criminal P. C. (1898), S. 367).**

Though the evidence, both for the prosecution and for the defence, has, at some stage of the case, to be weighed, in criminal cases the evidence has not to be weighed in golden scales, and there must be great preponderance of weight on the side of the prosecution before the accused can be found guilty. AIR 1944 F. C. 66, (FB) Rel. on. (Para 10)

Anno: Evidence Act Ss. 101 to 103 N. 3; Cr. P. C. S. 367 N. 6.

(b) **Evidence Act (1872), S. 154 — Result of cross-examination.**

The fact that the witness was declared hostile by the Court at the request of the prosecuting counsel and he was allowed to cross-examine the witness furnishes no justification for rejecting en-block the evidence of the witness. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to the same. (Para 16)

Anno: Evidence Act, S. 154 N. 7.

B. B. Badri Das and Pt. Madsudan Kak, for Appellant; Jaswant Singh, Asstt. Advocate-General, for the State.

**CASE CITED:**

(A) ('44) AIR 1944 FC 66: 45 Cri LJ 755 (FB)

**IQBAL AHMED MEMBER:** While fully alive to the salutary rule that enjoins respect for the estimate of oral evidence made by the trial Judge and, in particular, to concurrent findings on questions of fact recorded by the Courts below, the Board, in the present case, for reasons that will presently appear, is unable to endorse the finding about the guilt of Pt. Badri Nath Jalali recorded by the Courts below and to affirm his conviction.

(2) In or about Bhadon 2005 (August 1948) Pt. Bari Nath Jalali hereinafter referred to as the appellant, was temporary Tehsildar at Uri. Till December 1947, the area round about Uri was in possession of raiders, but they were dispossessed from the same and civil administration was established in or about the beginning of 1948. The exigencies of the situation, however, dictated the desirability of military control over the area for some time to come and, accordingly, the civil administration had, for the time being to function in collaboration with the military authorities.

(3) It is common ground that one Ghulam Rasul, who was Zaildar of Islamabad and surrounding villages, had gone over to Pakistan side and this fact, after the establishment of civil administration, necessitated the appointment of another Zaildar, the more so as the revenue for the S. year 2004 (1947) was in arrears. On 15th Bhadon 2005 (30-8-1948) some Zemindars of Islamabad and neighbouring villages presented a petition Ex. P. A. to the appelt. praying that one Mutwali Mir (PW 1) be appointed Zaildar of the illaqa in place of Gulam Rasul. On the same date, in pursuance of the order of the appellant, Dina Nath Patwari (P. W. 2) recorded the statement of a number of Zemindars who stated that

"Mutwali Mir has shown sympathy towards us and we request that it will meet the ends of justice if Mutwali Mir is appointed Zaildar of our illaqa".

It appears from the evidence of Dina Nath that the Chief Administrator, Pir Mohd Maqbul (P. W. 17) was present when the application just referred to was presented and when the joint statement of Zemindars was recorded by Dina Nath. Dina Nath further stated that "the Administrator ordered verbally that since he (Mutwali Mir) had done good work in military he may be appointed as Zaildar." At that time he passed the order verbally. It is also a matter of admission that after the departure of Gulam Rasul, Mutwali Mir was playing the role of Zaildar and was, to all intents and purposes, a de facto Zaildar.

(4) The application Ex.-P. A. was disposed of by the appellant on 7th Assuj 2005 (22-9-1948) by his order Ex. P. B. in which after noting that

"Mutwali Mir has rendered great help to the Military and had worked with great enthusiasm at the time of Qabali raids and the Zamindars too gave a statement on their part in favour of this man's appointment as Zaildar,"

he went on to observe that "under the present emergency conditions this man is fit and suitable of Zaildarship." He, however, added in the order that

"since this illaqa is under military operation at this time, therefore, at this time the appointment of Zaildar cannot be made according to the rules ..... therefore he is appointed Zaildar for the time being for conducting the work and afterwards necessary action under rules will be taken."

In view of the reasons just set out the appellant ordered that, subject to confirmation by the Chief Administrator (Pir Mohd Maqbul), "Mutwali Mir is appointed Zaildar of the aforesaid villages for the time being as an emergency measure."

(5) A period of about three weeks elapsed between the date of application Ex. P. A. and the passing of order Ex. P. B. and the case for the prosecution is that the appelt. deferred passing order on the application Ex. P. A. till his demand for a canister of Ghee and payment of Rs. 25/- as illegal gratification was complied with by Mutwali Mir. Indeed it is alleged that on some date between 28-31st Bhadon S. 2005 (12 to 15 Sept. 1948) a canister of Ghee was taken by Mutwali Mir and eventually delivered to the appellant, and further a sum of Rs. 25/- was also paid the very next day by Mutwali Mir to the appellant.

(6) The evidence shows that in the meantime information had reached the Chief Administrator that the appellant had received a sum of Rs. 50/- from Atta Mohd Numberdar (P. W. 7) as illegal gratification for recommending the remission of the Government revenue for the instalment of Magh 2004 and accordingly, the Chief Administrator passing order Ex. (P. W. 6) on 25-9-1948, directing that Atta Mohd be summoned "for the sake of an enquiry so that proper proceedings may be taken after an enquiry from him." Within four days of the last mentioned order the Chief Administrator on 29-9-1948, passed orders Ex. P. W. 8 in which, after pointing out that

"there is sufficient proof to believe that you have accepted Rs. 20/- and Rs. 30/- as illegal gratification from one Atta Mohd ..... to do away with the revenue of Kharif 2004",

he called upon the appellant to submit his explanation within two days "to complete the case and



to proceed further". The appellant forthwith submitted his explanation Ex. P. W. 9, which apparently was not acceptable to the Chief Administrator, with the result that the latter passed an order on 15-10-1948 suspending the appellant (vide statement of Gulam Nabi P. W. 16 on p. 47).

(7) After the suspension of the appellant, and the lapse of more than a month after the order for appointment of Mutwali Mir as Zaildar was passed, Mutwali Mir on 26-10-1948 submitted a petition Ex. P. C. to the Chief Administrator that "the ex-Tehsildar has taken one tin of Ghee and Rs. 25/- in cash from me in connection with my appointment as Zaildar. There is evidence existing and proceeding may be taken."

Thereafter the Governor of Kashmir, on 19-1-1949, called upon the appellant (vide Ex. P. W. 1) to submit his explanation with respect to 3 charges viz. (1) about the receipt of Rs. 50/- from Atta Mohd, (2) the receipt of one tin of Ghee and Rs. 25/- as bribe from Mutwali Mir and about a 3rd charge which is not material for our present purposes. The appellant thereupon submitted his explanation (Ex. P. W. 2) to the Governor on 24-1-1949. The explanation did not satisfy the Governor and, accordingly, he forwarded the case to the Government for necessary action. Thereafter the Anti-Corruption Department, having secured the necessary sanction for prosecution of the appellant, launched the prosecution which has culminated in the present appeal.

(8) Before the trial Magistrate the appellant was called upon to stand his trial for acceptance of illegal gratification on three counts viz. (1) acceptance of one tin of Ghee and Rs. 25/- from Mutwali Mir in consideration of recommending him for Zaildarship, (2) acceptance of Rs. 50/- as illegal gratification from Atta Mohd. for recommending postponement or remission of land revenue and (3) that he had accepted Rs. 47/- by way of bribe from Jumma Shah, Malik Mohd. etc. etc.

(9) The appellant was discharged with respect to 3rd charge but was convicted by the Magistrate with respect to first and second charges. On appeal, the learned Sessions Judge acquitted the appellant with respect to the second charge but maintained his conviction with respect to the first. On an application in revision by the appellant, the High Court upheld the conviction of the appellant with respect to the first charge above referred to. The appellant then was granted special leave to appeal to His Highness.

(10) It would thus appear that the evidence in the case relating to the first charge was, in the opinion of the learned Judges of the three Courts below, sufficient to bring that charge home to the appellant, and this fact, standing by itself, counsels great caution in interference with the finding recorded by those Courts. A perusal of the judgments of the Courts below, however, reveals that those Courts seriously misdirected themselves in one respect. Those Courts approached the consideration of the case from a point of view which was appropriate for adjudication of a civil matter, but wholly inapplicable to a case in which a public servant was charged with the offence of accepting illegal gratifications. What the Courts below virtually did was to compare the probability or otherwise of the respective stories for the prosecution and for the defence, and holding that the story for the prosecution was more probable and convincing, recorded the order of conviction. In other words the Courts below put the evidence for the prosecution in one scale and the evidence

for the defence in another and, after weighing the same, held that the scale containing the prosecution evidence was heavier and, accordingly, convicted the appellant. It is hardly necessary to observe that in criminal cases, unlike civil cases, the evidence has not to be weighed in this manner. In a criminal trial, an accused starts with presumption of innocence in his favour, and this presumption holds the field till the prosecution succeeds in establishing the guilt of the accused beyond all reasonable doubt. Unlike civil cases, the burden that rests on the prosecution in criminal cases does not shift from time to time, howsoever flimsy or unreliable the evidence for the defence may be.

The prosecution is not relieved of the burden of satisfying the judicial conscience of the Court from the evidence led by it about the guilt of the accused. In short, in criminal trials, in which the accused does not invoke to his aid any of the exceptions embodied in a criminal Statute in justification of the act of commission or omission with respect to which he is charged, the Court is bound to keep the evidence for the prosecution and for the defence in two water-tight compartments, and has first to consider whether or not the guilt of the accused has been established beyond all reasonable doubt by the prosecution evidence. If the answer to the question, just referred to, is in the negative, there is an end of the matter. If, however, the Court is of the opinion that the prosecution discharged the onus that rested upon its shoulders, it has then to turn to the defence evidence in order to find out whether that evidence does or does not rebut the prosecution evidence and either negatives the guilt of the accused or makes his guilt doubtful. It is true that, in one sense, the evidence, both for the prosecution and for the defence, has, at some stage of the case, to be weighed, but it is well known that in criminal cases the evidence has not to be weighed in golden scales, and there must be great preponderance of weight on the side of the prosecution before the accused can be found guilty.

(11) It may be, and possibly is a fact, that the evidence in the case disclosed facts that justified strong suspicions against the appellant, but this could be no justification for his conviction unless and until the prosecution succeeded in excluding every reasonable possibility of the appellant's innocence. In this connection it is well to bear in mind the following observations of the Federal Court in *H. T. Huntley v. Emperor*, A. I. R. 1944 F. C. 66 (A):

"A charge under S. 161 is one which is easily and may often be lightly made, but is in the very nature of things difficult to establish, as direct evidence must in most cases be meagre and of a tainted nature. These considerations cannot however be suffered to relieve the prosecution of any part of the burden which rests upon it to establish the charge beyond reasonable doubt. If after everything that can legitimately be considered has been given its due weight, room still exists for taking the view that however strong the suspicion raised against the accused every reasonable possibility of innocence has not been excluded, he is entitled to an acquittal."

There is yet another circumstance that points to the desirability of an independent and thorough examination of the evidence by the Board. It appears that certain facts, which were indicative of the innocence of the accused & facility of the prosecution case, were not referred to or touched by the Courts below and this, in the opinion of the Board, vitiated the conclusion arrived at by these Courts.



(12) It would be recalled that the charge against the appellant was that he accepted as illegal gratification a tin of Ghee from Mutwali Mir between 12 and 15-9-1948 and further received a sum of Rs. 25/- from him the very next day. This charge readily divides itself into two parts viz. (1) the receipt of one tin of Ghee and (2) the receipt of Rs. 25/-. Not a little confusion was caused by the omission of the Courts below to separately consider and record separate findings with respect to these two counts.

(13) Apart from the so-called circumstantial evidence, to which reference shall be made in due course, the conviction of the appellant with respect to this charge was based on the evidence of P. W. 1, (Mutwali Mir) P. W. 2, (Dina Nath) P. W., (Bansilal) and P. W., (Ahad Joo) and P. W. 5, (Gulam Mohd Kuli).

(14) It would be convenient first to deal with the second part of the charge viz. about the receipt of Rs. 25/- by the appellant. There is only the evidence of P. W. 4 Ahad Joo, P. W. 1 and Mutwali Mir, as regards this part of the case. Ahad Joo was a peon posted in Tehsil Uri and gave evidence against the appellant as regards the charge of acceptance of Rs. 50/- by the appellant from Atta Mhod. as well. His evidence as regards that charge was, however, not accepted by the Sessions Judge and the appellant was acquitted with respect to that charge. The fact of the rejection of the evidence of this witness, as regards the charge just referred to, laid his evidence with respect to the charge under consideration open to the obvious comment that he was not a witness of truth. No reference, however, to this aspect of the matter was made in the course of their judgments either by the Sessions Judge or by the High Court. Ahad Joo deposed that, when after delivering Ghee Mutwali Mir returned and had not gone far off,

"the accused told me to tell him that this Ghee will not do and that some money should be paid for a pair of boots. I went and told this to Mutwali Mir. He replied that he had no money with him at that time."

It is manifest that it is easy to make a statement like this and it is difficult to test its veracity by appropriate cross-examination. There is one circumstance, however, that demonstrates that this part of the prosecution case was an after-thought.

One could understand that, on receipt of the application for the appointment of Mutwali Mir as Zaildar, the appellant dictated his terms. Dina Nath P. W. 3, however, stated that after the receipt of the application he was asked by the appellant to tell Mutwali Mir to supply a tin of Ghee. Dina Nath makes no mention of any demand by the appellant for a pair of boots or the price thereof. The demand for illegal gratification piecemeal is, to say the least, extremely extraordinary. In all the circumstances we are not prepared to accept the evidence of Ahad Joo on the point. The result is that one is left with the solitary statement of Mutwali Mir as regards this part of the case, and the Board has no hesitation in rejecting the same. Reference has already been made to petition Ex. P. C. which was presented by Mutwali Mir to Chief Administrator on 26-10-1948. The alleged delivery of Ghee and payment of Rs. 25/- to the appellant by Mutwali Mir, according to the prosecution case, was round about 15-9-1948 and the application Ex. P. C. was not presented till after the lapse of about six weeks from that date. No explanation, good or bad or indifferent, as regards the delay in the presentation of the application was offered by Mutwali Mir. This application was presented after the appellant had

been suspended. That false complaints against officers, in the situation in which the appellant found himself, are recklessly made after they are relieved of their office and are crest-fallen, is by no means a phenomenon of unusual occurrence.

Indeed the statement of Mutwali Mir in cross-examination strongly points to the conclusion that the application Ex. P. C. did not originate from Mutwali Mir but was the handi-work of someone who was busy in manufacturing evidence against the appellant. Mutwali Mir stated that

"I have got the application marked Ex. P. C. written by a man whose name I do not know nor he is an acquaintance of mine. He is the resident of Uri".

Comment on this statement will be superfluous, but it may be observed in passing that Mutwali Mir was presumably unable to name the scribe of application Ex. P. C. for the simple reason that the application was got prepared not by Mutwali Mir but by some one else. The prosecution case as regards payment of Rs. 25/- to the appellant must therefore be rejected.

(15) The evidence as regards the receipt of a tin of Ghee by the appellant as illegal gratification is equally unconvincing. Reference has already been made to the evidence of Dina Nath P. W. 2 which shows that, on the presentation of the application by Zamindars, Pir Mohd. Maqbul—Chief Administrator (P. W. 17) ordered verbally that Mutwali Mir be appointed Zaildar. The Chief Administrator had the last voice in the matter and, therefore, it is extremely improbable that, after the receipt of his verbal order, the appellant could have summoned courage to ask for bribe as a condition precedent to the appointment of Mutwali Mir as Zaildar. Apart from this it is abundantly clear by the order Ex. P. B. passed by the appellant, which has been quoted above, that the appointment of Mutwali Mir as Zaildar was only as a temporary measure, and that he was "appointed Zaildar for the time being for conducting the work and afterwards necessary action under rules will be taken." This fact also negatives the probability of the demand of bribe.

(16) All that appears from the evidence of Dina Nath is that

"he told Mutwali Mir to get a tin of Ghee for the Tehsildar I told him that the accused had demanded a tin of Ghee. Mutwali Mir did not give any reply at that time."

Dina Nath did not commit himself to the statement that the Ghee was demanded by the appellant as consideration for the appointment of Mutwali Mir as Zaildar. The evidence of Bansilal P. W. 3 negatives the truth of the prosecution case. The witness was declared hostile by the Court at the request of the prosecuting counsel and he was allowed to cross-examine the witness. This fact, however, furnishes no justification for rejecting en-block the evidence of the witness. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to the same. In the course of his evidence Bansilal stated

"I told the accused that Mutwali Mir had brought the Ghee and the accused told me that he would send the price and that he had got the Ghee. I called out to Mutwali Mir and told him that the Tehsildar says that the price will be sent. Mutwali Mir showed by signs from a distance that it was all right."

The prosecuting counsel, when allowed to cross-examine this witness, however, put no question to



the witness regarding the statement just quoted.

(17) Reasons have been assigned above for rejecting the evidence of Ahad Joo. The result is that there remains the solitary statement of Mutwali Mir P. W. 1, in support of this part of the prosecution case. Most of the reasons assigned above for not accepting the evidence of Mutwali Mir as regards the payment of Rs. 25/- by him to the appellant equally hold good so far as Mutwali Mir's evidence as regards delivery of Ghee is concerned.

(18) The so called circumstantial evidence relied upon by the Courts below consists of the following links:

(1) The interval of 3 weeks between the presentation of the application Ex. P. A., the recording of the evidence of the Zemindars and passing of order Ex. P. B. by the appellant,

(2) the acceptance of Ghee by the appellant without weighing the same and settling its price;

(3) the delay in the alleged payment of the price of the Ghee by the appellant.

(19) The circumstances just referred to, do not, in the opinion of the Board, clinch the matter and demonstrate the guilt of the appellant. The fact of the receipt of the Ghee was throughout admitted by the appellant, and the only serious question for consideration was whether the same was received as illegal gratification. It is clear from the evidence in the case that Mutwali Mir dealt in Ghee. It is also clear that the military was in control of the area at that time. In view of the fact that problems of varying intensity must then have been engaging the attention of the civil authorities there is no occasion for surprise if the appellant did not dispose of the application Ex. P. A. for three weeks. His hands must have been full with works and duty of various description. When one pictures to one-self the utter confusion that must have reigned supreme at that time, one hesitates to disbelieve the assertion of the appellant that a Military Officer had asked for the Ghee and, as that officer had moved to Srinagar, the Ghee was sent there, but the officer could not be traced. Supplies could not have been arranged and received in a business-like manner at that time. The non-weighment of Ghee or the settlement of its price is therefore not a matter to which any weight can be attached. Each one of three links in the so called circumstantial evidence, tested by itself, leads one to nowhere and their cumulative effect is nil, for the simple reason that Zero multiplied by Zero is still Zero.

(20) On the whole, the Board have arrived at the conclusion that the guilt of the appellant was not established and, accordingly, the Board will humbly advise His Highness that this appeal be allowed, the conviction of and the sentence passed upon the appellant be set aside and he be acquitted, and the fine, if paid, be refunded.

C/D.H.Z.

Appeal allowed.

A.I.R. 1953 J. AND K. 44 (Vol. 40, C. N. 20)

(Board of Judicial Advisers)

DAR AND IQBAL AHMAD MEMBERS

Wali Dar, Appellant v. State.

Criminal Appeal No. 2 of 1952, D/- 9-8-1952.

Penal Code (1860), S. 300 — Benefit of doubt — (Evidence Act (1872), S. 3.)

No convincing motive for murder brought home to accused — Testimony of eye-witness regarding discovery of dead body shattered by evidence of investigating officer — Mystery surrounding two reports made to police, in that, one drawn up by Numberdar and Chowkidar did not mention names of eye-witnesses and the other drawn up by husband of deceased, from which conclusion was irresistible that report was outcome of conspiracy against accused who was regarded as a village bully — Also it was impossible to record definite finding on question of scene of murder — Held there was room for grave doubt in truth of prosecution story — Accused held was entitled to benefit of doubt. (Paras 20, 21)

Anno: Penal Code, S. 300 N. 44; Evidence Act S. 3 N. 5.

H. N. Dhar, Amicus Curiae; Raja Jaswant Singh Acting Advocate General, for the State.

SIR IQBAL AHMAD, MEMBER: This is an appeal by Wali Dar against his conviction under S. 302, R. P. C. and the sentence of death passed on him. The charge against the appellant was that, on the night intervening between the 3rd and 4th of Jan. 1952, he caused the death of his sister Mst. Fazi by strangulation. The fact that on the night in question Mst. Fazi was strangled to death is proved from the medical evidence in the case, and the sole question for consideration in the case is whether or not the charge under S. 302, R. P. C. was brought home to the appellant.

(2) It is one of those cases in which it is not possible to be dogmatic but, after making due allowance for the fact that there are grounds for grave suspicion against the appellant the Board, in view of certain extraordinary features of the case and the extremely unsatisfactory nature of the evidence, is unable to share the conviction of the Courts below as regards the guilt of the appellant.

(3) The case for the prosecution is that in the dead of night Wali Dar entered the room in which Fazi was sleeping, alone with Mst. Jainti, the wife of Wali Dar and certain children and there he strangled her to death by fastening and tightening a rope round her neck. Thereafter he lifted the dead body on his shoulders and proceeded to the courtyard of Abdullah (P. W. 3) and put the same there.

(4) On a perusal of the evidence recorded by the Sessions Judge, it was manifest that certain matters having vital bearing on the case were left in a state of absolute obscurity and the Board, accordingly, summoned some of the important witnesses for further examination and recorded their evidence.

(5) Wali Dar & his sister Fazi originally resided in village Shalhal. Fazi was married to one Jabbar Mir, resident of village Lachh. Fazi had two children by Jabbar Mir viz., Ali Mir (P. W. 5) a lad of about nine or ten years of age and Sona Mir who is about 5 or 6 years old. Jabbar Mir died in or about the year 1948. Jabbar Mir had 139 kanals of land in village Lachh, and after his death, at the request of Mst. Fazi, Wali Dar with his wife Mst. Jainti came to and began to reside in village Lachh with Mst. Fazi, and looked after the cultivation of the land. About two years after the death of Jabbar Mir, Mst. Fazi married Rasul



Wani (P. W. 1) son of Abdullah (P. W. 3) who also is resident of village Lachh and was the neighbour of Jabbar Mir. Rasul Wani's first wife Mst. Mehtabi is still alive and Rasul Wani has 4 children by her. It is, however, a fact that Mst. Mehtabi is a cripple.

(6) The case for the prosecution is that the marriage of Mst. Fazi with Rasul Wani was bitterly opposed by Wali Dar, but this is disproved by the statement made before the Board by Rasul Wani's father Abdullah (P. W. 3). Indeed the evidence recorded by the Board puts it beyond doubt that Wali Dar joined the marriage and partook of the feast given by Abdullah on the occasion of the marriage of Rasul Wani with Mst. Fazi. In view of this evidence the evidence tending to show that after the second marriage of Mst. Fazi there was bickering between her and Wali Dar, must be rejected.

(7) It would be noted that the period intervening between Fazi's marriage with Rasul Wani and the murder of Mst. Fazi was about 8 months and, even though Mst. Jainti (P. W. 4) the wife of Wali Dar tried to prove that during this period there used to be quarrel between Fazi and Wali Dar, and the latter at times beat Fazi, the evidence, as a whole, negatives the truth of this statement and points to the conclusion that the brother and sister amicably lived together, and the brother throughout had a controlling hand in the management of the land originally owned by Jabbar Mir.

(8) To begin with, therefore, the prosecution is up against difficulty of failing to attribute a motive to Wali Dar for the alleged commission of the dastardly crime by him. It was vaguely alleged that Wali Dar desired Mst. Fazi to transfer the land to him or, at any rate, to let him have a share out of the same. This, to say the least, is improbable, for the simple reason that, during the minority of her two children, Mst. Fazi had no right to give away the land that belonged to the two children. Again it was further sought to be made out that Wali Dar entertained the apprehension that sooner or later he will be deprived of the land of Jabbar Mir and possession of the same will be taken by Rasul Wani. This part of the prosecution case, however, receives a rude shock from the statement made by Rasul Wani (P. W. 1) before the Board. He stated that no interference whatsoever was made by him in the control of the management of the land by Wali Dar, and that Fazi was agreeable to and held out a promise to let Wali Dar have one third share in the land on her two children attaining majority.

(9) In view of what has been just stated, it is imperative to approach the consideration of the evidence in the case in the light of the cardinal fact that no convincing motive for the commission of the crime by Wali Dar has been brought home to him.

(10) It is common ground that on the night in question Mst. Fazi and her two children were sleeping in a room in Jabbar Mir's house alone with Mst. Jainti and her two babies, and the room was bolted from inside. Wali Dar was sleeping in an adjoining verandah. It is also a fact that on the morning of Jan. 4, the dead body of Fazi was first seen by Abdullah lying in the courtyard of Rasul Wani's house and the sole question for decision in the case was whether Wali Dar was responsible for the murder.

The conviction of Wali Dar has been based by the Courts below wholly and solely on the testimony of Mst. Jainti (P. W. 4) and Ali Mir (P. W. 5) who profess to be eye-witnesses of the murder. In order to assess the value to be attached to the testimony of these two witnesses it is necessary to refer briefly to the events that, according to the prosecution evidence, followed the discovery of the dead-body.

(11) It appears from the evidence of Abdullah (P. W. 3) that, no sooner he noticed the dead body of Fazi, he jumped to the conclusion that Wali Dar had murdered her, and his neighbours, to whom he immediately conveyed the news about the discovery of the dead body, also straightway said that Wali Dar was responsible for the murder. Soon after the Numberdar, the Halqa President, etc. appeared on the scene and Wali Dar was taken into custody. It is important to bear in mind in this connection that till then there was not even a whisper either by Mst. Jainti or Ali Mir that they had witnessed the commission of the crime.

(12) A report Ex. G. was then drawn up and the same was signed by Mohd. Sultan Numberdar and Jabbar Chowkidar of the village. Mohd. Sultan was not called as witness in the case Jabbar (P. W. 6) however, stated that he and Sultan got the report written by one Aziz Mir. The report was taken by the Numberdar & the Chowkidar and delivered at Police Station Handwara. Prem Nath, Sub-Inspector, (P. W. 12), who investigated the case, has stated before the Board that this report reached Handwara Police Station at about 3 p. m. It further appears from his evidence that the distance between village Lachh and Handwara by road is about six miles and by a short-cut foot path is about 4 miles, and that this distance could be covered on foot in about an hour and a half. It is, therefore, permissible to presume that the Numberdar and the Chowkidar did not leave village Lachh with the report till about 1 p. m. In other words, there was an interval of about six hours between the discovery of the dead body and the despatch of the first report from the village. The report merely mentions the fact of the discovery of the dead body and is conspicuous by an entire absence of any reference to any suspicion being harboured against Wali Dar. The report is, therefore, proof positive of the fact that till the despatch of the report neither Jainti nor Ali Mir had disclosed that they had witnessed the commission of the crime.

(13) It is said that Rasul Wani was absent from the village on the night in question and had gone to village Yamlaht, which is 3 miles away, to attend some Niaz ceremony at the house of one Nura Mir. It is alleged that on 4th Jan. at about 9 a. m. one Shams Gujri, a servant of Abdullah, conveyed the news to Rasul Wani about the discovery of the dead body of Fazi. It is further alleged that Jamal Wani, the brother of Rasul Wani was also absent from the village on that night. The simultaneous absence of these two brothers from village Lachh is, to put it mildly, a bit extraordinary, and therefore the omission by the prosecution to call Nura Mir and Shams Gujri as witnesses to testify to the absence of Rasul Wani from village Lachh on the night of the murder is significant.

(14) The case for the prosecution is that Rasul Wani, on receipt of the information, pro-



ceeded to his native village, saw the dead body, and then truth came to the surface with startling rapidity. Rasul Wani deposed that on reaching his village he forthwith enquired from Ali Mir and the latter then told him that Wali Dar had tied a rope round the neck of Fazi and strangled her to death and, thereafter, removed the dead body from the room and put the same in the courtyard of Abdullah. It is said that Rasul Wani then immediately proceeded to the Police Station and there lodged a report Ex. P. A. In the report the alleged information given by Ali Mir to Rasul Wani is set forth. But there is no mention in the report of any enquiries having been made from Mst. Jainti. Ghulam Qadir, the Halqa President, (P. W. 7), however, stated before the Board that on the arrival of Rasul Wani in the village & on enquiries being made by him both Ali Mir and Mst. Jainti straightway disclosed the fact that Wali Dar had committed the murder. On this point it is impossible to reconcile the evidence of Rasul Wani with the evidence of Ghulam Qadir.

(15) It has already been stated that it is common ground that on the night in question Fazi slept with her two sons and Mst. Jainti in one & the same room. It is, therefore, manifest that, on the discovery of the dead body, Abdullah, the Numberdar, the chowkidar, the Halqa President and all concerned must have made close enquiries from Jainti and Ali Mir about this mysterious murder. Further if these two persons, who now pose as eye-witnesses of the incident, had then said what they say now, the fact that Wali Dar was responsible for the murder would have been mentioned in the report lodged by the Numberdar and Chowkidar. The conclusion, is therefore irresistible that till late in the afternoon of the 4th of Jan. neither Ali Mir nor Jainti disclosed any fact pointing to the guilt of the appellant. If Ali Mir, who is a lad of 9 or 10 years of age, had witnessed the murder of his mother, it is difficult, if not impossible, to believe that he would not have in the morning, on enquiries being made from him, disclosed the fact to the villagers. The story about the studious silence of Ali Mir till the alleged arrival of Rasul Wani from village Yamlehr and then prompt disclosure by him of the prosecution case in all its details appears to the Board a little too refined and a little too ingenious and has very much the complexion of fabrication.

(16) Be that as it may, the case for the prosecution, resting as it does on the testimony of the two alleged eye-witnesses, can succeed only if implicit reliance can be placed on their evidence. The evidence of these witnesses, however, does not command such reliance. The Board had the opportunity of watching Ali Mir in the witness-box. He is an extremely young and simple lad incapable, on his own initiative, of testifying in detail about various processes by which her mother was done to death and the dead body was lodged in the courtyard of Abdullah. Indeed, the Board is of the view that he is got-up witness and was well drilled to narrate the story that he did in Court.

(17) There remains the evidence of Mst. Jainti, and the Board has no hesitation in rejecting her evidence. It is patent from her evidence that she is extremely hostile to the appellant. On every possible point, she attempted to stretch points against the appellant

and went to the length of stating that the appellant was a dangerous character. Such being her attitude towards the appellant one would have expected her to come out with the story, that she now narrates, at the earliest possible moment when the villagers assembled round the dead body. One, however, finds that in the report Ex. P. A. there is no mention of any enquiry having been made by Rasul Wani from Jainti nor is there any suggestion in that report that Jainti supported the alleged statement of Ali Mir about the appellant being responsible for the murder.

(18) Apart from this, it is impossible to overlook the improbabilities in the story given out by Jainti. To begin with she stated that the room being locked, the appellant jumped into the same through an aperture in the wall, and when he committed the crime shrieks were raised not only by Fazi but also by Jainti. It may be, that in the dead of night, those shrieks did not reach the ears of the neighbours, but what is curious is that even though Jainti and Ali Mir, according to their statements, were lulled into silence by the threat of being put to death, they unhesitatingly broke their silence on the arrival of Rasul Wani in the village. The story about the removal of the dead body by the appellant single-handed is also a bit curious. Jainti first deposed that the body was taken from the room through the aperture in the wall. She, however, presumably appreciating the absurdity of this portion of her statement, corrected herself, and said that the appellant unbolted the door of the room and then took the dead body out and after depositing the dead-body in the courtyard came back to the room and bolted the same from inside and thereafter went out of the room through the aperture in the wall.

(19) The conduct of the appellant on the morning of the 4th January, as disclosed by Mst. Jainti, shakes confidence in the truth of her statement. She admitted that, on coming to know of the fact of the murder of Fazi, the appellant clung to her body and was bitterly weeping. This, to say the least, is not the conduct of a person who, a few hours before, had mercilessly murdered his own sister who was a source of livelihood to him, his wife and his children.

(20) It is clear from the evidence in the case that Wali Dar was, rightly or wrongly, regarded by residents of Lachh as the village-bully. This accounts for the fact that not one single resident of that village lent a helping hand to Wali Dar during the trial of the case and Jainti, his wife, went to the length of appearing as an eye-witness against him. Abdullah (P. W. 3) has stated that on the discovery of the dead body the suspicion of the villagers fell upon Wali Dar, and circumstances point to the conclusion that by hook or crook, the villagers managed to induce Ali Mir and Jainti to implicate the appellant. The story told by Rasul Wani that he reached village Lachh at about 10. a. m. and then Ali Mir told him that the appellant was responsible for the murder is falsified by the evidence of the investigating Officer, Prem Nath. It is clear from his evidence that till 1. p. m. nobody had connected the appellant with the commission of the crime. The mystery surrounding the two reports in the Police Station is not solved by the evidence in the case and the conclusion is irresistible.



ble that the 2nd report lodged by Rasul Wani was the outcome of a conspiracy between and belated decision by the villagers to implicate the appellant. On the evidence in the case, it is impossible to record a definite finding on the cardinal question as to whether Fazi was murdered in one of the rooms of Ali Jabbar's house or the scene of murder was some other place. It follows that this must remain a case of undetected crime.

(21) On a consideration of the entire evidence in the case, the Board has come to the conclusion that there is room for grave doubt in the truth of the prosecution story and the appellant is entitled to the benefit of that doubt.

(22) For the reasons given above, this appeal must be allowed, the conviction of and the sentence of death passed upon the appellant must be set aside and he should be acquitted, and the Board will humbly advise His Highness accordingly.

B/H.G.P.

Appeal allowed.

**A.I.R. 1953 J. and K. 47 (Vol. 40, C.N. 21)**

**(Board of Judicial Advisers)**

**DAR AND IQBAL AHMAD MEMBERS**

Jamal Soofi and others Appellants v. Mohd. Sidqi and others, Respondents.

Civil Appeal No. 4 of 1952, D/- 10-9-1952.

(a) **Suits Valuation Act (1877), S. 9 — Rules under — (J and K), R. 16 — Forum of appeal — (J and K) Suits Valuation Act (1997) — (J. and K. Civil Courts Act (1977), S. 34).**

In regard to suits for pre-emption in relation to houses, the forum of the Court of appeal is determined not by valuation laid in the plaint but by the valuation determined by the judicial decision.

(Para 7)

(b) **Right of Prior Purchase Act (1993), Ss. 24(1) and 26(a) — Price to be fixed.**

The right of prior purchase can only be exercised on payment of price fixed in good faith by the vendor or the vendee, or on payment of the price determined by the Court on the basis of market value. In determining the market value the price actually paid may be taken into consideration but it cannot form an independent ground for the exercise of the right of prior purchase. The view that the pre-emptors are entitled to exercise the right of prior purchase on payment of price which the appellant has succeeded in proving is not correct and it is necessary to determine the market value of the property taking into consideration, among other matters, the payment of price which the appellant has succeeded in proving to the satisfaction of the Court. (Para 10)

H. N. Dhar, for Appellants; S. N. Dhar, for Respondents.

**DAR, MEMBER:** This is an appeal against the judgment and the decree of the High Court dated Assuj 4, 2008 by which the judgment and the decree dated 16th Poh. 2007, of the City Judge of Srinagar was modified.

(2) On Baisakh 24, 2005, respondents 3 and 4 executed a sale deed of a house and land situated in Mohalla Syed Hamidpora in the City

of Srinagar in favour of the appellants for an ostensible consideration of Rs. 5000/-. Respondents 1 and 2 who are the owners of the adjoining property claim to exercise right of prior purchase in regard to this sale and the main question for the consideration of the Board in this appeal is on payment of what price this right can be enforced by them.

(3) Prior to the sale there was an agreement of sale dated Baisakh 24, 2005 which recites that at the time of agreement, a sum of Rs. 2000/- was paid by the appellant to respondents 3 and 4. The sale deed of Baisakh 30, 2005 further recites that a sum of Rs. 1500/- was paid at the time of the execution of the sale deed and further a sum of Rs. 500/- was paid at the time of its attestation. On Baisakh 30, 2007 the date when the sale deed was executed a bond was also executed for the payment of Rs. 1000/- by the appellant to respondents 3 and 4 and this bond was also attested by the Registrar. Prima facie the ostensible consideration of Rs. 5000/- of the sale deed is thus duly supported by documents two of which are registered.

(4) Respondents 1 and 2, however, challenged this consideration to be fictitious to the extent of Rs. 3000/- and they also valued their suit for the purpose of jurisdiction at Rs. 2000/-. The respondents did not dispute that a sum of Rs. 1500/- was paid at the time of the execution of the sale deed and a further sum of Rs. 500/- was paid at the time of its attestation. But they denied the payment of Rs. 2000/- at the time of the agreement and the payment of any money in satisfaction of the bond of Rs. 1000/-.

(5) The trial Judge found that a sum of Rs. 700/- was paid at the time of the agreement, and no payment has been duly proved in regard to the bond, the ostensible consideration therefore was not fixed in good faith and could be disregarded. He then found the market value of the property to be Rs. 3000/- and granted a decree to respondents 1 and 2 on payment of that amount.

(6) Against this decree the appeals were taken to the High Court both by the appellants and respondents 1 and 2 and after filing these appeals, at the hearing, a question was raised by the appellants about the competency of the appeal to the High Court. That Court has come to the conclusion that the appeals were competent and that the sale consideration which has been proved to have been paid, was Rs. 2700/- and respondents 1 and 2 are entitled to enforce the right of prior purchase on payment of that sum only. As a result the decree of the trial Court was modified to that extent.

(7) The 34th section of the Civil Courts Act 1977, no doubt provides that an appeal from a decree of the Subordinate Judge shall lie to the District Judge where the value of the original suit in which decree was made did not exceed Rs. 2500/- and as the value of the suit in the plaint was set out to be Rs. 2000/-, the appeal against the decree of the trial Court prima facie lay to the District Judge and not to the High Court. But by the 9th section of the Suits Valuation Act 1977 the determination of value of certain suits has been left to the High Court and in exercise of the powers conferred by this section the High Court has made



certain rules with the sanction of the Government and Rule 16 of these Rules provides that the valuation of the suits for pre-emption in respect of houses shall depend upon judicial decision. The proper construction of these provisions, therefore, must be that in regard to suits for pre-emption in relation to houses, the forum of the Court of appeal is determined not by valuation laid in the plaint but by the valuation determined by the judicial decision and in this view of the matter the High Court has rightly held that the appeal to it was competent.

(8) On the question of consideration the High Court has taken the view that respondents 1 and 2 are entitled to exercise the right of prior purchase on payment of price which the appellant has succeeded in proving to have been paid to respondents 1 and 2.

(9) Section 24(1), Right of Prior Purchases Act, 1993 provides:

"(1) If in the case of sale the parties are not agreed as to the price at which the person having right of prior purchase shall exercise his right, the Court shall determine whether the price of which the sale purports to have taken place has been fixed in good faith or paid and if it finds that the price was not so fixed or paid, it shall fix as the price for the purposes of the suit the market value of the land or property."

Section 26(a) further provides:

"For the purpose of determining the market value, the Court may consider the following among other matters as evidence of such (a) the price or value actually received or to be received by the vendor from the vendee or the amount really due on the footing of mortgage as the case may be;"

(10) Both the Courts below have concurrently found that out of the sale consideration of Rs. 5000/- the appellants have succeeded in proving consideration to the extent of Rs. 2700/- only. From this finding it follows that the price at which the sale purports to have taken place, has not been fixed in good faith or paid, and therefore, it is the duty of the Court under S. 24(1) to determine the market value of the property and fix its price for the

purpose of the suit. In determining the market value under S. 26(a) it can take into consideration inter alia the price actually received by the vendor from the vendee but it is not bound to do so and the Statute does not give a right to the pre-emptor to pre-empt the property on payment of the price which the vendee succeeds in proving to the satisfaction of the Court or which the vendee has actually paid to the vendor. The right of prior purchase can only be exercised on payment of price fixed in good faith by the vendor or the vendee, or on payment of the price determined by the Court on the basis of market value. In determining the market value the price actually paid may be taken into consideration but cannot form an independent ground for the exercise of the right of prior purchase. The view of the High Court, therefore, that respondents 1 and 2 were entitled to exercise the right of prior purchase on payment of price which the appellant has succeeded in proving cannot be sustained and it is necessary to determine the market value of the property taking into consideration, among other matters, the payment of price which the appellant has succeeded in proving to the satisfaction of the Court.

(11) The trial Court has found the market value to be Rs. 3000/- and the High Court has not expressed any opinion upon this point. It becomes, therefore, necessary for the Board to consider the question for itself and it has come to the conclusion that the finding of the trial Court in this matter is correct and should be affirmed.

(12) The Board will, therefore, humbly advise His Highness that this appeal be allowed in part and that the variation made in the decree of the High Court from the decree of the trial Court be set aside and that the decree of the trial Court be restored. The appellant will have 3 months time from this date to deposit the purchase money if it has not already been made and the appellant will bear his own cost and will pay half costs of the respondents before the Board and the High Court.

B/H.G.P.

Appeal partly allowed.

END

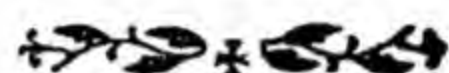


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# **KUTCH JUDICIAL COMMISSIONER'S COURT**

## **1953**

### **JUDICIAL COMMISSIONER :**

The Hon'ble Shri N. C. Vakil, B.A., LL.B.

### **GOVERNMENT PLEADER :**

Shri K. K. Chhaya, B.A., LL.B.

### **PUBLIC PROSECUTOR :**

Shri C. P. Pandya, Advocate.

### **REPORTER :**

Shri Manibhai Harilal Dholakia, B.A., LL.B., Pleader, Bhuj.

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# THE ALL INDIA REPORTER 1953

## Kutch J. C.'s Court

A. I. R. 1953 KUTCH 1

VAKIL, J. C.

Khanmamad Rehemam and others, Accused  
Nos. 1 to 4, Applicants v. The State of Kutch.

Criminal Revn. Appln. No. 18 of 1952, D/-  
12-9-1952.

(a) Criminal P. C. (1898), S. 439 — Concur-  
rent findings of fact — No interference. (Para 3)

Anno: Cr.P.C., S. 439 N. 15.

(b) Criminal P. C. (1898), Ss. 221 and 223 —  
Criminal trespass — Charge — (Penal Code  
(1860), S. 447).

In an offence under S. 447, I. P. C. it  
is sufficient to state in the charge that an  
accused person committed criminal tres-  
pass, on or about a particular day, at or  
about a particular time, by entering into  
or upon or by illegally remaining on the  
land (to be described) then in possession  
of a certain person. Specification that the  
intention was to commit theft or to insult,  
annoy or intimidate without mentioning  
the way in which the intimidation was  
made or the annoyance was caused does  
not make the charge defective. (Para 5)

Anno: Cr.P.C., S. 221 N. 14; S. 223 N. 5;  
Penal Code, Ss. 441 and 447 N. 20.

(c) Penal Code (1860), S. 75 — Charge  
under, when to be framed — Incorrect proceed-  
ing not prejudicing accused — (Criminal P. C.  
(1898), Ss. 221 (7) and 255-A).

It is not correct to say that additional  
charge under S. 75, Penal Code, should be  
framed after recording conviction of the  
accused. The additional charge under S. 75,  
I. P. C. has to be framed with the main  
charge. This is clear from the provisions  
of S. 221 (7) read with S. 255-A, Criminal  
P. C. What is required is that evidence  
in proof of previous conviction be led only  
after a judgment recording conviction is  
pronounced. Where the trial Court heard  
evidence after he concluded that the  
accused was guilty it is an incorrect pro-  
cedure.

Defect in procedure held did not how-  
ever prejudice the accused. AIR 1944 Lah  
25 (FB), Ref. (Para 5)

Anno: Penal Code, S. 75 N. 2, 8; Cri. P. C.,  
S. 221 N. 6; S. 255-A N. 4.

(d) Penal Code (1860), S. 75 — Charge  
under S. 447 — Previous conviction not under  
1953 Kutch/1

Chapter 12 or 17 of Penal Code, but under  
Sections of Kutch Penal Code corresponding to  
Ss. 323 and 186, I. P. C. — Additional charge  
under S. 75, held improper when it was not  
intended to exceed limits of punishment.

(Para 6)

Anno: Penal Code, S. 75 N. 8.

(e) Penal Code (1860), S. 75 — Previous  
conviction can be taken into account in deter-  
mining sentence, even though additional charge  
under S. 75 could not be framed — Considera-  
tions when such conviction should be taken  
into account stated. AIR 1929 Mad 306 and  
AIR 1928 Rang 200 (FB), Relied on. (Para 7)

Anno: Penal Code, S. 75 N. 7.

M. M. Mehta, for Applicants Nos. 1 to 4;  
C. P. Pandya, Public Prosecutor, for the State.

REFERENCES: Courtwar/Chronological/ Paras  
(44) AIR 1944 Lah 25: (45 Cri LJ 364 FB) 5  
(29) AIR 1929 Mad 306: (30 Cri LJ 471) 7  
(28) AIR 1928 Rang 200: (29 Cri LJ 869 FB) 7

ORDER: This is an application for revision  
of an order of conviction and sentence for an  
offence punishable under Section 447, I. P. C.  
by the Magistrate, First Class, Anjar, con-  
firmed on appeal by the Sessions Judge, Kutch.

(2) The prosecution case against the four  
applicants held proved by the courts below  
was that the applicants, armed with sticks and  
axes went to a field of the complainant Devjee  
for three successive nights with intent to inti-  
midate him as the latter had dispensed with  
the services of applicant No. 2 and they  
abused and gave threats to him.

(3) Much was urged against the conviction  
of the applicants on merits but in view of the  
concurrent findings of the courts below no  
interference on a question of fact is called for.

(4) It was urged that the charge against the  
applicants was defective. The charge framed  
was that the applicants committed criminal  
trespass by entering into the field of the com-  
plainant with intent to commit theft or with  
intent to insult, annoy or intimidate the person  
in occupation of the field. It was complained  
that the charge was vague inasmuch as it  
was not stated that intimidation was made or  
annoyance was caused in a particular way. In  
an offence under S. 447, I. P. C. it is suffi-  
cient to state that an accused person  
committed criminal trespass, on or about a  
particular day, at or about a particular time,  
by entering into or upon or by illeg-  
ally remaining on the land (to be described)



possession of a certain person. The trying Magistrate had specified that the intention was to commit theft or to insult, annoy or intimidate. The charge was therefore quite proper. It was not defective.

(5) It was urged on behalf of the applicants in the lower appellate Court that as evidence of previous convictions of applicant No. 2 was led in the trial Court, he was prejudiced. It appears that after the case was heard but before the judgment was delivered, evidence of previous conviction was led and then the applicant No. 2 was further charged under Section 75, I. P. C. with having previous convictions. The learned Sessions Judge remarked that the proper course for the trial Court was to frame the additional charge only after recording a conviction of the applicant No. 2 on the original charge. It was further remarked that the defects in procedure and conception of law had not occasioned any prejudice to the applicant No. 2. It is not correct to say that additional charge should have been framed after recording conviction of the applicant No. 2. The additional charge under Section 75, I. P. C. has to be framed with the main charge. This is clear from the provisions of Section 221 (7) read with Section 255-A, Criminal P. C. vide — ‘Emperor v. Dalip Singh’, AIR 1944 Lah 25 (FB). What is required is that evidence in proof of previous conviction be led only after a judgment recording conviction is pronounced. If the additional charge was framed at the stage stated above, the applicant No. 2 would have pleaded guilty to it with the result that it would not have been necessary to lead evidence in proof of it. The trial Court heard evidence after he concluded that applicant No. 2 was guilty. Thus by following incorrect procedure, the trial Court clearly demonstrated that it was not prejudiced. The lower appellate Court was therefore right in not accepting that contention.

(6) Thus the only question that remains for consideration is about sentence. The offence under section 447 I.P.C. is punishable with imprisonment for 3 months or fine or both. The trial Court sentenced applicants 1, 3 and 4 to one month's rigorous imprisonment and to pay a fine of Rs. 25 each and applicant No. 2 to 2½ months' rigorous imprisonment and to pay a fine of Rs. 50/-. The learned Sessions Judge observed that the trial Court had given good reasons for giving sentence and that he did not find any grounds for interference. First thing which becomes apparent is that the trial Court had discriminated the case of applicant No. 2 from other applicants. The trial Court remarked that though applicants 1, 3 and 4 had no axes of their own to grind against the complainant, that fact did not make the offence committed by them less serious. Yet their case was discriminated from the case of applicant No. 2. There was thus apparently no reason for discrimination. But the trial Court discriminated the case of applicant No. 2, in view of his previous convictions. As stated in the preceding para an additional charge under section 75 I.P.C. was framed. This was unnecessary and uncalled for as it was not intended to exceed the limits fixed by the Code for the offence. Moreover, the offences for which applicant No. 2 was previously convicted were not offences under chapter XII or XVII of the Penal Code. They were offences under the Kutch Penal Code, corresponding to sections Nos. 323 and 186 I.P.C. It was therefore an error to have resorted to section 75 I.P.C. and

to have framed additional charge of previous convictions against applicant No. 2.

(7) Though an additional charge under section 75 I.P.C., should not and could not have been framed, previous convictions, apart from the provisions of that section, could be taken into consideration in determining the question of sentence. Vide — ‘Suban Saheb v. Emperor’, AIR 1929 Mad 306 and — ‘Emperor v. Nga Ba Shein’, AIR 1928 Rang. 200 (FB). The offences in respect of which previous convictions can be considered, apart from the provisions of Section 75 I.P.C. are not necessarily those mentioned in chapter XII or XVII I.P.C. The reason is that antecedents of a convicted person are taken into consideration in determining the question of sentence. If the offences in respect of which an accused person is previously convicted are either trivial or do not involve any great mortal turpitude, they may not be regarded as sufficient evidence of character or antecedents, so as to induce a court to impose punishment more severe, though within limits prescribed by law, than what would normally be imposed having regard to other facts and circumstances established in the case. Applying the principle of law stated above, the offence of simple hurt and disobeying an order of a public servant, committed 4 years before the offence tried, cannot be accepted as such evidence of antecedents or character, so as to lead to a conclusion that an accused person deserves punishment which is almost the maximum provided by law. In fact, in this case previous convictions should not have been considered in deciding the question of sentence. There was thus no reason to discriminate the case of applicant No. 2.

(8) The other circumstances are that applicant No. 2, a dismissed employee of the complainant, called to his succour other applicants, his friends or relatives, and they all, armed with weapons, went to the field of the complainant for three successive nights abusing and threatening him with intent to intimidate him. The seriousness of the offence is obvious and it cannot be said that the trial Court did not exercise its discretion properly in awarding a sentence of one month and a fine of Rs. 25/- to each of the applicants Nos. 1, 3 and 4. So far as these applicants are concerned, the learned Sessions Judge was right in holding that no interference was called for. As there is no reason to discriminate the case of applicant No. 2, the sentence imposed on him will be reduced to that extent.

(9) The application of all the applicants against their conviction and the application of applicants 1, 3 and 4 against their sentences is dismissed. The sentence imposed on applicant No. 2 is reduced to one month's rigorous imprisonment and a fine of Rs. 25/-. Applicants to surrender to their bail and serve out their sentences. A fine of Rs. 25/- if paid in excess of what is confirmed be refunded to him.

B/R.G.D.

Order accordingly.

#### A. I. R. 1953 KUTCH 2

VAKIL, J. C.

Sha Doshabhai Panachand, Defendant-Appellant v. Sha Manilal Khengar, Plaintiff-Respondent.

First Appeal No. 15 of 1951, D/- 11-9-1952.

Civil P. C. (1908), O. 34 R. 7 — Order merely directing accounts to be taken, is not preliminary decree — No appeal lies.



Except in a case provided in section 16 of the Bombay Agriculturists' Relief Act (Act XVII of 1879), a suit by a mortgagor against his mortgagee solely for accounts is not contemplated by law. (Para 8)

Under Order 34, Rule 7 C. P., a court can either order that an account be taken of what would be due to the mortgagee as provided in clause (a) of sub-rule (1) or declare the amount due; but in either case, it should proceed to ascertain the amount due on the date which is to be fixed for payment and specify consequences of payment or non-payment thereof. If it merely directs that an account be taken of what was due to the mortgagee, its order would be nothing more than an interlocutory order. (Para 8)

Such an order has not got the effect of a decree against which an appeal under Section 96, Civil P. C. would be competent. AIR 1925 All 707 and AIR 1924 Oudh 140, Relied on. (Para 9)

Anno: Civil P. C., O. 34 R. 7 N. 3.

K. N. Mankad and C. B. Thacker, for Appellant; R. R. Thacker, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras ('25) AIR 1925 All 707: (47 All 803) 8 ('24) AIR 1924 Oudh 140: (77 Ind Cas 346) 8

JUDGMENT.: This appeal arises out of a suit brought by the Respondent for avoiding a mortgage, effected in Samvat 1955, by one Jamnabai in favour of one Soni Bhagwanjee, for 7001 Kories on the property in suit and to obtain possession of the said property or in the alternative for redemption of the said mortgage.

(2) The plaint was based on the averments that the property in suit was sold in Samvat 1965 in execution of a decree for payment of money against Jamnabai and was purchased by one Kanjee. Jamnabai had effected a mortgage on the property in suit in favour of her son-in-law Bhagwanjee in Samvat 1955 to defeat or delay her creditors. The Respondent purchased in Samvat 2002 the property from Bhabhubai, widow of Kanjee and applied on the strength of the sale certificate for possession. The appellant resisted delivery of possession claiming to be in possession under the mortgage as transferee of the rights of the mortgagee. The Respondent's application to remove the resistance was dismissed by the executing Court. The Respondent therefore sued to obtain the reliefs stated in para one above.

(3) The appellant by his written statement resisted the suit on various grounds. The trial Court held that the Respondent was not entitled to the principal relief claimed. It further held that Respondent was entitled to redeem. It, therefore, made following preliminary decree:-

"Plaintiff is entitled to redeem the suit property. The suit to proceed further for inquiry about the mortgage amount legally due to the defendant and about Kharkharajat legally due and on completion of inquiry, a final decree be made;

Plaintiff's suit for declaration that the document of Samvat 1955 is void and to get possession is dismissed. Order as to costs will be made at the time of the final decree."

(4) The appellant preferred this appeal against the first part of the 'preliminary decree'. The Respondent preferred a cross-appeal against the second part of the 'preliminary decree'.

(5) The Respondent raised a preliminary objection that the appeal was not competent as there was no preliminary decree provided by law against which an appeal could be preferred. It was con-

tended that there was only a direction to take accounts on a finding that plaintiff was entitled to redeem.

(6) The Respondent had claimed in the suit a principal relief and a relief in the alternative. The trial Court held that the Respondent was entitled to the alternative relief but not the principal. It is not necessary to consider whether the second part of the 'preliminary decree' was a decree as defined by the Code. Where a principal relief and a relief in the alternative are claimed and a court grants the alternative relief, a decree for the alternative relief granted has to be made. The question that may arise is whether in such a case it is necessary to make a decree for the principal relief not granted. That question would have arisen for consideration in the cognate appeal. But the respondent withdrew that appeal stating that there was no decree. As the appeal was withdrawn, it was unnecessary to decide that question in it. Though the appellant was interested in maintaining that the second part of the 'preliminary decree' was a decree as defined by law, it became unnecessary to decide that question in view of the withdrawal and in view of the fact that the appellant has not preferred the present appeal from that part of the decree. So the question is whether the first part of the 'preliminary decree' is a decree as defined by law.

(7) A preliminary decree for redemption is provided by Order 34, Rule 7 C. P. C. The said rule provides that if in a redemption suit, the plaintiff succeeds, the Court shall pass a preliminary decree provided in clauses (a) or (b) and (c) of Sub-rule (1). A plaintiff succeeds when the Court holds that he is entitled to redeem. It is not necessary to provide that the plaintiff is entitled to redeem. That is a finding which, if, incorporated in a decree, is superfluous. Clause (a) provides for an order that an account be taken of what was due to the defendant at the date of such decree for the principal and interest on the mortgage, costs of the suit awarded to the mortgagor and for other costs etc., called 'Kharkharajat'. If it is found convenient, account as stated above be taken first and the amount found due be declared under clause (b). In simple matters it is convenient to declare the amount due. Then under clause (c) plaintiff is to be directed to make payment within a time to be fixed and consequences of payment or non-payment are to be stated. This is what is provided as a preliminary decree for redemption under Order 34, Rule 7, C. P. C. The trial Court declared that the plaintiff was entitled to redeem the suit property. This was superfluous. It directed taking of account as provided in clause (a). According to the conception of the trial Court, this amounted to a preliminary decree. Provisions made in clause (c) which are the very 'sine qua non' of a preliminary decree for redemption were ignored. It is thus evident that there was a mere direction to take account on a finding that the Respondent was entitled to redeem. The so-called 'preliminary decree' made by the trial Court was not a preliminary decree for redemption as defined and provided by law.

(8) What the trial court did was to make a preliminary decree for accounts. It envisages making of another preliminary decree for redemption. Such a decree cannot be made under the provisions of Order 20, Rule 16 C. P. C. Reason is that except in a case provided in section 16 of the Bombay Agriculturists' Relief Act (Act XVII of 1879), a suit by a mortgagor against his mortgagee solely for accounts is not contemplated by law. It is true that a decree is a formal expression of an adjudication, which so far as regards the Court



expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. It is also true that under clause (a) of Order 34, Rule 7(1), an order directing account to be taken can be made. The question is one of form. The law contemplates only one preliminary decree for redemption. This is imperative and an order directing accounts to be taken cannot be regarded as a preliminary decree for redemption.

In — 'Naunihal Singh v. A. G. Skinner', AIR 1925 All 707, the Allahabad High Court observed that a court could not pass an interlocutory order for accounts. In — 'Mohkam Singh v. Chandra Pal Singh', AIR 1924 Oudh 140, the Court of the Judicial Commissioner, Oudh held that under Order 34, Rule 7, C. P. C., a court could either order that an account be taken of what would be due to the mortgagee as provided in clause (a) of sub-rule (1) or declare the amount due; but in either case, it should proceed to ascertain the amount due on the date which is to be fixed for payment and specify consequences of payment or non-payment thereof. If it merely directed that an account be taken of what was due to the mortgagee, its order would be nothing more than an interlocutory order.

(9) It is thus evident that the trial Court did not comply with the imperative provisions of law for making a preliminary decree for redemption and the 'preliminary decree' made by it was not in accordance with law. It has not got the effect of a decree against which an appeal under section 96 C. P. C. would be competent.

(10) Result is that the first part of the 'preliminary decree' made by the trial Court is set aside and the suit is remanded back to the trial Court for making a preliminary decree for redemption in accordance with the provisions of Order 34, Rule 7, C. P. C. after taking account and declaring the amount due to the mortgagee. No order as to the costs of the parties in appeal except and to the extent (?) court-fees paid on the memo of appeal is refunded.

B./R. G. D.

Order accordingly.

#### A. I. R. 1953 KUTCH 4 VAKIL J. C.

Nandvana Jatashankar Dosabhai, Applicant  
v. Sorathia Jiva Vasan and others, Opponents.  
Civil Revn. Appln. No. 50 of 1952, D/-  
1-9-1952.

(a) Custom (Kutch) — 'Digest of Local Customs' — Binding force of customs mentioned in.

In the absence of statutory provision on a subject, the local customs mentioned in the book titled 'Digest of Local Customs' in the province of Kutch published under the authority of H. H. the Maharao of Kutch are regarded as authoritative and of legally binding force. (Para 4)

(b) Transfer of Property Act (1882), S. 58(d) — Usufructuary mortgage — Characteristics of — Vatantar transaction in Kutch amounts to usufructuary mortgage.

The characteristics of a usufructuary mortgage are as follows:

(1) possession of the mortgaged property is delivered to the mortgagee,

(2) the mortgagee is to appropriate rents and profits of the property in lieu of interest or of principal or of both,

(3) the mortgagor does not incur any personal liability to repay the money,

(4) the mortgagee is not entitled to fore-close or to sue for sale. (Para 7)

The vatantar transaction in Kutch has all these characteristics and thus amounts to a usufructuary mortgage. (Para 7)

Anno: T. P. Act, S. 58 N. 35 Pt. 1.

(c) Custom (Kutch) — Digest of Local Customs, S. 645 — Vatantar transaction — Nature of — Amounts to a usufructuary mortgage — (Transfer of Property Act (1882), S. 58).

Section 645 of the Digest of Local Customs says that in a vatantar transaction, a person lends money on (security) immovable property; the property remains in possession of the lender; the lender uses the property or enjoys its rent or profit in lieu of interest; the property is returned to the borrower on payment of the principal amount borrowed. These characteristics of a vatantar prima facie show that it is a mortgage transaction. Vatantar is thus a transfer of interest, as distinguished from ownership, in specific immovable property as security for loan and is not a transaction called mortgage by conditional sale as property is not ostensibly sold.

Further, a vatantar has all the principal characteristics of a usufructuary mortgage and thus amounts to a usufructuary mortgage. (Paras 4-7)

Further, a vatantar has got all the principal characteristics of a usufructuary mortgage, though in some vatantar transactions, time limit called Bandhi is provided; it is not universal, and cannot therefore be regarded as a characteristic of the transaction. It is merely a covenant entered into by the parties to those particular transactions, and such a term does not make a usufructuary mortgage an anomalous one. Case law referred. (Para 8)  
Anno: T. P. Act, S. 58 N. 35.

(d) Debt Laws — Bombay Agricultural Debtors Relief Act (28 of 1939), Ss. 2, 4 — Vatantar transaction in Kutch — Amounts to usufructuary mortgage — Application for adjustment under S. 4 lies.

The transaction known as Vatantar in Kutch is a usufructuary mortgage, which comes within the purview of the inclusive part of the definition of the term 'debt' given in section 2 of the Bombay Act and the money for which the transaction was effected is a 'debt' for the adjustment of which an application under section 4 of the Act can be made. (Para 6)

(e) Transfer of Property Act (1882), S. 60 'Due' — Meaning of, in respect of usufructuary mortgage.

Where there is no question of enforcing payment, the word 'due' used in section 60 means, due for payment by the mortgagor on expiry of the time during which he authorised retention by the mortgagee of possession and enjoyment of usufruct or rent and profits of the property. In a usufructuary mortgage, money becomes due to enable the mortgagor to redeem though it may not enable the mortgagee to sue for its realisation by sale or otherwise. This is due to the fact that a usufructuary mortgagee has to remain in possession till redeemed by his mortgagor. (Para 9)

Anno: T. P. Act, S. 60 N. 4, 5.

K. N. Mankad, for Applicant; L. L. Thacker, for Opponent No. 1.



REFERENCES: Courtwar/Chronological/	Paras
('02) 26 Bom 252: (3 Bom LR 778)	8
('10) 34 Bom 358: (3 Ind Cas 165)	8
('40) AIR 1940 Cal 346: (41 Cri LJ 791)	8
('39) AIR 1939 Lah 235: (41 Pun LR 270)	8
('40) AIR 1940 Lah 401: (ILR (1941) Lah 71 FB)	6
('21) AIR 1921 Mad 517: (68 Ind Cas 717)	8
('34) AIR 1934 Pat 217	8

ORDER: This is an application for revision of an order dated 24-9-51, made by the Joint Civil Judge, Anjar, in consolidated debt adjustment application No. 300, confirmed by the District Judge, Kutch, in Civil Appeal No. 168 of 1951.

(2) The opponents filed the aforesaid debt adjustment application, under section 4 of the B. A. D. R. Act (hereinafter referred to as 'the Act'), on extension of the provisions of the Act to this State, for adjustment of a debt due from them to the applicant under a transaction called 'vatantar', effected in Samvat 1931 for 11000 Kories, on the allegation that the said transaction was a mortgage. The applicant resisted the application contending that 'vatantar' was a peculiar kind of conveyance which was not a mortgage and as there was no debt, the opponents were not entitled to maintain the application. The question came for consideration before the trial Court at the stage of deciding the statutory preliminary issues. The trial Court held that vatantar was a mortgage transaction and found the statutory issues in favour of the opponents. The lower appellate Court, on appeal confirmed the findings of the trial Court. The applicant has therefore preferred the present application for revision of the said order made by the trial Court.

(3) The only question that arises for consideration in this application is whether the vatantar transaction which is the subject-matter of the application is a usufructuary mortgage. If vatantar is a usufructuary mortgage, it will come within the purview of the inclusive part of the definition of the term 'debt' given in section 2 of the Act and the money for which the transaction was effected will be 'debt' for the adjustment of which an application under section 4 of the Act can be made. It is not necessary to refer to the particular terms and stipulations of the transaction in question as all vatantar deeds have got common salient characteristics. The question has assumed considerable importance in this State as large number of vatantar transactions are effected in the State and they will be affected by the decision of the question under consideration. As the question is to be decided in a general way, reference has to be made to the incidences and characteristics of a vatantar in general.

(4) It was contended on behalf of the applicant that vatantar was not a mortgage much less a usufructuary mortgage. A mortgage is transfer of an interest in specific immovable property for the purpose of securing payment of money advanced or to be advanced by way of loan. A vatantar is explained in section 645 of a book titled Digest of Local Customs in the Province of Kutch published under the authority of H. H. the Maharao of Kutch. In the absence of statutory provision on a subject, the local customs mentioned in this book were regarded as authoritative and of legally binding force. It is important to note that S. 645 is included in Chap. 18 which is captioned 'About dealings on securities'. In the First Section of

that chapter, it is stated that where in a transaction of lending and borrowing, property is given in security for repayment of debt or is given in mortgage, the said transaction is called a dealing on security. Such dealings are classified into four parts. Part II is called vatantar or Gasgarne and is explained in section 645. The section says that in a vatantar transaction, a person lends money on (security) immovable property; the property remains in possession of the lender; the lender uses the property or enjoys its rent or profit in lieu of interest; the property is returned to the borrower on payment of the principal amount borrowed. These characteristics of a vatantar prima facie show that it is a mortgage transaction.

It was contended that vatantars were virtually sale transactions with an agreement to reconvey but due to certain beliefs, deeds selling the property out-right were not executed. It was urged that this was manifest from the long period provided as time limit in such deeds. It is apparent that when a transferee has to enjoy usufruct or appropriate rents or profits of a property in lieu of interest, a time limit for a long period shows that at least for that period, the transferee would remain in possession of the property as if he was an owner. It is therefore not surprising that such transferee may become accustomed to look upon the property conveyed to them as owners. But when property is conveyed as security for a loan advanced, the transfer is only of an interest in the property and not of the ownership in it and that interest is called interest of a mortgagee. It is not unusual to see mortgage transactions in which mortgagees agree that they would not redeem for a long period and such a term by itself is not regarded as a clog on the equity of redemption. Reference was made to section 655 and it was urged that according to that section, one view was that if the property was destroyed due to act of God, the transferor was not liable for the debt. The section itself says that according to other view, it is doubtful that the transferor is relieved of the liability and on principle of equity the transferor would be held liable unless he furnished some other security. Another contention was that according to the terms of some of such transactions, structures could be constructed on property transferred and the transferees would become entitled to add the costs incurred to the principal money, indicating that they could deal with the property as owners. This is due to a special contract. Reliance was placed on section 685, which provides that Courts would not award interest on costs incurred for minor repairs and about other costs incurred, interest would be awarded, if there was a contract to that effect. It does not mean that transfer of ownership is made. In the absence of specific provision of law or contract to the contrary, the courts did not favour the idea of awarding interest when a transferee would enjoy benefit of the repairs made.

(5) There can thus be no doubt that vatantar is a transfer of interest as distinguished from ownership in specific immovable property as security for loan. It is true that provisions of the T. P. Act are not exhaustive as regards different kinds of transfers and it is possible to effect a transfer not provided in the T. P. Act. But I cannot conceive of a transfer which is neither a sale nor a mortgage but somewhat in between the two. Even assuming that



such a transaction could be contemplated, transfer made as security for loan is a transfer of interest in the property and not transfer of something less than ownership. Reliance was placed on section 658, which provides that if the property transferred was reduced in value, the transferee was not entitled to sue the transferor. It is provided by the same section that the lender would be entitled to sue the borrower in case the property was reduced in value due to fault of the borrower. Where there is transfer of ownership or of something less than that, there is no question of suing a transferor for the amount for which transfer is effected, if due to his fault, the property was reduced in value. On the other hand, as value of security is reduced, the right accrues to sue the transferor for the amount for which the property was transferred. It shows that the transfer was in respect of interest in property as security for loan. In fact, as will be shown hereafter, the vatantar has all the essential characteristics of a usufructuary mortgage. There are two principal kinds of mortgages stated in the Digest. One is called Chitham. It is just like a simple mortgage except that when the amount due is not paid on the date fixed, the mortgagee becomes entitled to get possession of the property and enjoy it as a vatantar. This is not a transaction called mortgage by conditional sale as property is not ostensibly sold. When possession is taken and is to be enjoyed as a vatantar, it does not become a mortgage by conditional sale as it is essential that the property must be transferred absolutely. It is therefore difficult to accept the contention that vatantar is not a mortgage transaction.

(6) Next question is whether vatantar is a usufructuary mortgage. The question arises this way. Every mortgage implies existence of a debt. Under a usufructuary mortgage, a mortgagee cannot call upon his mortgagor to pay the debt except under certain circumstances. Nor can he sue for sale or foreclosure. It was therefore held in —: 'Lachhman Singh v. Natha Singh', AIR 1940 Lah 401 (FB) that in case of a usufructuary mortgage, there was no debt. The legislature, therefore, out of caution, amended the definition of the term 'debt' in section 2 of the Act and made it inclusive of principal money payment of which was secured by a usufructuary mortgage. If, therefore, vatantar is a usufructuary mortgage, it does not become necessary to decide the question whether the principal money for the payment of which vatantar is effected, is a debt as originally defined by the Act. In fact, there is much to be said in favour of the view held by the Lahore High Court as there can be no 'debt', if a creditor is not entitled to enforce it against his debtor. Having regard to the weight of authority, it is evident that the opponents would have a very poor case, unless they could show that vatantar is a usufructuary mortgage. Treated as any other kind of mortgage, it would be difficult to urge that it implied a debt when it could not be enforced. It is thus that the question whether vatantar is a usufructuary mortgage assumes importance.

(7) Now, the characteristics of a usufructuary mortgage are as follows:

- (1) possession of the mortgaged property is delivered to the mortgagee;
- (2) the mortgagee is to appropriate rents and profits of the property in lieu of interest or of principal or of both;

(3) the mortgagor does not incur any personal liability to repay the money;

(4) the mortgagee is not entitled to foreclose or to sue for sale.

In a vatantar transaction, characteristic No. 1 exists. As regards characteristic No. 2, rent and profits are to be appropriated or usufruct is to be enjoyed in lieu of interest. There is no personal liability except under certain circumstances and the vatantar transferee cannot sue for sale or foreclosure. He must continue to remain in possession till the principal money is paid back to him and possession of the property is taken.

(8) Thus a vatantar has got all the principal characteristics of a usufructuary mortgage. Now in some vatantar transactions, time limit called Bandhi is provided. This is not universal. It cannot therefore be regarded as a characteristic of the transaction. It is a covenant entered into by the parties to those particular transactions. The contention is that if there is time limit for payment, it implies liability to pay and hence a vatantar transaction providing time limit is not a usufructuary mortgage. In that case, such a transaction becomes usufructuary san (?) implying existence of debt. If that is so, the opponent would be entitled to maintain the application. I, therefore, do not see how this contention can be of any benefit to the applicant. Again, the question under consideration depends upon the nature of the stipulation made. It will be seen that under a usufructuary mortgage, the mortgagor authorises the mortgagee to retain possession until payment of the mortgage money. The mortgagor may agree that the mortgagee may retain possession for a specified number of years. Such a term will not make a usufructuary mortgage an anomalous one. The Madras, Patna, Calcutta and the Lahore High Courts have held it accordingly and I agree with the view so held vide — 'Narayanamurthy v. Appalarasimhulu', AIR 1921 Mad 517; — 'Rameshwar Narain v. Pani Ram', AIR 1934 Pat 217; — 'Kishan Singh v. Nathu Ram', AIR 1939 Lah 235; — 'Akshoy Kumar v. Naba Kumar', AIR 1940 Cal 346. If, however, the stipulation is to make payment at the end of the period fixed, accepting thereby liability to pay, the mortgage will be an anomalous one vide — 'Umabai v. Bhau Balwant', 34 Bom 358. The observation in — 'Tukaram v. Ram Chand', 26 Bom 252 that such a transaction might come within the category of an anomalous mortgage was not necessary for the decision of the case.

(9) It was contended that in a vatantar transaction, the money did not become due and hence there was no right of redemption as provided by section 60 of the T. P. Act. This contention, if accepted, would mean that a vatantar is not a mortgage. It cannot be denied that a usufructuary mortgagor is entitled to redeem. In other words, the money becomes due in a usufructuary mortgage at once or on expiry of the time limit discussed in the preceding para. The word 'due' was used in S. 60 of the T. P. Act, as distinguished from the word 'payable'. It was contended that it could not be said that money became due and at the same time the person in whose favour it became due was not entitled to enforce its payment. Money under a mortgage is payable but its payment cannot be enforced nor redemption on payment could be sought till the period provided for payment and redemption expired. Where there is no question of enforcing payment, the word 'due'



used in section 60 means, due for payment by the mortgagor on expiry of the time during which he authorised retention by the mortgagee of possession and enjoyment of usufruct or rent and profits of the property. In a usufructuary mortgage, money becomes due to enable the mortgagor to redeem though it may not enable the mortgagee to sue for its realisation by sale or otherwise. This is due to the fact that a usufructuary mortgagee has to remain in possession till redeemed by his mortgagor. If the mortgagor agrees not to redeem for a specific period, he is contracting himself out of his right to a certain extent and to that extent money becomes due later.

(10) The other contentions urged related to differences in the rights and liabilities of a mortgagor and mortgagee under the T. P. Act and of a vatantardar under the Digest. They do not affect the main questions discussed so materially as to alter the nature of the transaction. It is therefore held that a vatantar is not only a mortgage but it is a usufructuary mortgage. The money payment of which is secured by the usufructuary mortgage is immovable property and the opponents are debtors as defined by the Act. The findings on preliminary issues recorded by the trial Court and confirmed by the appellate Court are correct. Result is that the application is dismissed with costs. Papers and proceedings in the case will go back to the lower appellate Court for transmission to the trial Court for proceeding further with the case.

B/D.R.R.

Application dismissed.

#### A. I. R. 1953 KUTCH 7

VAKIL J. C.

Bava Salemamad Gulmamad, Accused No. 1, Applicant v. The State of Kutch.

Criminal Revn. Appln. No. 19 of 1952, D/- 26-8-1952.

(a) Evidence Act (1872) S. 45 — Medical evidence — Case of grievous hurt — Medical certificate is not substantive evidence — Mere statement of witness on oath, that he issued the certificate is not requisite proof — Opinion must be given orally in witness box and there should be cross examination on it — Certificate is only corroborative piece — Absence of oral examination — Injury cannot be said to have been proved — There is no question of prejudice or no prejudice. AIR 1937 Mad. 407 Rel. on. (Paras 4 and 5)

Anno: Evid. Act, S. 45, N. 3.

(b) Criminal P.C. (1898), Ss. 221 and 223 — Charge under S. 320 I.P.C. — It is enough if it is stated that accused caused grievous hurt — It will give notice that accused will have to meet one or more of cases mentioned in various clauses in S. 320 — Charge mentioning specific clause under which accused had to meet case — Prosecution cannot subsequently base case on different clause. (Para 6)

Anno: Cr. P. C., S. 221 N. 1; S. 223 N. 10.

(c) Penal Code (1860), S. 320 (8) — Proof of being in hospital for more than 20 days is not equivalent as proof of grievous hurt. 19 Bom 247 and AIR 1931 Lah 280, Rel. on. (Para 7)

Anno: Penal Code, S. 320 N. 2, 3.

K. J. Dholakia, for Applicant; C. P. Pandya, Public Prosecutor, for the State.

REFERENCES: Courtwar/Chronological/ Paras  
(95) 19 Bom 247 7  
(31) AIR 1931 Lah 280: (32 Cri LJ 1252) 7  
(37) AIR 1937 Mad 407: (ILR (1937) Mad 764) 4

ORDER: The applicant was convicted by the Magistrate, First Class, Anjar for an offence under Section 325, I. P. C. and was sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs. 250/-. The conviction, on appeal, was confirmed by the Additional Sessions Judge, Kutch, but sentence was reduced to 6 months' rigorous imprisonment and a fine of Rs. 100. The applicant has, therefore, approached this Court for revision of the order of conviction and sentence.

(2) There was evidence to show that the applicant voluntarily caused hurt to Rakhya. The trying Magistrate as well as the Additional Sessions Judge on appeal have believed the evidence. In view of the concurrent findings on this question of fact, this Court will not interfere in exercise of its power in revision. Hence, the contention that the evidence was scanty and unbelievable and therefore the conviction be set aside cannot be accepted.

(3) For showing that the hurt voluntarily caused was grievous, as defined by section 320, I. P. C., the prosecution alleged that there was fracture of nasal bone and relied on medical evidence in proof of it. Rakhya, no doubt stated that his nasal bone was broken but he could not have said so as a matter of what he had personally seen. The Medical Officer, examined for the prosecution, only referred to the certificates given by him and stated that Rakhya remained in the Hospital as an indoor patient from 18-5-51 to 11-6-51. The trial Court relied on these certificates which showed that Rakhya had sustained eight injuries on different parts of his body of which there was one on the bridge of the nose caused by some hard blunt substance with swelling around and that on examination, after the swelling subsided, it appeared that the nasal bone was broken.

It was contended on behalf of the applicant before the Additional Sessions Judge that the Medical certificates did not constitute substantive evidence and in the absence of any substantive evidence on record, the trying Magistrate erred in holding that the hurt voluntarily caused was grievous. The Additional Sessions Judge felt the force of this contention as number and nature of injuries could be proved by the medical witness saying so in his evidence and not by giving reference to the certificates issued by him. The certificates issued may be used by the medical officer for refreshing memory and may be relied on by the prosecution as evidence to corroborate the medical evidence. But there cannot be corroboration of evidence not given. The Additional Sessions Judge deplored that ends of justice were not secured by leading evidence properly. At the same time, he concluded that there was defect and not lacuna and unless the applicant was prejudiced, he was not entitled to the benefit thereof. As the medical witness was questioned on behalf of the applicant about injury on the nose, the Additional Sessions Judge, held that the applicant was not prejudiced.

(4) It seems to me that the learned Additional Sessions Judge did not properly appreciate the contention urged before him. There was no question of prejudice or estoppel in this case.



The prosecution had to show beyond doubt that nasal bone was broken and hence injury caused was grievous. In other words, the medical witness ought to have stated in his evidence (and that would be the only material evidence in the case) that there was swelling of the dimensions to be mentioned on the bridge of the nose with a fracture of nasal bone below the seat of the injury. There can be no substitute for this evidence by production of certificates issued by the medical officer. A statement by a medical witness on oath that he had issued the certificates shown to him does not furnish the requisite proof. It proves the certificates which can only be used as corroborative evidence.

In — '*Perumal v. South India Ry. Co.*', AIR 1937 Mad 407 the Madras High Court observed as under:

"The evidence of experts must be given in the ordinary way. Subject to certain exceptions, —these exceptions being amongst others, the certificates of the Imperial Serologist touching the matter of blood stains and of the Chemical examiner, which are made admissible in evidence by themselves—it is quite obvious that the opinion of an expert must be given orally and that a mere report or certificate by him cannot possibly be evidence. Unless he goes into the witness box and gives oral evidence, there can be no cross examination of the expert at all."

These observations apply to the evidence of medical witnesses in respect of the injuries seen and noted by them as they apply in respect of their opinion. It is not enough to say that

"I had noted injuries and stated opinion in the certificates issued by me and they are the same as shown to me."

(5) When substantive evidence in the manner stated above is not given, there is want of evidence to prove a particular fact. Where there is absence or want of evidence, it cannot be said that a fact alleged is proved and no question of prejudice arises. There is thus no medical evidence to show number and nature of injuries on the person of Rakhya. It is therefore surprising that the learned Additional Sessions Judge, while accepting the force of the contention, should have dismissed it on the ground that the applicant was not prejudiced. If the law could thus be circumvented, the prosecution would never be alive to the necessity of proving nature and number of injuries by examining the medical witness in respect of each of them. Even the medical witness was not examined in the matter of his opinion as to how the injuries could possibly have been caused.

(6) What the medical witness had stated in his certificate was that the nasal bone on the left side appeared to have been broken. Thus, even in the certificate issued, the medical witness was not definite. He could not be definite because no X-ray examination was made. Yet the learned Additional Sessions Judge remarked that there was definite medical opinion that the nasal bone was broken in the centre. Thus there was no substantive evidence to show that the injury caused was grievous. The learned Public Prosecutor relied on the fact, as stated by the medical witness that Rakhya was treated as an indoor patient from 18-5-51 to 11-6-51 and it was contended that the case fell under Cl. 8 of S. 320, I. P. C. On behalf of the applicant it was contended that the charge which the applicant was called upon to meet was that

he had caused grievous injury by breaking the nasal bone and therefore he could not be convicted for an offence of causing grievous hurt falling under clause 8 of section 320, I. P. C. Under Section 221, Cr. P. C., it would have been sufficient if it was stated in the charge that the applicant had caused grievous hurt as the law creating the offence gives it a specific name. It will give notice to the applicant that he will have to meet a case in one or more of different ways mentioned in section 320. But when the case specified in the charge was that grievous hurt was caused by breaking nasal bone, the prosecution could not have obviously relied on the fact that the hurt was grievous under clause 8 of section 320, I. P. C. In the absence of specification, the applicant was expected to meet the case under all clauses. When specification was made, the applicant was not expected to meet a case under any other of the eight clauses of section 320, I. P. C. Thus the prosecution was not entitled to rely on clause 8 of Section 320, I. P. C.

(7) Moreover, the only evidence on record is that the applicant was treated as an indoor patient from 18-5-51 to 11-6-51. The medical witness did not state that during the period, Rakhya was suffering severe bodily pain or was unable to follow his ordinary pursuits. The mere fact that Rakhya was treated as an indoor patient for more than 20 days was not sufficient. Proof of being in a hospital for the space of 20 days cannot be taken as equivalent to proof of grievous hurt — '*Queen Empress v. Vastachela*', 19 Bom 247 and — '*Khair Din v. Emperor*', AIR 1931 Lah 280.

(8) Thus this application must be allowed in part and applicant's conviction be altered from Sections 325 to 323, I. P. C. The applicant's sentence on appeal was reduced to 6 months' Rigorous Imprisonment and a fine of Rs. 100. Though the conviction of the applicant is altered to one under section 323 and though there is no evidence about the nature and number of injuries except what Rakhya stated in his evidence, there is evidence that Rakhya remained in hospital for more than 20 days receiving treatment. The grievousness of the injury caused to him can thus be gauged. I think that ends of justice would be met if the applicant is sentenced to 3 months' rigorous imprisonment. Hence, the following order is made.

B/R.G.D.

Order accordingly.

### A. I. R. 1953 KUTCH 8

VAKIL J. C.

Jeevandas Ibji and others, Appellants v. Jadeja Karubha Dujajee, Respondent.

First Appeal No. 5 of 1951, D/- 6-9-1952.

(a) Custom (Kutch) — Vatantar transaction — Nature of — Has all the characteristics of usufructuary mortgage — (Transfer of Property Act (1882), S. 58 (d)). (Para 7)

Anno: T. P. Act, S. 58 N. 35.

(b) Custom (Kutch) — Vatantar transaction — Piece-meal redemption of — When allowed — (T. P. Act (1882), S. 60).

According to the usage as stated in S. 668 of the book titled a 'Digest of local customs and usages', published under authority of His Highness the Maharao of Kutch and regarded as having force of law, when some



of the co-mortgagors extend the period of a vatantar, other co-mortgagors are entitled to redeem to the extent of their share. The provision is based on the principle that integrity of the mortgage is broken. It follows that the mortgagors extending the period will also be entitled to redeem their share separately.

Held further that as the mortgagee had acquired 60 per cent of share in the mortgage security, they could not object to the piecemeal redemption of his share by the mortgagor. (Para 8)

Anno: T.P. Act, S. 60 N. 42, 44.

**(c) Custom (Kutch) — Suit for redemption of his share of vatantar by some mortgagors — All Bhayats not parties — Contentions in the nature of paramount title cannot be considered in the suit — (Civil P. C. (1908), O. 34 R. 1).**

(Para 9)

Anno: C.P.C., O. 34 R. 1 N. 5.

**(d) Hindu Law — Widow — Alienation — Legal necessity — Proof of — Alienation more than 50 years old — Presumptions may be made in favour of recital.**

After a long period has elapsed between the alienation and the suit, when all those who could have given evidence on the relevant points have grown old or passed away, a recital consistent with the probabilities and circumstances of the case assumes greater importance and presumptions are permissible to fill in details which have been effaced by time. AIR 1951 Nag 357(1), Relied on.

Held that the statement in the mortgage that the amount was necessary for the expenses of the marriage of the daughter of the executant widow should be accepted as evidence of necessity. (Para 10)

**(e) Custom (Kutch) — Suit for piecemeal redemption of vatantar — Question of rendering accounts — Other co-sharers not necessary parties — (Civil P. C. (1908), O. 34 R. 1).**

Where owing to the acquisition by the mortgagee of a share in the mortgaged property redemption piece-meal can be had of a Vatantar and the mortgage who has to render account is on the record, it is not necessary to make the other co-sharers parties though interested in the proper taking of accounts, as the mortgagee, who has by acquiring share of a mortgagor enabled the other mortgagors to sue for redemption piece-meal, cannot complain that he would have to lead the same evidence and get the said question determined again when other mortgagors sue to redeem their shares. (Para 11)

Anno: C.P.C., O. 34 R. 1 N. 6.

**(f) Custom (Kutch) — Suit for redemption of vatantar — Claim for mesne profits — Not maintainable — (Civil P. C. (1908), O. 34 R. 7).**

Possession of a possessory mortgagee so long as his right to possession subsists is not wrongful except when valid tender under S. 84 of the T. P. Act is made or when it is found that the mortgage was satisfied on the date of the suit. No order for mesne profits can therefore be made against the mortgagee in a suit for redemption of a vatantar in Kutch. (Para 12)

R. R. Thacker, for Appellants; G. U. Bhan-shali, for Respondents.

REFERENCE.....

(51) AIR 1951 Nag 357(1): (1951 Nag LJ 205) 10  
1953 Kutch/2

**JUDGMENT:** This appeal arises out of a suit brought by the Respondent and his son Tanubha, for redemption of their 21-3/7 per cent of share in the village Bharapar, on the allegations that the said village, owned by Bhayats of Kera, was mortgaged by them in the year Samvat 1912, for 49025 kories, with the predecessor-in-title of the appellants, for 21 years and that, the appellants predecessor-in-title, having obtained an extension of the period of the mortgage for 25 years in Samvat 1936 from the Respondent's predecessors-in-title, to the extent of their 21-3/7 per cent share in the security, broke the integrity of the mortgage, thereby enabling the Respondent and his son, to sue for redemption of their share, on payment of proportionate mortgage amount and costs (Kharajat) incurred on the mortgage security.

(2) The appellants resisted the suit contending that the Respondent was not entitled to redemption piecemeal; all Bhayats were necessary parties to the suit; the Respondent had got 16½ per-cent share only; one Faijiba, widow of Bhayat Punjajee, owning 2½ per cent share, had further extended the period of the mortgage by 51 years to the extent of that share; a suit for partition should have been filed; and that the applicants were entitled to 194545½ Kories as Kharajat.

(3) During the pendency of the suit, the appellants obtained a further extension of the period of the mortgage from Tanubha, son of the Respondent, who had joined with him as a co-plaintiff, to the extent of his share. Tanubha was transposed as a co-defendant. The appellants contended that the Respondent was not entitled to redeem to the extent of the share of Tanubha. The Respondent contended that the alienation made by Tanubha was affected by the doctrine of lis pendens.

(4) On these pleadings several issues were raised in the trial Court. It is necessary to refer to the issues framed and found with a view to ascertaining the contentions in appeal and the cross appeal No. 4 of 1951. Issue No. 1 raised was whether a partition amongst the Bhayats of Kera had taken place. This issue seems to have been raised on the contention of the appellants. It was found in the affirmative. This finding is not disputed in appeal. Second issue was about trial Court's jurisdiction as at the time the suit was instituted, Jadeja Court was functioning. This issue did not survive at the time of the trial. Third issue was about redemption piece-meal. The trial Court found this issue in the affirmative. This contention survives in appeal. Fourth issue was about Respondent's 21-3/7 per-cent share in the village. The trial Court found this issue in the affirmative. That contention is not raised by the appellants in their memo. It appears that respondent's father had made a testamentary disposition of his property by which the respondent was given only a right of maintenance. As it was joint family property, the testator had no right to make testamentary disposition in respect of it. That contention is not raised in appeal. Issue No. 6 was about inadequacy of Court fees. That contention is not raised in appeal. Issue No. 7 was about want of necessary parties. That contention is raised by the appellants in appeal. It is unnecessary to refer to issue Nos. 8 to 12 which the trial Court did not find necessary to decide.



It appears that a branch of Bhayats had further extended the period of the mortgage in Samvat 1967 for 81 years. It was therefore contended that the suit was premature and this contention was made subject matter of issue No. 12. As this contention is raised in appeal, it may be stated that it was a different branch and the period was extended to the extent of their share. It is for this reason that the trial Court found it unnecessary to record a finding on that issue. The trial Court found that the Respondent was liable to pay 16463 Kories as Kharajat for redemption of his share which was exclusive of his son's share viz.  $21\frac{3}{7} \times \frac{1}{2}$ : 10-5/7 per cent.

(5) Thus the contentions in appeal are as follows:—

1. Whether the Respondent was entitled to redemption piece-meal?
2. What share the Respondent and his son have got in the village?
3. Whether the Respondent was entitled to redeem the share of Punjajee in respect of which period was extended for 51 years in Samvat 1952?
4. Whether the suit was bad for want of necessary parties?
5. Whether Respondent was entitled to mesne profits?

(6) As the respondent was allowed redemption to the extent of 10-5/7 per-cent of share, he has preferred cross appeal No. 4 of 1951. The only question that arises for consideration in that cross appeal is whether the plaintiff was entitled to redeem the share of his son.

(7) The village was mortgaged in Samvat 1912 by all the then owners for 21 years. The mortgage was Vatantar. A Vatantar has all the characteristics of a usufructuary mortgage. The mortgagee was to remain in possession and enjoy rents and profits of the village for 21 years. The period of 21 years was not to be inclusive of famine years. Thus the period of 21 years did not expire till Samvat 1936, when respondent's predecessors-in-title executed a deed in favour of the mortgagee, for extension of the period for 25 years. It was stated in the deed that the executants had  $21\frac{3}{7}$  per cent share in the village. The respondent and his son, as members of a joint Hindu family, are the only persons representing that share on the date of the suit. As the period of 25 years expired long ago, the suit under appeal was brought for redemption.

(8) Apparently the respondent was suing to redeem piece-meal the mortgage of Samvat 1912. He was not entitled to do so under the provisions of the T. P. Act unless he showed that the mortgagee had acquired the share of one of the mortgagors. The appellants say that they had acquired 60 per cent of the share in the village. The respondent was therefore not only not bound to redeem the whole mortgage, but he was also not bound to redeem the whole share except 60 per cent share acquired. But when the mortgage was effected, T. P. Act was not applicable. In this part of the country, many such vatantar mortgages were executed. Some co-sharers used to extend the period of the mortgage. As other co-sharers were not entitled to redeem the whole mortgage, by usage they redeemed their share on payment of proportionate mortgage amount. The usage is stated in section 668 of the book titled a Digest of local customs and usages published under

authority of His Highness the Maharao of Kutch and regarded as having force of law. It is stated in section 668 that when some of co-mortgagors extend the period of a vatantar, other co-mortgagors would be entitled to redeem to the extent of their share. The provision made was based on the principle that integrity of the mortgage was broken. It follows that the mortgagors extending the period will also be entitled to redeem their share separately. This contention, therefore, fails. I do not see how the appellants, who have acquired 60 per cent of the share in the mortgage security and who have acquired extension of the period of the mortgage from other mortgagor sharers are interested in raising this contention, except to raise a technical bar to the suit.

(9) Next contention is about the share of the Respondent. The appellants mortgagees, having accepted in the conveyance executed in their favour that the Respondent's predecessor-in-title represented  $21\frac{3}{7}$  per cent share are now estopped from denying it. The appellants had, however, acquired 60 per cent of share and they raised the contention in the nature of paramount title. It was conceded that the contention should not be considered in this suit. Such a contention about title can properly be considered in a suit in which all Bhayats were parties. Thus the respondent is entitled to redeem the share admitted by the appellants without prejudice to the latter contending hereafter, as owners of 60 per cent share, that the former was not entitled to  $21\frac{3}{7}$  per cent share and that he was only entitled to  $16\frac{1}{2}$  per cent share.

(10) Coming to the last contention, it appears that one Punjajee was one of the executants of the deed of Samvat 1936. His widow, who inherited his share, further extended the period of the mortgage for 51 years, to the extent of her husband's share, in the year 1952. When the suit was instituted, the said period had not expired. The Respondent's contention was that the alienation by way of extension of the period was without legal necessity. Though it was neither alleged nor proved that Punjajee and his other co-executants were members of a joint Hindu family, the trial Court found that Faijiba was not entitled to make the alienation as she was a widow of a coparcener. It is true that there was no evidence aliunde about legal necessity except the recital in the deed. It was contended that the alienee was bound to adduce some independent evidence of existence of legal necessity. The transaction was effected in Samvat 1952. After 50 years, it is not possible to get evidence of necessity as it is not possible for the respondent to emphatically deny its existence. In such a case, Nagpur High Court in — '*Wawan v. Janabai*', AIR 1951 Nag. 357(1) presumed existence of legal necessity. Mayne in his work on Hindu Law at page 791, tenth edition observes that after a long period has elapsed between the alienation and the suit, when all those who could have given evidence on the relevant points have grown old or passed away, a recital consistent with the probabilities and circumstances of the case assumes greater importance and presumptions are permissible to fill in details which have been effaced by time. The necessity for alienation stated was that Faijiba had to incur expenses for marriage of her daughter. It is common knowledge that among Jadejas, such



expenditure has to be incurred. The trial Court was therefore wrong in holding that the respondent was entitled to redeem that share.

(11) The contention about necessary parties was raised as the respondent's share was to be determined. Otherwise, if a suit for redemption piece-meal was tenable, the other co-sharers are not necessary parties to the suit. It was contended that for taking account of costs incurred on the entire security, they were necessary parties. Where redemption piece-meal could be had and the mortgagee who has to render account is on the record, it is not necessary to make the other co-sharers parties though interested in the proper taking of accounts, as the mortgagee, who has by acquiring share of a mortgagor enabled the other mortgagors to sue for redemption piece-meal, cannot complain that he would have to lead the same evidence and get the said question determined again when other mortgagors sued to redeem their shares. For this reason, other co-mortgagors are not necessary parties to the suit.

(12) Last contention is about mesne profits. As the respondent who sued for redemption had not also sued for partition, the trial Court placed him in joint possession to the extent of his share. At the same time, the trial Court decreed mesne profits from the date of the suit. This was obviously wrong. The appellants were not in wrongful possession of the property to the extent of the Respondent's share on the date of the suit and for that matter till the date of the preliminary decree. Possession of a possessory mortgagee so long as his right to possession subsists is not wrongful except when valid tender under section 84 of the T. P. Act is made or when it is found that the mortgage was satisfied on the date of the suit. In other cases, possession will be wrongful when the mortgagor becomes entitled to possession when mortgage amount ascertained is paid to the mortgagee or in Court for payment to him. Thus the order for mesne profits was wrong.

(13) Result is that the respondent will be entitled to redeem 8 13/14 per cent of the mortgage on payment of 7294 Kories for his share of the mortgage amount and 13052 Kories for his share of the costs incurred. The order as to mesne profits in the trial Court's decree is set aside. Subject to these variations, the decree of the trial Court is confirmed and the appeal is dismissed. Appellants to pay a moiety of the taxed costs of the Respondent and to bear their own.

B/D.R.R.

Order accordingly.

**A.I.R. 1953 KUTCH 11 (Vol. 40, C. N. 6)**  
**VAKIL J. C.**

Lalji Kanji, Applicant v. Bhavan Bhanji, Opponent.

Civil Revn. Appln. No. 58 of 1952, D/- 27-9-1952.

**(a) Limitation Act (1908), S. 12(2) — Applicability — Does not apply to execution application.**

S. 12(2) does not apply to application for execution of decrees and hence the time requisite for obtaining a certified copy of the decree cannot be excluded under S. 12(2).

(Para 5)

Anno: Lim. Act, S. 12 N. 4 Pt. 5b.

**(b) Limitation Act (1908) S. 5 — Applicability — Does not apply to execution applications.**

Section 5 does not provide for an application for execution and by no enactment in force in Kutch the provisions of the said section are made applicable to applicants for execution. The question of condonation of delay under the section, therefore, does not arise.

(Para 5)

Anno: Lim. Act, S. 5 N. 3 Pt. 1.

**(c) Limitation Act (1908) Preamble, Art. 182(2) — Retrospective operation of Act — Decree passed by Kutch Court on 21-5-47 — Applicability of Art. 182 — Execution application filed on 20-7-1950 held barred.**

Rules of limitation are procedural rules having retrospective operation but not such as to defeat a substantive or vested right except where expressly so provided.

(Para 6)

In the case of a decree passed by the Final Appellate Court in Kutch on 21-5-1947, there was no law of limitation which compelled the decree-holder to seek execution within three years. When the Indian Limitation Act was applied to Kutch by the Merged States (Laws) Act, 1949, the effect was to curtail the period for the exercise of the right by providing a period of three years computed from 21-5-47. The decree-holder had time to make an application for execution. His vested right was not defeated by the successive Acts providing for limitation brought in force in Kutch after the passing of the decree. Thus the execution application filed for the first time on 21-7-1950 was governed by Art. 182(2), Lim. Act and was clearly barred. Case law referred.

(Paras 6, 7)

Anno: Lim. Act Pre. N. 15, Art. 182 N. 46.

Applicant in person.

Ramji Vallabhji, for Opponent.

**REFERENCES:** Courtwar/Chronological/ Paras  
(14) AIR 1914 Cal 806: (41 Cal 1125 FB) 7  
(51) AIR 1951 Kutch 15 6  
(16) AIR 1916 Mad 912: (39 Mad 645) 7  
(37) AIR 1937 Pat 605: (171 Ind Cas 953) 7

**ORDER:** This is an application for revision of a decree of the District Court, Kutch, in Civil Appeal No. 180 of 1951, confirming an order made by the Subordinate Judge, Bhuj dismissing execution petition No. 43 of 1950, as barred by limitation.

(2) The applicant sued the opponent to recover a sum of money. The trial Court partially decreed the suit. The applicant unsuccessfully preferred appeals to the then Varishtha and Hazur Courts. The Hazur Court dismissed the second appeal on 21-5-47. The execution petition was filed on 20-7-50, that is one month and 29 days beyond the period of three years prescribed by Article 182 of the Indian Limitation Act. Both the Courts below held the execution petition barred by limitation.

(3) The only question to be considered in this application for revision is whether the Courts below were right in holding that the execution petition was barred by limitation. On 20-7-50, the Indian Limitation Act as applied by the Merged States (Laws) Act 1949 was in force in the State of Kutch. The date of the decree was 21-5-47. If the Act can be retrospectively applied, the execution petition would obviously be barred under Article 182. The trial Court assumed that the Act applied and considered



a question of exclusion of time under section 12 of the Act. The District Court thought that the Hazur Order No. 322 dated 10-11-45 prescribed a period of three years for making an application for execution. The District Court therefore considered the questions of exclusion of time under section 12 of the Act and of condonation of delay under section 5 of the said Act.

(4) By the Hazur Order in question, provisions of section 48 of the Code of Civil Procedure were introduced in the Kutch Civil Procedure Code. Provision was also made for enforcement of causes becoming either barred or getting lesser period than 12 years due to new law made. The said Order did not prescribe a period of limitation, as is provided by Article 182 of the Act, for making an application for execution of a decree. Obviously, if the order made remained in force on 21-5-47, the question would have arisen for consideration on an application for execution of the decree made beyond a period of 12 years computed from that date. It is surprising that this apparent distinction was not appreciated by the learned District Judge.

(5) The question of exclusion of time and condonation of delay urged by the applicant and considered by the learned District Judge did not arise. It appears that according to the prevailing practice in the State, formal decrees were not drawn. The applicant had to obtain a copy of the decree of the trial Court, as provided by the Code of Civil Procedure, for making an application for execution. As he applied for a certified copy on 17-5-48, he claimed exclusion of time, presumably from 21-5-47 to 17-5-48, as time requisite for obtaining a certified copy of the decree under section 12 of the Act. It is apparent that provisions of Section 12(2) of the Act are not applicable to applications for execution of decrees. The learned District Judge thought such exclusion of time was not contemplated by the old law in force in the Kutch State on 10-11-45 (date of the Hazur Order) and under the existing rules made on the analogy of Bombay State practice, exclusion was available for reasonable period. In 1945, there was no law of limitation in force in Kutch and hence no question of exclusion of time arose. There is no Bombay State Practice and no rules on the analogy of any such practice are made. What the learned District Judge meant was the judicial interpretation placed by the High Court of Bombay on the expression 'time requisite' used in section 12 (2) of the Act. Thus question of exclusion of time did not arise. The learned District Judge, then considered the question about condonation of delay and remarked that as on application of the Act, period was extended upto 1952, it would be legislating to grant any such concession. If period for making an application for execution was not extended with the result that it became barred on a certain date, a question of condonation could be considered provided it could be so done under section 5 of the Act. Section 5 does not provide for an application for execution and by no enactment in force, the provisions of the said section are made applicable to applicants for execution. The question therefore did not arise. This would have become apparent to the learned District Judge on perusal of the plain provisions of section 5 of the Act.

(6) Thus the learned District Judge did not address himself to the only question arising in the case. That question is whether the Act can

be retrospectively applied to the applicant's execution petition. It was observed by this Court in — '*Maganlal Kunverji v. Mulji Budha*', AIR 1951 Kutch 15, that the Law of Limitation was a remedial one and the general rule was that every suit would be governed by the law of limitation in force on the date of its institution. *Prima facie*, therefore, Article 182 of the Indian Limitation Act as applied by the Merged States (Laws) Act is applicable to the applicant's execution proceeding. This is due to a canon of construction that rules of limitation are procedural rules having retrospective operation but not such as to defeat a substantive or vested right except where expressly so provided. On 21-5-47 there was no law of limitation which compelled the applicant to seek execution within three years. The applicant had therefore a vested right to execute the decree and according to the law then in force, the vested right could be exercised at any time. What the Indian Limitation Act as applied by the Merged States (Laws) Act did was to curtail the period for the exercise of the right by providing a period of three years computed from 21-5-47. If the right was defeated, that is, if the right could not have been exercised on the date the Act was made applicable, it could be urged that the Act could not have retrospective operation so as to defeat a vested or a substantive right.

(7) In — '*Gopeshwar Pal v. Jiban Chandra*', AIR 1914 Cal 806 (FB), it was observed that intention to take away a vested right without compensation or any saving was not to be imputed to the Legislature unless it be expressed in equivocal terms. In — '*Raja of Pittapur v. Gani Venkata Subba Row*', AIR 1916 Mad 912, it was observed that where an Act contained provisions for limitation of suits which took away vested rights of suits without providing any equivalent remedy, the provisions must be construed to have been enacted subject to the implied exception that they were not to extend to such vested rights of suit which were to continue subject to the rules of limitation. In — '*Badri Narain Singh v. Ganga Singh*', AIR 1937 Pat. 605 it was held that when the Legislature did not expressly state that a vested right was taken away, the new period of limitation was to be dealt with as a matter of procedure. What happened in the present case was that the Indian Limitation Act as applied by the Merged States (Laws) Act prescribed a period of limitation for making an application for execution, while according to the law in force on 21-5-47, there was no such period prescribed. In such a case the Act will apply with retrospective effect if on the date the Act was applied, the right to make an application for execution was not taken away. The application of the shorter period of limitation, not taking away the vested right, is procedural and it applies with retrospective operation. In between two Acts had come into force. One was the Kutch Limitation Act 1948. This Act prescribed the same period prescribed by Article 182 for making application for execution of a decree. The Act made no provision for applications for execution which though not becoming barred due to the Act having been brought into force had little period of limitation left. On that day an application for execution by the applicant was not barred and the law providing limitation will be regarded as procedural having retrospective effect. Same was the case when the Indian Limitation Act was applied by the Application of Laws Order, 1949. When each of



these Acts was made applicable, the applicant had time to make an application for execution. His vested right was not defeated. Hence the answer to the question is that the Act will apply retrospectively to the application for execution filed by the applicant. Thus the Applicant's application on the day it was filed was barred by limitation.

(8) The applicant made a grievance that the Varishtha Court has not made a decree. The practice was to make a bill of costs only. The position cannot be better than a decree not drawn. A person desiring to execute a decree within time has to apply for a copy. Thus the contention based on the grievance cannot be accepted.

(9) Result is that the application fails and it is dismissed with costs.

B/D.R.R.

Application dismissed.

**A.I.R. 1953 KUTCH 13 (Vol. 40, C. N. 7)**

VAKIL J. C.

Hargovind Premji, Applicant v. Bhimji Khimji and others, Opponents.

Civil Revn. Appln. No. 75 of 1951, D/- 22-9-52.

(a) Civil P. C. (1908), S. 115 — Decision on question on res judicata is case decided — (Kutch (Province) Courts Order (1948), S. 35).

A decision of a preliminary issue going to the root of the case, such as limitation, jurisdiction or res judicata, may result in dismissal of a suit or in proceeding further with it. No order is required to proceed further with the suit; but the decision itself is to be regarded as an interlocutory order. Decision on such issue amounts to "case decided". AIR 1949 Kutch 5; AIR 1952 Kutch 32, Ref. (Para 3)

Anno: Civil P. C., S. 115 N. 4, 5.

(b) Civil P. C. (1908), S. 115 — Exercise of jurisdiction not vested — Decision of preliminary issue.

Where a court has jurisdiction to decide an issue, it does not act illegally or with material irregularity because it decides a case wrongly. The question is not whether the decision was right or wrong. The question is whether by the erroneous decision, the trial court vested itself with jurisdiction which but for the decision it could not have. So long as the subordinate court does not invest itself with jurisdiction and decide the suit, it cannot be said that it has exercised jurisdiction not vested, simply because it decided a preliminary issue, when it had jurisdiction to decide that issue. It is thus evident that by a mere decision of a preliminary issue, the trial Court does not exercise the jurisdiction not vested in it and it cannot be said that by deciding it, it exercises the jurisdiction not so vested or acts in the exercise of its jurisdiction with material irregularity. AIR 1949 PC 239, Rel. on. (Para 4)

Anno: Civil P. C., S. 115 N. 9.

(c) Kutch (Province) Courts Order (1948), S. 35 — It is not necessary that court should have acted illegally — It is enough if there is important question of law — (Civil P. C. (1908), S. 115).

The important distinction between para. 35 of the Kutch Courts Order, 1948 and Section 115, Civil P. C., (Section 115, Civil P. C. having been expressly made inappli-

cable to the State of Kutch) is that under the Kutch (Province) Courts Order, 1948, S. 35, it is not necessary for the exercise of the powers of revision to show that the Subordinate Court had acted illegally in the exercise of its jurisdiction. If the High Court thinks that there is an important question of law which requires further consideration and other conditions laid down in sub-para. 1 (b) of S. 35, are complied with, powers of revision can be exercised and for that purpose, an application for revision has to be treated as an appeal. (Para 5)

Anno: Civil P. C., S. 115 N. 2, 13.

R. R. Thacker, for Applicant; K. K. Chhaya, for Opponent No. 1.

REFERENCES: Courtwar/Chronological/ Paras

('49) AIR 1949 PC 239; (76 Ind App 131 PC) 4

('85) 9 Bom 432 4

('49) AIR 1949 Kutch 5 2

('52) AIR 1952 Kutch 32 3

ORDER: This is an application for revision of a decision that opponent 1's suit was not barred by the principle of Res Judicata.

(2) The facts are that opponent 1 sued the applicant and other opponents for recovery of the amount due on the basis of a mortgage alleged to have been effected in Samvat 1939 in favour of opponent 1's predecessor-in-title by the predecessors-in-title of the applicant and other opponents. The defence, relevant for disposal of this application was denial of the alleged mortgage and a contention that in view of the dismissal of a previous suit brought by the collaterals of the opponent 1, the consideration of the question of the alleged mortgage was barred by the principle of Res Judicata. The trial Court decided this contention as a preliminary issue against the applicant. Hence the present application for revision of the said decision.

(3) A preliminary objection was raised that an application for revision was not competent. The question for consideration is whether a decision of a preliminary issue is a case decided within the meaning of that expression used in para 35 of the Kutch (Province) Courts Order, 1948 and Section 115, C. P. C. A decision of a preliminary issue going to the root of the case, such as limitation, jurisdiction or res judicata, may result in dismissal of a suit or in proceeding further with it. No order is required to proceed further with the suit; but the decision itself is to be regarded as an interlocutory order. Such orders are to be distinguished from interlocutory orders made from day to day in suits and proceedings which are not made appealable by the Code. There is a conflict of Judicial opinion on the question whether interlocutory orders could be made subject matters of applications for revision as 'cases decided'.

In — 'Murarji Surji v. Jayant Trading Corporation Ltd., Bombay', AIR 1949 Kutch 5, this Court held that a case could be a part of a proceeding in a suit and that decision of a question whether plaint should be rejected or returned to the plaintiff for want of jurisdiction was a case decided within the meaning of that expression used in para 35 of the Kutch Courts Order, 1948.

The question again came for consideration before this Court in — 'Ravji v. Premji', AIR 1952 Kutch 32, but it was not decided. However, it was observed that it was inexpedient



to interfere with such decisions in the exercise of the powers of revision. It is unnecessary to consider in this case whether the view expressed by this Court in — 'Muralji's case' be revised. Treating the decision of the preliminary issue as a case decided, the question to be considered is whether the application falls within the purview of para 35 of the Kutch (Province) Courts Order 1948.

(4) It is apparent that the trial Court exercised the jurisdiction vested in it. It had jurisdiction to decide the issue and it cannot be said that it had exercised the jurisdiction not vested. The contention, however, was that by erroneously deciding the issue, the trial Court invested itself with jurisdiction which in law it did not possess and in support of this contention reliance was placed on — 'Joychandlal v. Kamalaksha', AIR 1949 P. C. 239.

In that case it was pointed out by the Judicial Committee that on an erroneous decision resulting in a Subordinate Court exercising a jurisdiction not vested in it by law, or failing to exercise a jurisdiction so vested, a case for revision arose. At the same time, the principle that a Subordinate Court did not act illegally or with material irregularity because it decided a case wrongly was accepted as firmly established. It is thus clear that the question is not whether the decision was right or wrong. The question is whether by the erroneous decision, the trial Court vested itself with jurisdiction which but for the decision it could not have. In laying down the principle stated above, their Lordships cited two cases by way of illustrations. One of the two cases was — 'Hari Bhikaji v. Naro Vishvanath', 9 Bom. 432. It is clear from the facts of the Bombay case that on finding that the suit was not barred by res judicata, the Subordinate Court vested itself with jurisdiction to decide the appeal and decided it. The decision right or wrong could not be interfered with in revision. But if it was found that the question of res judicata was erroneously decided, by doing so, the subordinate Court invested itself with jurisdiction to decide the appeal. It is apparent that so long as the subordinate court did not invest itself with jurisdiction and decide the suit, it cannot be said that it has exercised jurisdiction not vested, simply because it decided a preliminary issue, as, it had jurisdiction to decide that issue. Thus it is clear that though it be accepted that decision of a preliminary issue is a case decided, by doing so, a subordinate court does not exercise the jurisdiction not vested. That decision may be right or wrong. But if the subordinate court on deciding that issue decides the suit, by erroneous decision of the issue, it invests itself with jurisdiction which it would not have to do if the issue was correctly decided. It is thus evident that by a mere decision of a preliminary issue, the trial Court did not exercise the jurisdiction not vested in it and it cannot be said that by deciding it, it exercised the jurisdiction not so vested or acted in the exercise of its jurisdiction with material irregularity.

(5) However, the important distinction between para 35 of the Kutch Courts Order, 1948 and Section 115, C. P. C., (Section 115, C. P. C. having been expressly made inapplicable to the State of Kutch) is that under the Kutch (Province) Courts' Order, 1948, it is not necessary for the exercise of the powers of revision to

show that the Subordinate Court had acted illegally in the exercise of its jurisdiction. What is provided in the Kutch (Province) Courts' Order 1948 is that if this Court thinks that there is an important question of law which requires further consideration and other conditions laid down in Sub-para 1(b) are complied with, powers of revision can be exercised and for that purpose, an application for revision be treated as an appeal. Thus, on the assumption that decision of the preliminary issue was a case decided, it is necessary to consider whether there was an important question of law requiring further consideration.

An issue of res judicata may require further consideration, provided, it is important. In this case, it can hardly be said that it is important. On the face of it, it is clear that the previous suit was instituted by the Collaterals of Opponent 1. Opponent 1 who was not a party to the previous suit cannot be bound by any decision arrived at in it. It was not alleged that plaintiffs in the suit were acting in a representative capacity. Thus the question decided by the trial Court was simple. It has often been remarked that such contentions should not be tried as preliminary issues. The trial Court must have thought that its decision might go at the root of the case. On facts clearly stated, the trial Court decided the issue in the manner done. It was urged that the bond on which the collateral sued was now made a subject-matter of the present suit. If it can be so done according to law, there is no reason why it should not be so done and how for that reason a contention that the suit is barred by the principle of res judicata can be raised. It was contended that the applicant raised the question of estoppel. If such a contention was raised, it is not yet decided and this Court is not called upon to consider it.

(6) Result is that the application fails and it is dismissed with costs.

B/R.G.D.

Application dismissed.

**A.I.R. 1953 KUTCH 14 (Vol. 40, C. N. 8)**

**VAKIL J. C.**

**Dowlatram Bulchand Advani, Applicant v. Thakursee Moti and others, Opponents.**

**Criminal Misc. Appln. No. 3 of 1952, D/- 19-9-1952.**

**(a) Criminal P. C. (1898) Ss. 526 and 528 — Right of accused to approach High Court directly cannot be taken away.**

Section 528 does not in terms provide that an application for transfer be made to the Magistrate of the District under section 528, before an application under that section can be made to the High Court. There is no bar, according to law, to the making of an application for transfer to the High Court under section 526, directly without having made a similar application under section 528 to the Magistrate of the District. Where the law provides concurrent remedy, a party may move a higher or lower tribunal for obtaining relief. However, in the course of time, a practice grew up according to which High Courts did not ordinarily transfer a case pending before a Magistrate unless the party applying for transfer had moved the District Magistrate before going to the High Court. (Para 3).



But such a practice cannot exclude the right of a party to approach the High Court directly, and cannot be followed by the Kutch Judicial Commissioner's Court. Case law considered. (Para 6)

Anno: Criminal P. C., S. 526 N. 2.

(b) Criminal P. C. (1898), S. 495 — Appearance by Supreme Court Advocate on behalf of party — He must sign application as Supreme Court Advocate so as to make it clear that he is entitled to appear as matter of right — No permission is required for appearance before Kutch Judicial Commissioner's Court.

(Para 7)

Anno: Criminal P. C., S. 495 N. 3.

Parmanand Kundanmal instructed by L. L. Thacker, for Applicant; K. N. Mankad and I. R. Antani, (for Nos. 1 and 2) and R. R. Thacker, (for No. 3), for Opponents.

REFERENCES: Courtwar/Chronological/ Paras

- ('50) AIR 1950 Ajmer 19(1): (51 Cri LJ 864) 5
- ('25) AIR 1925 All 640: (26 Cri LJ 960) 3
- ('04) 6 Bom LR 480: (1 Cri LJ 589) 3
- ('30) AIR 1930 Bom 480: (32 Cri LJ 338 FB) 4
- ('46) 48 Bom LR 41: (AIR 1946 Bom 276: 47 Cri LJ 700 FB) 4
- ('23) AIR 1923 Lah 685(1): (24 Cri LJ 466) 3
- ('42) AIR 1942 Oudh 429: (44 Cri LJ 97) 3
- ('51) AIR 1951 Raj 158: (52 Cri LJ 1220) 5
- ('26) AIR 1926 Sind 137: (27 Cri LJ 40) 5
- ('36) AIR 1936 Sind 51: (37 Cri LJ 792) 3

ORDER: This is an application under section 526 Cr. P. C., for transfer of a case pending before the Additional Magistrate, First Class, Anjar, to any Magistrate, First Class, Bhuj on the grounds stated in clauses (a), (b), (d) and (e) of sub-section (1) of the section.

(2) A preliminary objection raised for consideration was whether it was incumbent on the applicant to have moved the Magistrate of his District under section 528 Cr. P. C., before approaching this Court under section 526 Cr. P. C. Apprehending that such an objection be raised, it was stated in the application that the applicant had moved the Magistrate of the District who had rejected the application under section 526 Cr. P. C. It was added that rejection of the application took place before 24th March 1952. Since then, the case was heard for two days. It was orally stated that an adjournment was obtained under sub-section (3) of section 526 for making an application to this Court. It was admitted that some of the grounds stated in the present application were the same urged in the application to the District Magistrate. The question whether those grounds can be urged in support of the present application does not for the present arise for consideration. It was not contended that this application should be regarded as one made on rejection of the same by the Magistrate of the District under Section 528 Cr. P. C.

(3) Section 528 Cr. P. C. does not in terms provide that an application for transfer be made to the Magistrate of the District under section 528, before an application under that section can be made to the High Court. There is therefore no bar, according to law, to the making of an application for transfer to the High Court under section 526 Cr. P. C., directly without having made a similar application under section 528 Cr. P. C. to the Magistrate of the District. Where the law provides concurrent remedy, a party may move a higher or lower tribunal for obtaining relief. However, in the course of time, a practice grew up according to which High Courts did not ordinarily transfer a case pending before a Magistrate unless the party applying for transfer had moved

the District Magistrate before going to the High Court, vide In Re. A Fonseca 6 Bom L. R. 480; — 'Ghulam Nabi v. Jamala', AIR 1923 Lah 685 (1); — 'Ravi Chander v. Sunder Singh', AIR 1925 All 640; — 'Mahomed Ramzan v. Emperor', AIR 1936 Sind 51; and — 'Bhagwat v. Emperor', AIR 1942 Oudh 429. The question is whether this Court should follow the practice.

(4) In considering the question, it will be proper to examine the grounds advanced in support of the practice. One ground stated is convenience. It would be more convenient to first go to the Magistrate of the District for transfer. Second is that a superior tribunal should not be approached for relief unless an inferior tribunal entitled to grant relief has refused it. In this connection, reference is made to the practice of applying to the local authorities (Sessions Judge or the District Magistrate) under section 436 Cr. P. C. before approaching directly to the High Court. As regards convenience, it is urged that applications of this type would be expeditiously disposed of by local authorities and that in many cases it would not be necessary to approach the High Court at all.

So far as this Court is concerned, a transfer application can be disposed of as expeditiously, if not with greater expedition, as would be done by local authorities. On the other hand, in majority of cases, orders made for or against by local authorities are likely to come for consideration of this Court by way of revision or on an application under section 526. As regards the second ground, it is apparent that it is always desirable that an inferior tribunal entitled to grant relief, should be approached in the first instance. But the question is whether this ground can be made a matter of practice and be held against an applicant who claims a right under law to obtain relief from the High Court. It is quite evident that to do so would be legislating and not administering the law as it stands. The Bombay High Court in 'Re. P. D. Shamdasani (No. 2)', A I R 1930 Bom 480 (F. B.) observed that if an accused person claimed the right to go direct to the High Court, his right as a matter of law could not be excluded. The rule of practice that for the exercise of powers in revision, the Sessions Court or the District Magistrate must be moved in the first instance is based on the fact that none of the local authorities is entitled to grant relief which can only be done by the High Court on a report containing recommendation made by them. It is supported on the ground of concurrent remedy and not concurrent jurisdiction to grant the relief sought, vide observations made in — 'Emperor v. Nandlal', 48 Bom L.R. 41 at p. 44 (F.B.). Such a practice cannot therefore be regarded as denying a right given by law as, eventually, the High Court decides the question whether relief be granted or not. That practice cannot be considered by way of an analogy in support of the practice under consideration.

(5) It was pointed out by the Learned Pleaders for the opponents that the practice was followed by the Court of the Judicial Commissioner, Ajmer — 'S. R. Daruwala. v. Rex', AIR 1950 Ajmer 19(1) and by the High Court of Rajasthan — 'Nathuram v. State', AIR 1951 Raj 158. In the first mentioned case, there is only a reiteration of the practice without any discussion. In the second, the practice was laid down as having the force of law. It was contended by the learned pleaders for the opponents that the Bombay High Court, in the Full Bench case referred to above, thought that incorporation of sub-section (8) of Section 526 in 1923 made all the difference but in the said sub-section, there was nothing which changed the law and practice which was prevalent in all the High Courts before this sub-section was introduced in the Code.



The Bombay view, as I read the judgment, was based on the fact that practice could not be allowed to exclude a right expressly conferred by law. At the same time, the previous ruling was distinguished on the ground that it was given before amendment of the Section in 1923. The amendment effected was compulsory adjournment which was no part of the essence of obligation laid upon the Court, the obligation being that the party should have reasonable time to move the High Court and to obtain its orders. In — 'Nathoomal v. Emperor', AIR 1926 Sind 137, the learned Judicial Commissioner pointed out that in any case, it was competent under the sub-section before its amendment in 1923, before granting adjournment, to proceed with the case upon a point at which the accused would be called on for their defence. The Legislature by re-enacting sub-section (3) made it clear that a party interested was entitled as a matter of right to approach the High Court for transfer and this by implication meant that it was not a right which could only be exercised on a previous application made under section 528.

The Sind ruling was explained by the Rajasthan High Court on the ground that the main reason which led the learned Judicial Commissioner to hold the view that a party could apply direct to the High Court was that trial would be unnecessarily delayed. But it was observed by the learned Judicial Commissioner that there was nothing in the Statute which rendered it necessary to move the District or Sub-Divisional Magistrate in the first instance. It was observed by the learned Judges of the Rajasthan High Court that there was nothing in S. 526, Criminal P. C. which said that a party had a right to go to the High Court direct. With due deference, it must be stated that, when the High Court and the local authorities have concurrent jurisdiction, the right cannot be gain-said. If there was any doubt about the existence of the right, it was made clear by providing for compulsory adjournment.

The Sind view and the Bombay view were expressed in 1926 and 1930 respectively. If the Legislature intended to recognise the practice, it would have provided in the amendment effected in 1932 A. D., that no such adjournment shall be granted unless the party applying for it had moved the local authorities in the first instance. It is true that in the Bombay case, the order of the Presidency Magistrate, granting time to apply to the Chief Presidency Magistrate was wrong. But the application was made for revision of the order, as the applicant wanted adjournment to move the High Court and the question that arose was whether the applicant was entitled to do so directly.

(6) I therefore hold that a party is entitled as of right to apply for transfer to the High Court directly and it is not necessary according to law that he should first apply in that behalf to the District Magistrate or Sub-Divisional Magistrate of the District under Section 528. I further hold that the practice that an application under Section 526 would not be entertained unless an applicant had first moved the District Magistrate or Sub-Divisional Magistrate of the District under Section 526, excluding as it does the aforesaid right, cannot be accepted and followed by this Court. The preliminary objection is therefore not sustained. The application will be heard on merits.

(7) As regards the second preliminary objection, it is evident that Shri Parmanand, the learned Advocate appearing for the applicant should have signed the application as Supreme Court Advocate so as to make it clear

that he was entitled to appear as a matter of right. The contention that under Section 495, Criminal P. C., the learned Advocate was not entitled to conduct the prosecution unless permitted to do so by the Magistrate, cannot be urged in respect of an appearance before this Court.

B/R.G.D.

Order accordingly.

# A.I.R. 1953 KUTCH 16 (Vol. 40, C. N. 9)

VAKIL J. C.

Kuverji Monshi, Applicant v. Heerji Lakhmichand & Co. and others, Opponents.

Civil Revn. Appln. No. 41 of 1952, D/- 6-10-1952.

(a) Kutch Province (Courts) Order, 1948, S. 35 — Erroneous decision by subordinate Court — Revision — (Civil P. C. (1908), S. 115).

Where the trial Court has jurisdiction to decide a question it cannot be said that it acted illegally or with material irregularity because it decides wrongly the question within its competence. (Para 3)  
Anno: C.P.C., S. 115 N. 12 Pt. 7.

(b) Kutch Province (Courts) Order, 1948, S. 35 — Erroneous decision not followed by exercise of jurisdiction — Revision — (Civil P. C. (1908), S. 115).

An erroneous decision by a subordinate Court as to jurisdiction must result in exercise of the jurisdiction by that Court. Where, therefore, there is only erroneous decision not followed by exercise of jurisdiction, no revision can be entertained as against the erroneous decision as to jurisdiction on the ground of acting illegally or with material irregularity in the exercise of jurisdiction; in such a case no question arises of actually having exercised jurisdiction not vested in the Court: AIR 1949 PC 239, Rel. on; AIR 1937 Nag 334 and AIR 1950 Mad 158, Expl. (Para 4)

Quaere: Whether a finding on a preliminary issue can be regarded as a 'case decided' within the meaning of that expression used in S. 115, Civil P. C. and S. 35, Kutch Province (Courts) Order, 1948. (Para 2)

Anno: C.P.C., S. 115 N. 4 and 12.

K. N. Mankad, for Applicant; J. K. Dholakia, for Opponents.

REFERENCES: Courtwise/Chronological/ Paras  
(83-84) 11 Ind App 237: (11 Cal 6 PC) 5  
(17) 44 Ind App 261; (AIR 1917 PC 71) 5  
(49) AIR 1949 PC 239: (76 Ind App 131 PC) 5  
(49) AIR 1949 Kutch 5 2  
(50) AIR 1950 Mad 158: (1949-2 Mad LJ 623) 5  
(37) AIR 1937 Nag 334: (ILR (1939) Nag 641) 4

JUDGMENT: This is an application for revision of a finding in consolidated suits Nos. 74 and 75 of 1950, recorded by the Civil Judge (S. D.) on a preliminary issue relating to jurisdiction to entertain the suit. The suits were brought against the defendant applicant in the trial Court on the ground that at the time of the commencement of the suits, he used to actually and voluntarily reside in Kutch. The question was important as plaintiffs would not be entitled to the larger period of limitation if the trial Court had no jurisdiction to entertain the suits. The trial



Court, on the evidence led in the case came to the conclusion that the defendant-applicant was residing at both the places viz., in Kutch and in Bombay and found the issue in the affirmative. It is against this finding that the applicant has approached this Court in revision under para. 35 of the Kutch Province (Courts) Order, 1948.

(2) Whether a finding on a preliminary issue can be regarded as a 'case decided' within the meaning of that expression used in S. 115, Civil P. C. and S. 35, Kutch Province (Courts) Order, 1948, is a question which will have to be considered in a proper case in view of the sharp conflict of judicial opinion on the subject. A similar question arose before this Court in — 'Murarji v. Jayant Trading Corporation Ltd., Bombay', AIR 1949 Kutch 5, and was decided in the affirmative. In the judgment there was no discussion of the views held by different High Courts. It may, therefore, be necessary to consider the question in future as it arises. This case can be decided on the assumption that the finding amounts to a case decided.

(3) The trial Court had jurisdiction to decide the question and it cannot be said that it acted illegally or with material irregularity because it decided wrongly (as contended by the applicant) the question within its competence. No doubt, S. 35, Kutch Province (Courts) Order, 1948 does not provide for revising cases in which the subordinate Court has acted illegally in the exercise of jurisdiction. It makes a broader provision that revisional powers can be exercised where there is an important question of law which in the opinion of the Judicial Commissioner requires further consideration. The question of jurisdiction in this case was a mixed question of law and facts. The applicant as well as the opponents can respectively assail and support those findings of facts. Thus the question is not a pure question of law.

(4) The applicant's main contention was that by erroneously deciding that it had jurisdiction, the trial Court exercised jurisdiction not vested in it by law. An authority in support of this contention is — 'National Petroleum Co. Ltd. v. Meghraj', AIR 1937 Nag 334. In that case it was held that as the lower Court had no jurisdiction to try the suit, it acted without jurisdiction in proceeding to try it. It is important to note that only question of jurisdiction was decided. It is true that an erroneous decision resulting in a subordinate Court exercising jurisdiction not vested in it by law will give rise to a case for revision. What is, however, necessary is that the erroneous decision as to jurisdiction must result in exercise of the jurisdiction by the subordinate Court. It follows that where there is only erroneous decision not followed by exercise of jurisdiction, no revision can be entertained as against the erroneous decision as to jurisdiction on the ground of acting illegally or with material irregularity in the exercise of jurisdiction and no question of actually having exercised jurisdiction not vested arises.

(5) The view expressed in the concluding portion of the last para receives support from the decision of the Privy Council in — 'Joychand v. Kamalaksha', AIR 1949 PC 239. In that case reference was made to the previous pronouncement by the Board in — 'Rajah Amir Hasan Khan v. Sheo Baksha Singh', 11 Ind App 237 (PC) and — 'Balkrishna Udayar

v. Vasudeo Aiyar', 44 Ind App 261 (PC), that a subordinate Court did not act illegally or with material irregularity because it decided wrongly a matter within its competence and it was pointed out that if the erroneous decision resulted in the subordinate Court exercising jurisdiction not vested in it or failing to exercise jurisdiction so vested, a case for revision arose under sub-cl. (a) or sub-cl. (b). The learned pleader for the applicant relied on — 'Naryudu v. Venkata Ramanamurthi', AIR 1950 Mad 158. What is essential is that the subordinate Court by its erroneous decision must have vested itself with jurisdiction which it did not possess. It follows that mere erroneous decision is not enough. The erroneous decision must lead to the subordinate Court exercising jurisdiction which if there was no erroneous decision, it would not have been exercised. Viewed in this light, the decision in the Madras case cited above, following the Privy Council case in — 'Joychand v. Kamalaksha', does not help the applicant as in that case jurisdiction which the subordinate Court had not was exercised by deciding the suit.

(6) Result is that the application fails on the ground that revision is not competent and it is dismissed with costs.  
B/V.S.B.

Revision dismissed.

**A.I.R. 1953 KUTCH 17 (Vol. 40, C. N. 10)**  
VAKIL J. C.

Damji Karamchand, Applicant v. Kutch State, Opponent.

Criminal Revn. Appln. No. 9 of 1952, D/- 26-4-1952.

**Criminal P. C. (1898), Ss. 386, 426, 555 — Security bond for stay of realisation of fine — Recovery of fine from surety during imprisonment of accused — Validity — Legality of security bond.**

An accused was sentenced to undergo rigorous imprisonment for 2 years and to pay fine of Rs. 10,000 or in default further imprisonment for 9 months. He was released on bail on furnishing surety who executed a bond for Rs. 10,000 for stay of realisation of fine during the pendency of appeal. On dismissal of appeal, the surety was called upon to get the amount of fine for the accused or to pay it himself, while the accused was undergoing imprisonment. The surety objected to the recovery of fine under S. 386, Cr. P. C. and also questioned the validity of the surety bond.

Held (1) that the proviso to S. 386(1), Criminal P. C. was not applicable as accused had not undergone punishment in lieu of fine and that so long as imprisonment in default to pay fine was not wholly undergone, fine could be realised in the manner provided in the sub-section.

(Para 5)

(2) that the Judicial Commissioners' Court had inherent power to order stay of realisation of fine on furnishing security and that there was nothing illegal in that order. AIR 1945 PC 94, Disting. (Para 7)

(3) Further that the forms in the Code are to be used as provided in S. 555 but they are not supposed to be exhaustive. A bond taken under the Code is a bond taken in accordance with the provisions contained in the Code and hence the secu-



rity bond which was executed under the order passed in exercise of the inherent powers of the Court was one under the Code and as such was valid. The fact that there was no specific provision in the Code for taking such security would not render it invalid or illegal. (Para 8)

Anno: Cr. P. C., S. 386 N. 4, S. 426 N. 7; S. 555 N. 3.

G. U. Bhanushali, for Applicant; C. P. Pandya, Public Prosecutor, for the State.

REFERENCE ..... /Para  
(45) 47 Bom LR 634: (AIR 1945 PC 94) 7

ORDER: The facts giving rise to the present application for revision of an order dated 14-3-52, made by the Additional Sessions Judge, Kutch, briefly stated, are as follows:

(2) One Manilal Gokal along with others was convicted in Sessions Case No. 27 of 1949 for offences punishable under Ss. 411 and 414, I.P.C., and was sentenced to undergo rigorous imprisonment for 2 years and to pay a fine of Rs. 10,000/- or in default to undergo further rigorous imprisonment for 9 months. Manilal Gokal preferred criminal appeal No. 6 of 1950 against his order of conviction and sentence to this Court and applied for being released on bail. This Court made the following order below Manilal's application for bail:

"Release appellant on bail of Rs. 10,000 with two sureties of like amount together. Trial Court shall stay realisation of fine on security to its satisfaction."

It seems that the trial Court directed Manilal to furnish a surety for Rs. 10,000/- for 'stay of realisation of fine'. Manilal furnished the present applicant as surety and the latter executed a bond for Rs. 10,000/- binding himself to pay the fine of Rs. 10,000 if Manilal made a default.

(3) On dismissal of appeal preferred by Manilal, the present applicant was called upon by a notice to get the amount of fine paid by Manilal failing which he (applicant) should pay it himself. The applicant by his written statement dated 14-3-52 contended that the bond taken from him was not in compliance with the order made by this Court; under Criminal P. C., no such bond could be taken and therefore it was illegal and unenforceable; under S. 426, Criminal P. C., Court had no jurisdiction to make an order directing an accused person to furnish such a security; under S. 386, Criminal P. C., the amount of fine could not be recovered except for special reasons so long as a convicted person was undergoing sentence of imprisonment.

(4) All the contentions raised by the applicant were summarily disposed of by the Additional Sessions Judge as under:

"Applicant stood as surety for the fine imposed on the accused & not as surety for suspension of the sentence. Applicant has passed a bond in the presence of the Court to pay the fine of the accused. According to it (bond) the Court is entitled to recover the fine of the accused from him....."

The applicant was therefore called upon to pay the fine within 4 days failing which it was ordered that the amount of fine would be recovered by attachment of his property and by other lawful means.

(5) The applicant has therefore preferred the present appln. for revision requesting this Court to consider the legality & propriety of the order made by the Additional Sessions Judge and set

it aside. The application was supported on the same grounds urged before the lower court. I take up for consideration the last mentioned contention in para 2 above first. The contention was that the convict Manilal was undergoing imprisonment and hence in the absence of any special circumstances, there was no question of recovering fine. In support of this contention reliance was placed on S. 386, Criminal P. C. That Section prescribes procedure for recovery of fine to which an offender has been sentenced. In the proviso to sub-s. (1) of that Section, it is provided that if the offender has undergone whole of the sentence in default to pay fine, no Court shall issue a warrant mentioned in the Sub-Section unless for special reasons to be recorded in writing it considered necessary to do so. It is an admitted fact that when notice was issued on the applicant, Manilal had not undergone sentence of imprisonment in lieu of fine. Hence the proviso to the Sub-section is not applicable. So long as imprisonment in default to pay fine is not wholly undergone, fine can be realised in the manner provided in the Sub-Section. This contention therefore fails.

(6) It was submitted that the order of the Court reproduced in para 2 above, meant that if the offender did not pay fine he had to appear for undergoing imprisonment in default and the security was ordered for that purpose. It was therefore contended that the bond taken by the lower Court was not in conformity with the order made by this Court. The first part of the order of this Court provides for releasing Manilal on bail. When an accused person convicted of an offence is sentenced to a substantive term of imprisonment and also to a term of imprisonment in default to pay fine, the order of bail made by an appellate Court is both for the substantive term of imprisonment and for the term of imprisonment in default to pay fine. Such a person cannot be asked to undergo imprisonment in default to pay fine though he is bailed out. It cannot be urged that he is bailed out for the substantive sentence only. Though such a person is bailed out, fine can be recovered from him in the manner provided in S. 386, Cr. P. C. Under S. 426, Cr. P. C., execution of sentence or order appealed against can be suspended. The word 'sentence' means not only substantive term of imprisonment but also sentence of fine. This Court therefore passed an order for suspension of the sentence. So far as sentence of imprisonment both substantive and in default to pay fine, was concerned, this Court passed an order for bail. As regards the sentence of fine which can be recovered despite furnishing bail as per first part of the order, this Court ordered suspension by directing the lower Court to stay realisation of fine on the applicant furnishing security. It is thus evident that the security to be furnished was not for the appearance of the appellant. For appearance, to undergo the substantive imprisonment as well the imprisonment in default to pay fine, bail was taken. The persons standing as sureties in respect of the order of bail had only to produce the appellant for undergoing imprisonment as provided in S. 499, Cr. P. C. or else to pay the penalty. The applicant who stood as surety for payment of fine had to see that the appellant paid the fine or else to pay the amount of fine as penalty. It cannot therefore be accepted that according to the order of this Court security to be taken for



stay of realisation of fine was to produce the appellant for undergoing imprisonment in default to pay fine. It must therefore be held that the bond taken was in conformity with the order made by this Court.

(7) It was then contended that under S. 426, Cr. P. C., no such order to furnish security could be made and hence the order made by this Court was illegal. As stated in the preceding para, under S. 426, an order for suspension of sentence could be made and sentence means both imprisonment and fine. The section provides that when an order of suspension is made, the appellant may be released on bail or on his own bond, if he is in confinement. It is not provided that for suspension of the sentence of fine a security be taken. When fine can be recovered, it will be meaningless to pass an order for suspension of sentence of fine during the pendency of appeal, if the person in whose favour such an order is made cannot be asked to furnish security for payment of fine. This Court making an order for suspension of the sentence of fine had inherent power to have that order carried into effect, or to secure the ends of justice. The ends of justice required that if realisation of fine from a person from whom it could be immediately recovered be stayed, pending appeal by him, a security be taken to see that fine was paid on dismissal of appeal and confirmation of the order of fine. It was urged that chapter 39 together with S. 426 was intended to contain a complete and exhaustive statement of the powers of a High Court to grant bail and excluded existence of any additional inherent powers in a High Court relating to the subject of bail. Reliance was placed on — '*Jairam Das v. Emperor*', 47 Bom L R 634 (P.C.). In that case it was held that after an appeal was disposed of by a High Court, it had no inherent power to grant bail to a convicted person desirous of preferring an application for leave to appeal to the Supreme Court. It was in view of this pronouncement that sub-s. 2B was inserted by an amendment to S. 426. The Legislature by the amendment made recognised the existence of power. The ruling cited refers to grant of bail only and not to suspension of sentence of fine. I therefore hold that this Court has inherent power to order stay of realisation of fine on furnishing security. It is very rare that such orders are made. In the present case, there is nothing to show that fine could not have been realised from the appellant at that time. Hence, this Court ordering stay of realisation of fine had to provide for furnishing of security in the interest of justice. There was nothing illegal in such an order which could be made in the exercise of inherent power of the Court.

(8) It was then contended that under Criminal P. C. such a bond could not be taken. The applicant agreed to pay the amount of fine if the appellant failed to do so. There are various kinds of bonds provided in the Code. The bond under consideration is not one of these kinds. It cannot therefore be said that it was not a bond taken under the Code. The forms in the Code are to be used as provided in S. 555. They are not supposed to be exhaustive. A bond taken under the Code is a bond taken in accordance with the provisions contained in the Code. Under the Code an order for suspension of fine could be made. The order for security was made in the exercise of inherent power as stated in para 7 above. The security furnished

should therefore be held to have been taken under the Code and therefore it is perfectly valid. The fact that there was no specific provision in the Code for taking such security will not render it invalid or illegal. This contention therefore fails.

(9) The Additional Sessions Judge did not follow the procedure prescribed in S. 514 of the Code. He seems to have thought that S. 547 was applicable. That Section provides for recovery of money other than a fine payable by virtue of an order made under the Code. In this case, what was payable was the sum of Rs. 10,000 as penalty as the applicant did not get the fine paid by the appellant. The sum of Rs. 10,000 was payable under the bond as appellant committed default in payment of fine. It was not directly payable by virtue of any order made under the Code such as payment of compensation, payment of maintenance, payment of subsistence charges to witnesses and so on. Unless the order of forfeiture was made, the Court was not entitled to recover the amount from the applicant. The condition in the bond that the applicant shall see to the payment of fine by the appellant is broken. The Lower Court shall therefore follow the aforesaid procedure before realisation of the amount from the applicant.

(10) The last contention urged was that this Court was not entitled to make any order for stay of fine. Fine was a sentence and suspension of sentence is provided in Section 426. This contention is against the plain provisions of S. 426, Criminal P. C. Suspension of the sentence of fine can be effected by ordering the Court who has to make recovery to stay its realisation pending appeal. If an appellate Court made such an order, fine can be realised despite an appeal preferred and if the order of conviction is set aside, apart from ignominy, harassment and inconvenience would be caused to an appellant who on appeal is found not guilty.

(11) Result is that the application fails and it must be dismissed. The Additional Sessions Judge shall follow the procedure provided in S. 514, Cr. P. C., in the light of the observations made in para 9 above.

B/D.R.R.

Application dismissed.

**A.I.R. 1953 KUTCH 19 (Vol. 40, C. N. 11)**  
**VAKIL J. C.**

Manekbai, Plaintiff-Applicant v. Chhaganlal Kumverji, Defendant-Opposite Party

Civil Revn. Appln. No. 164 of 1950, D/- 13-12-1951.

**(a) Civil P. C. (1908), S. 115 and O. 41, R. 2 — Ground not set forth in memo of revision application.**

The provision in rule 2 of Order 41 that an appellant shall not urge or be heard in support of any ground or objection not set forth in the memo of appeal does not apply to applications for revision which are governed by S. 115. When the applicant has prayed for a decree for certain amount claimed including interest that is sufficient to show that the applicant disputed the finding of the trial Court to the effect that she was not entitled to interest. (Para 2)

Anno: C.P.C., S. 115 N. 2, O. 41 R. 2 N. 3.

**(b) Civil P. C. (1908), O. 41 R. 1 — Points for determination — Giving up of.**



It is true that where points of determination are raised and a particular point is not found therein, it may be presumed that it must have been not urged or given up. But where a Court does not raise points for determination and proceeds on an assumption that only question of limitation was to be considered no such presumption can be made. AIR 1950 Lah 126 Ref. (Para 3)  
Anno: C.P.C., O. 41 R. 1 N. 11.

**(c) Civil P. C. (1908), S. 34 — Interest before suit — Law in Kutch State — Limitation.**

In Kutch State there was no law of limitation. But according to a book of Deshi Shiresta a suit for recovery of a personal debt could be brought within 35 years. One of the shirestas was that worth of a debt became lesser as it grew older and in case of old debts less than the Damdupat amount was awarded as interest. In one case decided by the Privy Council of the State in 1910 A. D. the principle was further developed and made into a working rule. It was explained that at 6 per cent interest would be equal to principal in about 16 years. As it took 16 years for the accumulated interest to be equal to the principal, within 16 years the creditor would lose all interest in a retrograde way and three years thereafter he would lose principal. So after the accumulated interest was equal to principal within a particular number of years, it would rateably be lessened for the period exceeding that period till nothing remained due for interest and after three years nothing would remain for principal. This is how the principle called 'Junvat' was applied in the matter of recovery of interest in case of old debts.

Where for a period of 16 years after the death of the debtor no action was taken:

Held that no interest could be allowed due to 'Junvat' as there was no diligence. AIR 1951 Kutch 88 Disting. (Para 4)  
Anno: C.P.C., S. 34 N. 6, 7, 16.

**(d) Civil P. C. (1908) Pre., S. 34 — Law in Kutch State — Suit for recovery of debt — Application of Contract Act during pendency of suit.**

As in Kutch State a suit could be held to have been filed in time without application of the Limitation Act, it would not be equitable to apply Contract Act and hold despite the shiresta in Kutch State that interest in case of a State claim be allowed. Reason is that though state claims were allowed, a negligent plaintiff was progressively deprived of the interest due. It is therefore equitable to hold that before the Contract Act was applied, the plaintiff had become disentitled to interest and she could not get revival of her right on the application of the Contract Act during the pendency of the suit. (Para 5)

Anno: C.P.C., Pre., N. 3 S. 34 N. 6.

Premji Bhawanji, for Applicant; Surji Umersi, for Opposite Party.

REFERENCES: Courtwise/Chronological/ Paras  
(51) AIR 1951 Kutch 88 4  
(50) AIR 1950 Lah 126: (Pak LR 1950 Lah 201) 3

**ORDER:** This matter came for hearing before this Court again as per order passed in Review Application No. 2 of 1951. The applicant-plaintiff brought a suit to recover 1317-3/4 Kories for principal and an equal sum for interest from the opponent on the foot of a khata. Defence was that the suit is barred by Limitation and as the debt was an old one applicant was not entitled to interest. The trial court dismissed the suit holding it barred by limitation. It recorded a finding that as the debt was an old one, applicant was not entitled to recover interest. The District Court on appeal confirmed the decree of trial court on a finding that the suit was barred by Limitation.

This Court held that the suit was not barred by limitation. This Court therefore decreed the suit as prayed for without considering the question whether applicant was entitled to interest claimed. The opponent filed review application No. 2 of 1951. The review application was not allowed so far as other contentions were concerned. But it was allowed so far as this Court in the above judgment omitted to consider the question of interest. The matter has therefore come again before this court for hearing on the question of interest.

(2) The applicant's contention was that she was entitled to interest and hence the suit should be decreed as was done by this court by the judgment before review. The opponent's Learned Advocate raised a preliminary objection that the applicant having not raised a contention in his memo of revision Application that the Trial Court erred in holding that she was not entitled to recover interest was debarred from raising that contention. A review was granted at the instance of the opponent as this court in reversing the decree of the District Court had not considered the question of interest. So the only question to be considered in this revision application at this stage is whether the applicant was disentitled to interest on the ground that it was an old debt as held by the trial court.

It was urged that though review was allowed, it was open to the opponent to contend that the applicant was not entitled to urge anything after the finding of the trial court as that point was not raised in the memo of the application. The provision in R. 2, Order 41, C.P.C. that an appellant shall not urge or be heard in support of any ground or objection not set forth in the memo of appeal does not apply to applications for revision which are governed by S. 115, C. P. C. The applicant had prayed for a decree for the amount claimed and that was sufficient to show that she disputed the finding of the trial court that she was not entitled to interest.

(3) It was however contended that the applicant had abandoned this point in appeal as is evident from the judgment of the Appellate Court in which no specific point for determination covering this contention was raised and in which it was observed that besides limitation no other point was taken. In support of this contention reliance was placed on — 'Karim Bax v. Qadir Bakhsh', AIR 1950 Lah 126. It is true that where points for determination are raised and a particular point is not found therein it may be presumed that it must have been not urged or given up. It was contended that presumption became irrebuttable as no such point was mentioned in the memo of the application. But where a Court does not raise points for determination and proceeds on an assumption that only question of limitation was to be considered no such presumption can be made. The observation of the court of appeal



referred to above must be taken to have been made in connection with the consideration of the question of limitation. It seems that the Appellate Court overlooked the fact that the Trial Court decided the question of interest against the applicant and this Court followed suit. The preliminary objection therefore fails.

(4) The debt was incurred many years before the suit was filed. The amount claimed for principal was due 35 years before the suit. In Kutch State there was no law of limitation. But according to a book of Deshi Shiresta a suit for recovery of a personal debt could be brought within 35 years. The Shirestas mentioned in this book though providing rules for guidance had acquired force of law. One of the shirestas was that worth of a debt became lesser as it grew older and in case of old debts less than the Damdupat amount was awarded as interest. Following this principle in some judgments of the highest court in the former Kutch State interest was not awarded. In one case decided by the Privy Council of the State in 1910 A. D. the principle was further developed and made into a working rule. It was explained that at 6 per cent interest would be equal to principal in about 16 years.

As it took 16 years for the accumulated interest to be equal to the principal, within 16 years the creditor would lose all interest in a retrograde way and three years thereafter he would lose principal. So after the accumulated interest was equal to principal within a particular number of years, it would rateably be lessened for the period exceeding that period till nothing remained due for interest and after three years nothing would remain for principal. This is how the principle called 'Junvat' was applied in the matter of recovery of interest in case of old debts. This principle had to be devised as ordinary law of limitation bars recovery of claims after some years, for instance three years from the date of the cause of action in case of personal debts according to Indian Law of Limitation, but the law in force in Kutch did not provide for limitation and it was only a shiresta which provided 35 years as the period of limitation.

The Learned Pleader for the applicant cited a recent case of the Privy Council of the State of the year 1942 A. D. But on a perusal of judgment in that case it does not appear that the principle was considered. The question came for consideration before this court in — '*Velji Girdhar v. Harakhbai*', AIR 1951 Kutch 88. It was observed that the object of the rule being to prevent prejudice to the debtor by compelling the creditor to be diligent in recovering his debts it was obvious that case might be concerned, (sic) in which an application of the rule might hit the creditor unjustly when he had not been at fault. In that case dealings stopped in Samvat 1973. The original creditor died in Samvat 1977, survived by his minor son who in his turn died after four years survived by his mother. As against these facts, the debtor lived upto Samvat 1987. It was therefore held on the facts of the case that the debtor was not entitled to any indulgence.

In the present case the amount claimed for principal was found due in Samvat 1972. Though the original creditor died in Samvat 1975, a notice of demand was made in that very year by Jamnabai the mother of the plaintiff and widow of the creditor and the debtor in response to the notice made an acknowledgment of the debt for the balance due on account made in favour of Jamnabai and Devkibai, mother of the creditor. No steps were taken for recovery of the debt by Jamnabai and Devkibai in whose favour acknowledgment was

made. Plaintiff explained that Devkibai treated Lilbai, possibly the mother of the debtor, as younger sister and hence no action was taken. This seems to be a mere inference of the plaintiff. The original debtor lived upto Samvat 1988 and yet no action was taken. For a period of 16 years after the death of the debtor no action was taken. Thus the facts of the present case are different from the facts of the reported case cited above. As there was no diligence in recovering the debt, it must be held that the trial court was right in holding that interest could not be allowed due to Junvat.

(5) One more contention that can be urged in this connection requires consideration. During the pendency of the suit, the Indian Contract Act became applicable to the State of Kutch. There was an implied agreement to pay interest and it was made specific in the acknowledgment. As shiresta was not law, it could not have been urged that application of the Indian Contract Act might defeat vested right acquired by law. But the fact is that both the Indian Contract Act and Indian Limitation Act were made applicable to the State of Kutch. If a suit could be held to have been filed in time without application of the Indian Limitation Act, it would not be equitable to apply Indian Contract Act and hold despite the shiresta, that interest in case of a stale claim be allowed. Reason is that though stale claims were allowed, a negligent plaintiff was progressively deprived of the interest due. It is therefore equitable to hold that before the Contract Act was applied, the plaintiff had become disentitled to interest and she cannot get revival of her right on the application of the Indian Contract Act during the pendency of the suit.

(6) Result is that application is partially allowed and the decrees passed by the Courts below are varied by substituting a decree for 1317½ Kories with interest at 6 per cent from the date of the suit and a moiety of the taxed costs of the suit, appeal and this application. The decree dismissing the suit for the remaining moiety claimed for interest is confirmed. The decree will be limited to the estate of the defendant's father in the defendant's hands.  
B/D.H.

Revision partly allowed.

A.I.R. 1953 KUTCH 21 (Vol. 40, C. N. 12)

BAXI J. C.

Shankergar Trithvigar, Applicant v. Bhachibai Sambhugar, Opponent.

Criminal Revn. Appln. No. 33 of 1951, D/- 21-7-1951.

(a) Criminal P. C. (1898), S. 488 — Neglect or refusal to maintain — Failure to prove — Order for maintenance on ground of cruelty — Validity.

A Magistrate has jurisdiction to award maintenance to a wife under S. 488, Cr. P. C., if it is proved that the husband has refused or neglected to maintain her but not otherwise.

A wife applied under S. 488 for maintenance on the ground that her husband ill-treated her and left her. It was not her case that she was forced to leave her husband due to his cruel treatment. In the proceedings the husband offered to take her back but she refused to return unconditionally. The Magistrate without deciding the main question whether there was refusal or neglect to maintain the wife, ordered maintenance on the ground



that the husband was guilty of cruel conduct and that the wife was justified in refusing to return to him unconditionally.

Held that the order could not be sustained as it was based on the supposition that she was compelled by cruelty to go away, a case which she herself had pleaded nowhere in the proceedings.

Held also that in considering the question of cruelty the Magistrate was not justified in taking into consideration the evidence of cruelty of the husband prior to a compromise between them under which the wife had returned to her husband. (Para 6)

Anno: Cr. P. C., S. 488 N. 11, 19, 21.

**(b) Criminal P. C. (1898), S. 488 — Nature of order that can be passed.**

Section 488 authorises the Magistrate to award only monthly payments for maintenance. An order directing the husband to provide for the wife's residence is illegal as being in contravention of the terms of S. 488. (Para 7)

Anno: Cr. P. C., S. 488 N. 12 Pt. 2.

Kundanlal J. Dholakia, for Applicant; Nana-lal V. Bhatt, for Opponent.

**ORDER:** The opponent preferred an application against the present applicant under S. 288 claiming maintenance and separate residence and a return of her stridhan clothes and ornaments. Her case was that a year after her marriage which took place in st. 2005, the opponent's sister and her husband came to live with them. Thereafter under the instigation of his mother and sister, the present applicant began to treat her with cruelty. On one occasion he beat and turned her out of the house by taking her to her cousin Laxmigar's. The dispute was, however, settled through the intervention of the caste and a compromise Ex. P. 1 was effected. Within two months thereafter the present applicant again turned her out, took her at night to her brother Chimangar's after taking all her stridhan clothes and ornaments and left her there. Her case is that the applicant had refused to take her back thereafter.

(2) The applicant's defence was a denial of cruelty or beating. He contended that the present opponent had gone away to her brother's of her own accord. He offered by his written statement to maintain her if she returned to him but pleaded inability to give her separate maintenance. He also contended that an order directing him to provide residence to her could not be made in proceedings under S. 488.

(3) It appears that during the proceedings before the Magistrate, the opponent offered to return to the applicant provided the latter gave security against future illtreatment. Nothing, however, came out of it. This offer should be construed as a refusal to return to him unconditionally and a reply to the present applicant's offer to take her back. The learned Magistrate held that the applicant was guilty of "neglectful and cruel" conduct: that the applicant and his sister were illtreating her, and that she was justified in refusing to return to him. He ordered the applicant to pay her Rs. 20/- p. m. for the first 3 months and Rs. 25/- p. m. thereafter for maintenance. This was, because, the opponent was enceinte when the order was made and expected to deliver within 3 months. The extra five rupees were, therefore, awarded for the child. The applicant had let a portion of his house to a tenant. The learned Magistrate ordered him

to have it vacated and deliver it to the opponent for residence and until he could do so, he was ordered to pay her Rs. 6/ p. m. for house rent. The applicant applied in revision to the Sessions Court against this order; but the learned Additional Sessions Judge rejected his petition. He has now applied to this Court in appeal.

(4) The Magistrate has jurisdiction to award maintenance to a wife under section 488 if it is proved that the husband has refused or neglected to maintain her but not otherwise. In this case, the opponent's case is that she was ill-treated by her husband and his sister and the husband took her one night to her brother, Chimangar's and left her there. If this is proved, it is a case of refusal or neglect to maintain her. The applicant offered to take her back by his written statement and the question of his cruelty would be relevant, when the question, whether the present opponent's refusal to return to him unconditionally was based on valid grounds, comes up for consideration. The learned Magistrate unfortunately did not formulate the issue whether the applicant had refused to maintain the opponent nor did he examine the evidence in this context though he observes in his judgment that the opponent deposes that she was taken away when summarising evidence led by her. But the burden of his order is that the applicant was ill-treating her and consequently she was justified in refusing to return to him unconditionally. The main question whether the applicant had refused to maintain her has not been separately taken up and discussed by him.

(5) The opponent alleged that the applicant took her at night to Chimangar's. It is not her case that she left the applicant's house of her own accord, or that her husband's alleged cruelty compelled her to leave his house. The present applicant's contention on the other hand is that she went away of her own accord. Chimangar (P. W. 2) has been examined by her. He states

that she was "sent away" *भेज दी* by the present applicant. He does not state who accompanied her. If she was "sent away" the present applicant could not have accompanied her otherwise Chimangar would have said that he had "brought" her. Then Chimangar went to the applicant's house and inquired about the cause of her coming. This furnishes further corroboration for the inference that the applicant could not have accompanied her because Chimangar would not then have found it necessary to go and make inquiries at the applicant's house. Chimangar's evidence supplies direct corroboration to his case just as it falsifies the case of the opponent that he took her to Chimangar's. The opponent has thus failed to prove the case set up by her in her application. Whether his conduct was cruel or not is beside the point because it was not her case that the alleged cruelty had driven her away. Under the circumstances, the learned Magistrate's order granting maintenance to her on the ground that the applicant and his sister had treated her cruelly was tantamount to giving her maintenance on the supposition that she was compelled by cruelty to go away, a case which she herself had pleaded nowhere in the proceedings. His order must be set aside on this ground alone.

(6) Stress was, however, laid by the learned Magistrate on the alleged cruelty of the present applicant. In this too there has been a slight confusion of thought on his part. The reconciliation between the parties following the caste intervention may be taken to be the point which marks the married life of the parties. All previous wrongs were evidently forgiven and the parties started with a clean slate, the opponent re-



turning to her husband. Any ill-treatment or beating on the applicant's part during the period before the reconciliation must, therefore, be completely ruled out of consideration in determining this petition for the opponent herself had forgiven him. It cannot even be taken as corroborative evidence of subsequent ill-treatment. The opponent must adduce evidence of cruelty after the reconciliation before she can be entitled to an order in her favour. Now the learned Magistrate has mixed up both the periods. The only evidence of beating subsequent to the return of the applicant after the compromise is that of the opponent's own statements that her husband and his sister used to beat her. The applicant denies the entire story of ill-treatment or beating. Chimangar states what the opponent had told her. His evidence is thus hearsay and there is no other evidence of post reconciliation cruelty. The learned Magistrate, however, took into consideration the evidence of Laxmigar P. W. 3 and 3 other witnesses all of whom depose to what had taken place before the reconciliation and based his finding also on their evidence. Thus he allowed his judgment to be influenced by evidence which could have no bearing on the present issue. If this evidence is excluded from consideration, nothing is left except the word of the opponent who is not supported by her own brother in her statement that she was taken by the applicant to his house. I hold that the opponent has not proved such cruelty on the applicant's part after she was reconciled with him and returned to him, which would justify her in demanding separate maintenance or in putting him to terms before she returned to him.

(7) The applicant has been ordered to get his house vacated and place it at the opponent's disposal and during the time that this is done he has ordered to pay Rs. 6/- by way of monthly rent. This order is quite in contravention of the terms of section 488, which authorises the Magistrate to award only monthly payments for maintenance and not to decree residence also.

(8) The opponent has now delivered a child. It was en ventre sa mare when the order was made. Rs. 5/- per month have been awarded for its maintenance after its birth. The infant is in no way responsible for staying apart from its father who is bound to maintain it in whosesoever custody it may be. The order of payment of Rs. 5/- is, therefore confirmed.

(9) Though I have differed from the learned Magistrate's conclusions, I may state that he has carefully tried the case. I cannot say the same thing about the learned Additional Sessions Judge. He dismissed the objection against the legality of the order awarding residence to the opponent by observing that though the order was illegal, the applicant had the option of continuing monthly payments of Rs. 6/- if he did not want to give her residential house. The learned Judge, however, overlooked that the order to get the house vacated and deliver it to the opponent was mandatory and the applicant was not given any option in the matter. The order of payment of Rs. 6/- was only intended for interim payment of house rent. He confirmed the Magistrate's order on merits by observing that he did not see any reason to interfere with the trying Magistrate's appreciation of evidence. There is no question of interfering with the learned Magistrate's appreciation of evidence. But it was the learned Judge's duty to see whether the learned Magistrate had grasped the issues involved and had properly directed himself to them.

(10) The revision is allowed. The Magistrate's order is set aside and the applicant is ordered to pay the opponent Rs. 5/- per month for maintenance of the infant so long as it remains in her custody. The opponent shall pay the applicant the costs of this revision and of both the Courts below.

C/K.S.

Revision allowed.

A.I.R. 1953 KUTCH 23 (Vol. 40, C. N. 13)

BAXI J. C.

Devkunvarbai Anandji, Appellant v. Khushalchand Damji and Co., Bombay, Plaintiff and others, Auction-purchasers, Respondents.

Civil Misc. Appeals Nos. 2 and 3 of 1951, D/- 12-6-1951.

**Civil P.C. (1908), O. 21, R. 90 — "Person whose interests are affected" — Interest now affected must be shown.**

An applicant making an application to set aside the sale under O. 21, R. 90 has to show that his interests in the property sold are affected by the sale; for, if he has no interest in the property which can be affected, his application becomes incompetent. Thus an assignee of mortgage rights in the property sold must prove the assignment in order to show that his interest in the property is affected by the sale. (Paras 4, 6)

Anno: C.P.C., O. 21 R. 90 N. 8.

K. N. Mankad, for Appellant; J. G. Vaidya, for (Plaintiff) Respondent; R. R. Thacker, for (Auction-purchaser), Respondents.

**JUDGMENT:** These appeals arise out of the orders of the learned Additional District Judge dismissing the appellant's applications for setting aside the sales of certain immoveable properties in execution of the decrees of the Bombay High Court in Suits Nos. 2 and 3 of 1946 passed in favour of respondent No. 1 against the firm of Visanji Hansraj and Co. The appellant's applications have been made under O. 21 R. 90, Civil P. C.

(2) The respondent No. 1's firm had obtained 3 decrees against the firm of Visanji Hansraj and Co. in suits Nos. 1, 2 and 3 of 1946. They got the decrees in Suits Nos. 2 and 3 transferred to the District Court of Kutch and got certain properties of Visanji Hansraj, one of the partners of the firm of Visanji Hansraj and Co., attached on 2-2-1950. The properties were auctioned in due course on 27-7-1950. The present applications are made for setting aside these sales. The properties have been sold in two lots. One lot has been sold in execution of the decree in suit No. 2 (C. Exe. No. 2 of 1950), and the other lot was sold in execution of the decree in C. S. No. 3 (C. Exe. No. 3 of 1950).

(3) The learned Additional District Judge disposed of these applications by separate orders but they involve identical principles. These appeals are, therefore, disposed of by one judgment.

(4) The learned Additional District Judge held that the irregularities and the illegalities complained of were not material nor did they cause substantial injury to the appellant. A further point was raised before this Court on behalf of the respondents. It was urged on their behalf that before an application under O. 21, R. 90 Civil P. C., can be entertained, the applicant has to show that his interests are affected by the sale. The appellant has no in-



interest in the properties which could be affected by them and therefore her applications were incompetent.

(5) The appellant claims to have an interest in the properties in this way. She alleges that Vishanji Hemraj (Hansraj?) created an equitable mortgage on these properties in favour of his mother Bhanbai by depositing their title deeds with her in Bombay to secure a loan of Rs. 20,000/-. The mortgage is alleged to have been made in 1945 i.e., before the respondents' suits against Vishanji Hemraj and Co. in the Bombay High Court. This Bhanbai is alleged to have assigned her rights under the mortgage to the present appellant, who by the way is her daughter, for a consideration of Rs. 10,000/-. Thus the appellant claims to be the assignee of her mother's mortgage rights over these properties which according to her are vitally affected by the sales.

(6) The appellant has, however, utterly failed to prove either the equitable mortgage or its alleged assignment in her favour. No document evidencing the mortgage is produced. There is no proof that any consideration passed from Bhanbai to Vishanji Hemraj. All that we have on record by way of authentic evidence is an ex parte decree of the Bombay High Court in civil suit No. 684 of 1950 obtained by the appellant on her assignment against her brother Vishanji Hemraj. The decree recites the equitable mortgage but it is no evidence against the present respondents who were not parties to that suit. The evidence about the alleged assignment is equally worthless. The High Court's decree mentioned above recites that the present appellant produced an Indenture dated 19-4-1950 evidencing the assignment. Curiously enough, this indenture is not produced in the execution proceedings in the District Court. Moreover, the assignment affects immoveable properties in Kutch and must be registered here. It is otherwise of no effect. It is not shown that the assignment was registered. Even if, therefore, the alleged assignment is genuine it cannot help the appellant and can create no interest in the properties in favour of the appellant. She has no interest in the properties created by the alleged assignment which can be affected by the sales and which can sustain her applications.

(7) I am moreover satisfied that the alleged mortgage as well as the assignment are collusive and intended to defeat the execution of the respondent's decrees against Vishanji Hemraj's properties. (After adverting to the circumstances of the case the judgment proceeded:) I am satisfied that the mortgage and the assignments are collusive and create no interest in the appellant which can sustain her application under O. 21, R. 90, Civil P. C.

(8) I have discussed the case sufficiently to show that the appellant has no locus standi and she must fail. It is therefore unnecessary to go into the questions whether there have been material irregularities in publishing or conducting the sale or whether the appellant has suffered any injury thereby. I find however that there has been no substantial injury to any one by the sales. (After considering the evidence on this question the Judicial Commissioner concluded:) The appellant thus fails on merits also and her appeals are ordered to be dismissed with costs.

C/V.S.B.

Appeals dismissed.

A.I.R. 1953 KUTCH 24 (Vol. 40, C. N. 14)

VAKIL J. C.

Lalji Ganpat and others, Defendants-Appellants v. Liladhar Devji, Plaintiff and others. Defendant-Respondents.

Second Appeal No. 16 of 1951, D/- 17-1-1952.

Civil P. C. (1908), S. 100 — Applicability in State of Kutch — (Kutch Courts Order (1948), S. 32).

Since the application of Civil P. C., (Act 5 of 1908) to the State of Kutch, second appeals to the Kutch Judicial Commissioners' Court are regulated both by S. 32, Kutch Courts Order, 1948 and S. 100, Civil P. C. Under S. 32, Kutch Courts Order, 1948, a second appeal can lie from an appellate decree of the District Court on any ground which would be a good ground of appeal if the decree had been passed in an original suit. Under S. 100, Civil P. C., a second appeal can lie to the High Court from any decree passed in appeal by a Subordinate Court on any of the three grounds mentioned therein. Section 100, Civil P. C., saves what is otherwise expressly provided in the body of the Code or by any other law for the time being in force. The Kutch Courts Order being the law for the time being in force, any express provision made therein which is otherwise than the provision of S. 100, Civil P. C., is saved. Though there is a similar saving provision in S. 32, Kutch Courts Order, 1948, in view of the saving provision in S. 100, Civil P. C., it cannot be said that S. 100, Civil P. C., otherwise provides as regards grounds on which a second appeal can lie. It thus follows that a second appeal under S. 32, Kutch Courts Order, 1948, does lie on any ground despite the provisions of S. 100, Civil P. C. If, a second appeal does not lie under S. 32, Kutch Courts Order, 1948, as it does not fall under any of the four classes mentioned therein, it may lie under S. 100, Civil P. C., as S. 33, Kutch Courts Order, 1948, which is subject to S. 32 of the said Order does not otherwise expressly provide. Result is that a second appeal can lie under S. 32, Kutch Courts Order, 1948, despite the provisions of S. 100, Civil P. C. but if a second appeal does not lie under S. 32 of the Kutch Courts Order, 1948, it can lie under S. 100, Civil P. C., on any of the grounds mentioned in that section. (Para 5)

Anno: C.P.C., Ss. 100 and 101 N. 2 and 3.

J. K. Dholakia, for Appellants and Respondent No. 4; R. B. Mehta, for Respondent No. 1.

JUDGMENT: This second appeal is preferred against the decree of the Addl. Dist. Judge, Kutch, in Regular Civil Appeal No. 92 of 1950, reversing the decree of the Subordinate Judge, Mandvi, in Regular Civil Suit No. 219 of 1949 and decreeing plaintiff's suit for redemption as prayed for in the plaint.

(2) Regular suit No. 219 of 1949 was brought by the plaintiff for redemption of a mortgage effected in respect of a right to take a share in the produce of an agricultural land called Vadhai. It was alleged in the plaint that one Nathaji was the owner of the land. One Lalji Ganpatram had acquired tenancy rights in the said land. Nathaji mortgaged his right to get a share in the produce of the said land with



Lalji for 3002 Kories in the Samvat year 1978. Plaintiff purchased equity of redemption from the heirs of the mortgagor and brought the suit under appeal for redemption.

(3) Out of five heirs of the mortgagee who were made parties to the suit, appellant 1 alone resisted the suit. Her principal contention was that the period provided for redemption at the time of the mortgage was by a new contract entered into by the heirs of the mortgagor extended by 25 years and hence the suit for redemption was premature. It was not admitted that the right mortgaged was to get 1/3rd share in the produce. There were other contentions raised about legal necessity, inalienability of the right mortgaged etc. These contentions were repelled by the trial court, not considered by the District Judge and not pressed before me in second appeal.

(4) The trial court found that the period provided for redemption of the mortgage was extended by 25 years and hence the suit for redemption was premature. The District Judge held it not proved that the period was extended. He held that the right was to recover 1/3rd share of the produce as alleged in the plaint and that plaintiff was also entitled to recover 'Bab' (Cess). He therefore decreed the suit accordingly.

(5) The principal contention urged in this second appeal was that the District Judge erred in holding that the period of redemption was not extended by 25 years. The learned Advocate for the Respondent No. 1 contended that under the provisions of S. 100, Civil P. C., this finding on the question of fact by the District Court was binding on this Court and that in Second appeal that contention could not be urged. This second appeal is preferred under S. 32 of the Kutch Courts Order, 1948. Since the application of the Code of Civil Procedure (Act 5 of 1908) to the State of Kutch, Second appeals to this Court are regulated both by S. 32, Kutch Courts Order, 1948 and S. 100, Civil P. C. Under S. 32, Kutch Courts Order, 1948, a second appeal can lie from an appellate decree of the District Court on any ground which would be a good ground of appeal if the decree had been passed in an original suit. Under S. 100, Civil P. C., a second appeal can lie to the High Court from any decree passed in appeal by a Subordinate Court on any of the three grounds mentioned therein. Thus, unlike S. 32, Kutch Courts Order, 1948, grounds on which a second appeal can lie under S. 100 are limited. As S. 32, Kutch Courts Order, saves provision otherwise made by any law for the time being in force, it is urged that a second appeal which does not lie under S. 100, Civil P. C., on a question of fact is not competent under S. 32, Kutch Courts Order, 1948. The provision otherwise made by any law for the time being in force may give a right of appeal not provided by S. 32, Kutch Courts Order, 1948, or may exclude a right given by that section. Section 100, Civil P. C. gives a right of second appeal from any decree passed in appeal by a Subordinate Court and is not limited to four classes of cases mentioned in S. 32, Kutch Courts Order, 1948. It can, therefore, be urged that when a second appeal does not lie under S. 32, Kutch Courts Order, 1948, it may lie under S. 100, Civil P. C. It can also be argued as is done in this case that a second appeal under S. 32, Kutch Courts Order, 1948, cannot lie if it is not based on any of the three

grounds mentioned in S. 100, Civil P. C. Such a result would have followed but for the fact that S. 100, Civil P. C., saves what is otherwise expressly provided in the body of the Code or by any other law for the time being in force. The Kutch Courts Order being the law for the time being in force, any express provision made therein which is otherwise than the provision of S. 100, Civil P. C., is saved. Section 32 of the Kutch Courts Order, 1948, makes express provision for a second appeal on any ground which would be a good ground of appeal if the decree had been passed in an original suit and this provision is otherwise than the provision in S. 100, Civil P. C. So this provision in S. 32, Kutch Courts Order, 1948 is saved. Though there is a similar saving provision in S. 32, Kutch Courts Order, 1948, in view of the saving provision in S. 100, Civil P. C., it cannot be said that S. 100, Civil P. C., otherwise provides as regards grounds on which a second appeal can lie. It thus follows that a second appeal under S. 32, Kutch Courts Order, 1948, does lie on any ground despite the provisions of S. 100, Civil P. C. If, a second appeal does not lie under S. 32, Kutch Courts Order, 1948 as it does not fall under any of the four classes mentioned therein, it may lie under S. 100, Civil P. C., as S. 33, Kutch Courts Order, 1948 which is subject to S. 32 of the said order does not otherwise expressly provide. Result is that a second appeal can lie under S. 32 of the Kutch Courts Order, 1948 despite the provisions of S. 100, Civil P. C. but if a second appeal does not lie under S. 32, Kutch Courts Order, 1948, it can lie under S. 100, Civil P. C. on any of the grounds mentioned in that section.

(6) It was the appellants' case that a document in respect of extension of the period of mortgage by 25 years was made. She led secondary evidence alleging that the document was lost. The trial court relying on the evidence led held that a document as alleged by the appellant was executed and it was lost. The District Court did not accept the evidence that document was lost and held that it was neither proved that the document was executed nor was it proved that it was lost. (Reviewing the evidence, his Honour proceeded:) I therefore agree with the lower court in holding that the document neither existed nor was it lost.

(7) It was then contended that plaintiff by his deed had not purchased the equity of redemption. The cultivation rights of the vadi called 'Chas' were acquired by Laljee. The owner was thus in the position of a superior holder entitled to get share in the crop. This right to get share in the crop was called 'Bhog' of the Dhada (Land). What was mortgaged in Samvat 1974 was the Bhog of the Dhada. What was stated in the plaintiff's deed was that "Butanodhado", was mortgaged and its equity of redemption was sold. The contention was that as 'Buta' and 'chas' meant the same thing and as what was mortgaged was 'Bhog' and not 'Buta' nor 'Chas', plaintiff by his sale deed had not acquired the equity of redemption in Bhog. On behalf of the Respondent, it was pointed out that this contention was not taken not only in the memo of appeal but it was not taken before the lower court — nor before the trial court. An appellant is not entitled to urge any ground of objection not set forth in the memo of appeal. No doubt it can be so done by obtaining leave of the Court. But it is evident that plaintiff's right to sue on the basis of the



deed was challenged on various grounds. If a particular ground now sought to be urged was not raised before, the court cannot exercise discretion in favour of an appellant and allow him to raise that point. It was contended that the Court could suo motu raise this point, particularly when it was apparent on the face of the record. What was apparent on the face of the record was otherwise. In plaintiff's deed it was stated that the cultivation rights were with Laljee from the time of the ancestors of the executants. What was left was Bhog. It was further stated that "Eutano Dhado" was mortgaged with Laljee. Apparently Bhog was mortgaged. So what was meant was that Bhog was mortgaged and the equity of redemption was sold to the plaintiff. This contention therefore fails.

(8) It was then contended that there was no evidence to show that the superior holder was entitled to get 1/3rd share of the crop. Now the appellant's husband who was purchaser of tenancy rights and mortgagee of the Bhog right, knew full well about the extent of the right to get share of the crop. In the mortgage deed no specification was made. It appears that Laljee got tenancy rights after the land was converted into vadi. Appellant has not produced the original deed alleging that it was lost along with the deed for extension of the period of the mortgage. The District Court was inclined to think that the document was suppressed by the appellant. There was evidence to show that ordinarily 1/5th share was taken as Bhog but when land was cultivated by irrigation, 1/3rd share was taken. After hearing the learned Advocate for the Appellant, I am not inclined to come to a contrary conclusion.

(9) Lastly it was contended that Bab was not transferred by the deed to the plaintiff. It was not disputed that the mortgagor was entitled to recover 'Bab' (cess) from Laljee despite the mortgage. It is so stated in the mortgage deed. By the deed, the plaintiff's right to Bab was not transferred besides the equity of redemption. It appears that the District Judge did not consider this question when he considered the question about arrears of 'Bab' claimed in the plaint and at the time of passing the final order, he decreed payment of Bab from the date of the decree though in para 10 of his judgment about the decree to be passed he has not said a word about 'Bab'.

(10) Result is that the decree passed by the lower Court is confirmed except in so far as it provides awarding Bab to the plaintiff from the date of the decree. The decree awarding Bab to the plaintiff is set aside. As the appeal substantially fails and is dismissed, appellant to pay cost of Respondent 1 and bear her own. C/R.G.D. Appeal dismissed.

**A.I.R. 1953 KUTCH 26 (Vol. 40, C. N. 15)**

**VAKIL J. C.**

Vishanji Bhanjee, Defendant-Applicant v. Gangashanker Shambhoolal, Plaintiff-Opponent.

Civil Revn. Appln. No. 19 of 1951, D/- 6-12-1951.

**(a) Contract Act (1872), S. 73 — Breach of promise of marriage.**

Though a suit to recover damages for breach of a contract to marry may lie at

the instance of a bride or a bride-groom or persons actually parties to the contract, the fact that there was a just cause or a preferable suitor will be a sufficient answer to a suit for damages by a bride-groom against the father of the bride in which damages were claimed against the father alone and not against the bride. This is on the principle that a father is not bound to perform the agreement if there was a just cause or a preferable suitor was available. If the father does not plead any good cause for retraction, he is liable to pay damages: Case law discussed. (Para 9)

Anno: Contract Act, S. 73 N. 12.

**(b) Contract Act (1872), S. 73 — Breach of promise of marriage — Quantum of damages — No good evidence about loss of reputation — Something by way of solatium and possible loss of reputation should be decreed.**

(Para 10)

Anno: Contract Act, S. 73 N. 12.

**(c) Civil P.C. (1908), S. 115 — Material irregularity in the exercise of jurisdiction — There being broad grounds of probabilities supporting conclusions arrived at by lower Courts — Findings of fact by lower Courts cannot be disputed on ground of material irregularity in the exercise of jurisdiction.**

(Paras 5, 6, 7)

Anno: C.P.C., S. 115 N. 2, 12.

K. N. Mankad, for Applicant; R. R. Thacker, for Opponent.

REFERENCES: Courtwise/Chronological/ Paras ('97) 21 Bom 23 8

('15) 17 Bom LR 225: (AIR 1915 Bom 300) 8, 9

('20) 22 Bom LR 143: (AIR 1920 Bom 225) 8, 9

('41) AIR 1941 Bom 129: (ILR (1941)

Bom 211) 8, 9

('14) AIR 1914 Lah 83: (22 Ind Cas 644) 8

('34) AIR 1934 Lah 544: (152 Ind Cas 913) 8

**ORDER:** This is an application for revision of a decree of the District Court, Kutch, in Civil Application (appeal?) No. 207 of 1950 confirming a decree of the Subordinate Judge, Anjar in Suit No. 77 of 1950.

(2) The facts are that the opponent sued the applicant for recovery of a sum of Rs. 1476-2-0 as price of ornaments and clothes and as damages, on the allegation that the latter committed a breach of an agreement to marry his daughter Nirmala with him. The applicant denied the alleged agreement and contended that his daughter who had attained the age of majority married outside Kutch of her own accord.

(3) The trial court found for the opponent on all questions of agreement, its breach, ornaments, out of pocket expenses and damages and decreed the suit. The decree on appeal was confirmed by the District Court. The applicant has preferred this application for revision of the decree of the District Court.

(4) There being concurrent findings of the courts below on the questions of agreement to marry, its breach, giving of ornaments and incurring of out of pocket expenses, it was not open to the applicant to challenge them in revision. It was urged that the lower Appellate Court disregarded material evidence in holding that ornaments were given to the applicant and hence it was a material irregularity in the exercise of jurisdiction. It was further urged that according to law, applicant was not



liable to pay damages for alleged breach of agreement to marry and there was no evidence to support the finding of out of pocket expenses.

(5) For understanding the first contention, it is necessary to state few facts. According to the opponent betrothal took place in the month of Magh Samvat 1999. The opponent admits that a talk about betrothal took place but as ornaments were to be given and as opponent's father died, nothing further happened in the matter. The applicant's daughter married in Jeth of Smt. 2006, outside Kutch. The Courts below had no hesitation in holding that betrothal had taken place. There are broad grounds of probabilities which support the conclusions arrived at by the Courts below, apart from the question of actual appreciation of evidence of witnesses.

These grounds are that if betrothal did not take place, opponent and applicant's daughter would have been betrothed elsewhere during the period of 7 years that followed the preliminary talk. Moreover, the unusual thing was that applicant's daughter had to be married outside Kutch. The applicant in an unguarded moment blurted out that in his community, breaches of seven betrothals had taken place and his daughter's case was the eighth instance. He stated this fact to show that in none of the seven instances damages were awarded. The applicant's learned advocate tried to explain this inconvenient admission by the applicant as meaning failure of preliminary talk. If that was so, no question of damages arose. Thus the fact found by the court below that betrothal had taken place could not have been challenged on the ground of material irregularity in the exercise of jurisdiction.

(6) Now the fact that betrothal had taken place shows that a breach of the agreement was committed after 7 years when applicant's daughter married outside Kutch. It was admitted by the applicant that in his community it was customary to give ornaments after betrothal. The applicant who alleged that betrothal did not take place as ornaments were not given would not have kept the betrothal for 7 years if ornaments were not given. On the broad ground of probability, appreciation of evidence by the lower courts on the question of giving of the ornaments must be accepted.

It was contended that the District Court, in appreciating evidence ignored some apparent and material facts. These facts are that according to the opponent and one of his witnesses, ornaments were given a few days after betrothal in the month of Magh Samvat 1999 while the goldsmith's bill produced in the case and supported by the evidence of the goldsmith showed that all the ornaments mentioned in the plaint were not ready till the month of Ashad of that year. The other three witnesses of the opponent stated that ornaments except a silver piece were given on the last day of the month of Vaishakh but as opponent's father died on Chaitra Sudi 2nd and as it was stated in the plaint that opponent's father gave ornaments, the District Court got over the evidence of those three witnesses by saying that ornaments were given 2 days before opponent's father died. It was therefore urged that the District Court ignored the circumstances that ornaments were not ready till Ashad and the father of the opponent who died on Chaitra,

Sudi 2nd could not have given ornaments as alleged in the plaint.

(7) It appears from the goldsmith's bill that first three plaint mentioned ornaments were prepared on Falgun Sudi 6th, fourth ornament was prepared on Falgun Sudi 14, fifth one prepared on Vaishakh Sudi 7th and the last silver ornament was prepared in Ashad. The opponent stated that his father died on Chaitra Sudi 2nd of Samvat 1999. It however appears that he had no precise idea about the date on which his father died. The applicant in his examination in chief corrected the opponent by stating that opponent's father died at the end of Samvat 1999 or in the beginning of Samvat 2000. If the Lower Appellate Court had directed its attention to this part of the evidence of the opponent, it would have been obliged to observe that ornaments were given on the last day of Falgun Samvat 1999, viz., 2 days before opponent's father died.

The conclusion arrived at by the lower Appellate Court ran counter to the undisputed documentary evidence that only four pieces of the plaint mentioned ornaments were ready by that time. The fact is that the witnesses examined in the case were deposing to an event which happened 7 years back and they could not have precisely remembered the exact date on which ornaments were given in Samvat 1999 or beginning of Samvat 2002. However this discrepancy was not sufficient for discarding their evidence particularly when it was supported on broad ground of probabilities. I can accept the contention that both the lower courts did not direct themselves to furnishing reason for accepting the evidence despite the apparent discrepancy. But I am not prepared to accept that their appreciation of evidence was erroneous. The betrothal having taken place, it is quite probable that ornaments must have been given or else the betrothal would not have continued for nearly 7 years.

It is significant to note that the applicant's daughter married elsewhere, not because ornaments were not given as it was customary to do, but because she did not like the opponent. I therefore hold that this finding of fact by the two lower courts cannot be disputed on the ground of material irregularity in the exercise of jurisdiction. I further hold that even it can be done, the appreciation of evidence on this question by both the lower courts was correct. The first contention therefore fails.

(8) The trial court awarded the opponent a sum of Rs. 500/- as damages for breach of the agreement to marry. The defence of the applicant was that his daughter married on attaining majority and hence he was not responsible for breach. Apparently the applicant's daughter could not have arranged for marriage outside Kutch without the active aid and support of her father and the conclusion was evident that breach was induced by the applicant. The question is whether damages can be awarded for breach of the agreement to marry and what would be the quantum of damages. The earliest case in Bombay in which something more than nominal damages were awarded against the father of a minor girl is reported in — '*Purushotamdas v. Purshotamdas*', 21 Bom 23. In that case defence was that the girl was unwilling to marry for 3 years. In — '*Khimji v. Narsi*', 17 Bom L R 225 it was held that the father was not bound to perform the agreement if there was just cause or if a



preferable suitor was available. In — 'Balubhai v. Nanalal', 22 Bom L R 143, a good cause for retraction was held sufficient to disentitle plaintiff to recover damages. In that case, one significant fact was that the plaintiffs died during the pendency of suit. In — 'Khimji v. Lalji', AIR 1941 Bom 129 a minor girl was held entitled to sue for damages for breach of an agreement to marry. In a Lahore case Jai Lal J. was inclined to view that such a suit would not lie except between persons who have been betrothed to each other: 'Santu v. Mt. Hardevi', AIR 1934 Lah 544. In an earlier Lahore case reported in — 'Budhu Mal v. Mansha Ram', AIR 1914 Lah 83, it was held that something should be awarded for breach of contract and possible loss of reputation.

(9) It thus appears from the case law discussed above that though a suit to recover damages for breach of a contract to marry may lie at the instance of a bride or a bridegroom or persons actually parties to the contract, the fact that there was a just cause or a preferable suitor will be a sufficient answer to a suit for damages by a bridegroom against the father of the bride in which damages were claimed against the father alone and not against the bride. This is on the principle that a father is not bound to perform the agreement if there was a just cause or a preferable suitor was available.

In — 'Khimjee's case', (AIR 1941 Bom 129) Beaumont C. J. observed that under Hindu Law the contract was conditional on the other party being a suitable spouse at the time when the marriage was to be performed. The learned Advocate for the applicant relied on the cases reported in — 'Khimji v. Narsi', 17 Bom L R 225 and — 'Balubhai v. Nanalal', 22 Bom L R 143. It was not the applicant's defence that there was just cause for the breach or a preferable suitor was available. In — 'Balubhai's case', 22 Bom L R 143, it was held that there was good cause for retraction. The applicant did not plead any good cause for retraction. He is therefore liable to pay damages.

(10) As regards quantum of damages, it is clear that there was hardly any good evidence about loss of reputation. Hence, what should have been decreed was something by way of solatium and possible loss of reputation. I think a sum of Rs. 250/- awarded by way of damages will meet the ends of justice.

(11) As regards the question of out of pocket expenses, there is a general presumption that the sum awarded must have been spent having regard to the fact that betrothal remained in existence for 7 years.

(12) The application substantially fails except that the damages awarded are reduced to Rs. 250. The decree of the courts below is confirmed except that the sum awarded for damages is reduced to Rs. 250. The rest of the application is dismissed. Applicant to pay opponent's costs.

C/D.H.

Order accordingly.

**A.I.R. 1953 KUTCH 28 (Vol. 40, C. N. 16)**

**VAKIL J. C.**

Manilal Deepchand and another, Appellants v. Kasamali Bhachu and others, Respondents.

Second Appeal No. 5 of 1952, D/- 12-9-1952.

(a) **Civil P.C. (1908), S. 96 and O. 41, R. 2 — Competency of appeal.**

An objection that the appellant in the lower appellate Court was not competent to file an appeal can be raised for the first time in the second appeal. Also objection that no appeal lay to the lower appellate Court under S. 96, as there was no decree defined by law, can be raised for the first time in second appeal. AIR 1934 All 677, Rel. on. (Para 4)

Anno: C.P.C., S. 96, N. 2; O. 41 R. 2 N. 1.

(b) **Practice — Practice opposed to the law applied cannot be allowed to prevail.**

(Para 5)

(c) **Civil P.C. (1908), S. 96 — Jurisdiction to entertain appeal.**

Estoppel or waiver cannot confer jurisdiction on an appellate Court to entertain an appeal if there is no decree as defined by law against which an appeal under S. 96, can be preferred. (Para 5)

Anno: C.P.C., S. 96 N. 4.

(d) **Civil P.C. (1908), S. 2(2) — "Preliminary decree".**

A preliminary decree cannot be called a decree when it is to operate on a necessary party being brought on record.

(Para 6)

Anno: C.P.C., S. 2(2) N. 10.

(e) **Civil P.C. (1908), S. 2(2) and O. 34, R. 7 — Preliminary decree in redemption suit.**

The definition of "decree" must be taken with the provisions of the Code regarding the stage at which a decree is to be prepared and the essentials of such a decree. In the case of redemption suit, there is specific provision in O. 34, R. 7 requiring the Court to pass a preliminary decree on definite lines. Where the formal expression given to adjudication of a matter in controversy does not comply with the provision of R. 7 it does not amount to a preliminary decree. Further, a second preliminary decree in which the amount found due is incorporated and made payable with a date to be fixed is not contemplated: AIR 1934 Pat 97(2); AIR 1943 Nag 204 (FB); AIR 1925 All 707 and AIR 1924 Oudh 140, Rel. on. AIR 1934 Oudh 307 and AIR 1943 Mad 767, Distinguished.

(Para 7)

Anno: C.P.C., S. 2(2) N. 10.

K. N. Mankad, for Appellants; K. K. Chhaya and R. R. Thacker, for Respondents.

**REFERENCES:** Courtwise/Chronological/ Paras

('25) AIR 1925 All 707; (47 All 803)	8
('34) AIR 1934 All 677; (151 Ind Cas 25)	4
('14) AIR 1914 Bom 149; (39 Bom 339 FB)	8
('21) AIR 1921 Bom 220; (45 Bom 627)	8
('43) AIR 1943 Mad 767; (211 Ind Cas 63)	7
('43) AIR 1943 Nag 204; (ILR (1943) Nag 241 FB)	8
('24) AIR 1924 Oudh 140; (77 Ind Cas 346)	8
('34) AIR 1934 Oudh 307; (9 Luck 701)	7
('34) AIR 1934 Pat 97 (2); (149 Ind Cas 311)	8

**JUDGMENT:** This is a second appeal from the decree of the District Court, Kutch, in Regular Civil Appeal No. 110 of 1951, reversing the preliminary decree of the Court of the Subordinate Judge, Bhachau, in Regular Suit No. 61 of 1950 and dismissing the appellants' suit.

(2) The respondents denied appellants' right to redeem and claimed 3000 Kories as 'Khara-



jat'. The trial Court held that the appellants & one Bai Santok were entitled to redeem. Instead of directing the appellants to join Bai Santok as a party to the suit & then adjudicating on the question of the amount due to the mortgagees for the principal amount, costs of the suit and for 'kharkharajat', the trial Court made the following order:

"Plaintiffs can redeem the suit shop on making Santokbai, widow of Kubadia Pomshi Umarsey, as a person having interest on the mortgage security, a party to the suit and on payment of 801 Kories, being the principal amount of the mortgage and any sum found due to the defendants for 'kharkharajat'."

This order was incorporated in a decree drawn up.

(3) The respondents appealed to the District Court, Kutch, from the decree stated above. The District Court reversed the decree of the trial Court and dismissed the appellants' suit with costs throughout. Against the decree of the District Court, the appellants have preferred the present appeal under S. 100, Civil P. C.

(4) It was urged on behalf of the appellants that the decree made by the trial Court was not a preliminary decree as provided in O. 34, R. 7, Civil P. C., and therefore, the respondents were not entitled to prefer an appeal under S. 96, Civil P. C., against that decree to the lower appellate Court. In other words, the contention was that there being no decree, the lower appellate Court erred in entertaining the appeal and in reversing the decree. On behalf of the respondents, it was contended that no such contention was raised by the appellants in the lower appellate Court. The appellants had not raised this contention in the memo of their appeal. By an order dated 16-8-52, made under O. 41, R. 2, Civil P. C., they were permitted to raise this contention. It was pointed out in the order made that an objection that the appellant in the lower appellate Court was not competent to file an appeal could be raised for the first time in this second appeal and the case reported in — 'Govindchand v. Gajadhar', AIR 1934 All 677 was cited in support of that proposition of law. It was further pointed out that an objection that no appeal lay to the lower appellate Court under S. 96, Civil P. C., as there was no decree defined by law, could be raised for the first time in second appeal. It is true that the appellants supported the decree of the trial Court in the lower appellate Court but having lost in that Court, they now contend that the appeal was not competent. Despite the fact that the appellants did not raise this contention in the lower appellate Court, they were allowed to do so for the simple reason that if there was no preliminary decree in the eye of law, the appeal was incompetent.

(5) It was pointed out that in this State there was an established practice to make such preliminary decrees. Whatever may be the legal sanctity accorded to such decrees in the past, it is evident that after Civil P. C., (Act 5 of 1908) was applied, a preliminary decree must comply with the provisions of the Code. A practice opposed to the law applied cannot be allowed to prevail. It appears that no objection was taken in the lower appellate Court as the implications of a preliminary decree as provided by the Code were not appreciated. If

according to the Code, the decree passed by the trial Court was in no sense a preliminary decree, it would be futile to argue that such was the practice in the past. At the most, the appellants who did not urge the point before the lower appellate Court can be deprived of their costs. But estoppel or waiver cannot confer jurisdiction on the lower appellate Court to entertain an appeal if there was no decree as defined by law against which an appeal under S. 96, Civil P. C. could be preferred.

(6) First question is whether there was an adjudication conclusively determining the rights of the parties with regard to all or any of the matters in controversy. It was held by the trial Court that Santokbai was a necessary party to the suit as a person interested in the equity of redemption. Santokbai being not a party to the suit, no adjudication made in her absence, would bind her. To say that redemption could be had after making Santokbai a party is not conclusive determination of the rights of parties. Coming to a preliminary decree for redemption, it is apparent that it can be made if a plaintiff succeeds and if Santokbai was a necessary party to the suit, it cannot be said that plaintiff had succeeded till Santokbai was made a party. The preliminary decree cannot be called a decree when it is to operate on a necessary party being brought on record.

(7) It was contended that formal expression given to adjudication of any of the matters in controversy between the parties would be a decree as defined by law and in this case the adjudication was that the appellants were entitled to redeem. The Chief Court of Oudh in — 'Mahmod Sadiq v. Fakhr Jahan Begum', AIR 1934 Oudh 307 held a formal expression of the plaintiffs' right to contribution technically a preliminary decree as only thing remained was to find out the amount due. The Madras High Court, in — 'Venkayamma v. Ramayya', AIR 1943 Mad 767, held formal expression of adjudication on three out of six issues in a case a decree. These cases proceed on the interpretation of the expression "all or any of the matters in controversy". Whether by defining the term 'decree' in the manner done, it was intended that an appeal be heard piece-meal though the scheme of the Code is against it, is a bigger question which does not require to be decided in this case. But the said definition must be taken with the provisions of the Code regarding the stage at which a decree is to be prepared and the essentials of such a decree. In the case of redemption suit, there is specific provision in O. 34, R. 7, Civil P. C., requiring the Court to pass a preliminary decree on definite lines. The stage is the stage when the amount due for principal and interest on the mortgage, the costs of the suit if awarded and costs and other expenses properly incurred by the mortgagee on the mortgaged property is found due so that it could be declared as due or when a direction for taking accounts in respect of them could be made so that the amount so found due be made payable by the mortgagor in the preliminary decree. A second preliminary decree in which the amount found due is incorporated & made payable within a date to be fixed is not contemplated. Then the defined lines are that consequences of payment or non-payment be stated in the preliminary decree. An order directing a suit to proceed further for taking



account of the amount due may be regarded as a preliminary decree in cases falling under O. 20, R. 16, but it cannot be called a preliminary decree in a redemption suit.

(8) There are respectable authorities for the propositions of law stated in the preceding para; vide observations made by the Patna High Court in — 'Dhup Panday v. Narbadeshwar Prasad Narain Singh', AIR 1934 Pat 97(2) following — 'Channalswami v. Gangadharappa', AIR 1914 Bom 149 (FB) and — 'Dattatray v. Radhabai', AIR 1921 Bom 220 and by the Nagpur High Court in — 'Baliram Ganpatram v. Manohar Damodhar', AIR 1943 Nag 204 (FB). The Allahabad High Court in — 'Naunihal Singh v. A. G. Skinner', AIR 1925 All 707 observed that there could be no objection to the passing of an interlocutory order for taking accounts but it could not be embodied in the form of a decree as the law did not contemplate such procedure in a suit for redemption. Similar observations were made by the Judicial Commissioner, Oudh, in — 'Mohkam Singh v. Thakur Chandra Pal Singh', AIR 1924 Oudh 140.

(9) It must therefore be held that the so-called preliminary decree made by the trial Court was not a preliminary decree defined by law. The respondents were not entitled to prefer an appeal from that decree and the lower appellate Court was not entitled to entertain the appeal. Result is that the decree made by the lower appellate Court is set aside and the suit is remanded back to the trial Court for disposal in accordance with law in the light of the observations made in this judgment. There will be no order as to costs in this appeal except court-fees to the extent refunded. The costs in the lower appellate Court to be costs in the cause.

B/V.S.B.

Case remanded.

**A.I.R. 1953 KUTCH 30 (Vol. 40, C. N. 17)**  
**VAKIL J. C.**

Kumverji Shamji, Defendant-Applicant v. Jivandas Hirji, Plaintiff-Opponent.

Civil Review Appln. No. 2 of 1951, D/- 22-11-1951.

**(a) Civil P. C. (1908), O. 47, R. 1 — Error or mistake apparent on face of record.**

Where a judgment proceeds on an erroneous assumption that a certain contention raised by a defendant was found against him by the trial Court and as it was not raised by him before the High Court in revision, the High Court was entitled to decree the suit entirely on a finding on the other question of limitation in favour of the plaintiff, it is an error or mistake apparent on the face of record. (Para 5)

Anno: C.P.C., O. 47 R. 1 N. 15.

**(b) Civil P. C. (1908), O. 47, R. 1 — Sufficient reason — Re-arguing same question in different perspective.**

Where a question raised in review was discussed at length in the light of the arguments submitted before the High Court in revision, the applicant cannot be allowed to re-argue the question in a different perspective. AIR 1928 Rang 34, Ref. to. (Para 7)

Premji Bhawanji, for Applicant; Soorji Umarshi, for Opponent.

REFERENCES: Courtwise/Chronological/ Paras  
(22) AIR 1922 PC 112: (3 Lah 127) 7  
(28) AIR 1928 Rang 34: (5 Rang 699) 7

ORDER: This is an application under O. 47, R. 1, Civil P. C., for review of a judgment dated 20-2-1951 of this Court in Civil Revision Application No. 184 of 1950 by which a decree dated 27-7-1950 of the District Court, Kutch in regular appeal No. 8 of 1950 confirming a decree of the Sub-Judge, Bhuj, in suit No. 16 of 1949, was set aside and a decree for

"the plaintiffs prayed for limited to the estate of the defendant's father in defendant's hand, which has not been duly disposed of. The defendant shall pay the plaintiff's costs throughout, including the costs of this revision"

was passed.

(2) Suit No. 16 of 1949 was brought by the opponent to recover from the applicant, to the extent of the estate of his father in his hands, a sum of 'Kories' 2635/- on the basis of a loan alleged to have been made by the father of the opponent to the father of the applicant. It was alleged that 'vahivat' continued till 1975 and hence the suit was in time. The sum of 'Kories' 2635/- claimed was partly for principal and partly for interest. The applicant resisted the suit on various grounds out of which two grounds, material for disposal of the present application need be stated. The first ground was that the suit was barred by limitation and the second was that plaintiff was not entitled to interest as the debt was an old one.

The trial Court found for the defendant on these grounds and dismissed the suit. The plaintiff appealed to the District Court, Kutch. The District Court decided the appeal on the question of limitation only. It found that the suit was barred by limitation. It therefore affirmed the decree of the trial Court and dismissed the suit. Against the decree of the District Court, an application to revise the decree was preferred to this Court. This court allowed the application and made a decree stated in para 1 above.

(3) The applicant defendant has now preferred the present application for review under O. 47, R. 1, Civil P. C. Two contentions were urged before me. First was that this Court committed an error or mistake apparent on the face of record in decreeing plaintiff's suit after deciding the question of limitation in her favour without deciding the question of interest in respect of which a finding was recorded by the trial Court in favour of the defendant. Second contention was that this Court did not properly appreciate the custom which was considered in deciding the question of limitation and hence there was sufficient reason for reviewing the judgment.

(4) As regards the first contention, it is apparent on the face of the record that besides limitation, defendant had contended that plaintiff was not entitled to get interest as it was an old debt. This contention was accepted by the trial Court and the issue covering this contention was found in defendant's favour. In appeal the District Court considered the contention of limitation only. It did not find it necessary to consider the



other contention about interest as it held that suit was barred by limitation. This Court found that the suit was not barred by limitation. This Court had therefore to consider whether plaintiff was not entitled to get interest as found by the trial Court. This Court in para 1 of its judgment observed that defendant had put forward other defence besides limitation and these defences were rejected by the lower court. This Court over-looked the fact that the contention that a plaintiff was not entitled to get interest was found by the trial court in defendant's favour. Having over-looked this fact, this court passed a decree as prayed for in favour of the opponent on finding the question of limitation in her favour.

(5) Where a judgment proceeds on an erroneous assumption that a certain contention raised by a defendant was found against him by the trial court and as it was not raised by him before the High Court in revision, the High Court was entitled to decree the suit entirely on a finding on the other question of limitation in favour of the plaintiff, it is an error or mistake apparent on the face of record. In this case two questions were to be considered. They are that the suit was barred by limitation and that plaintiff was not entitled to get interest. The trial court found both these contentions against the plaintiff. When this court found that the suit was not barred by limitation, it had to consider whether plaintiff was entitled to get interest. Instead, this court erroneously assumed that this question was decided against the defendant. It was a material fact.

Naturally the applicant did not agitate this question in revision as the finding of the trial court was in his favour. The learned Advocate for the opponent says that he had agitated the question. In any case, the court assumed though erroneously that it was decided against the defendant and hence it was not considered in the judgment. I therefore hold that the erroneous assumption by the Court that this contention was decided against the defendant which resulted in its being not considered by it in revision was an error apparent on the face of record and the applicant is entitled to a review of the judgment so far as the claim of the interest is concerned.

(6) As regards the second contention, the learned Advocate for the applicant could not have supported it on the ground that there was some mistake or error apparent on the face of record. The exact point is that there was no law of limitation in Kutch State till Samvat 2004. Before this date suits for recovery of a personal debt would be barred by the customary law of Kutch 35 years after the 'vahivat' of the debt had stopped. Plaintiff alleged that in Samvat 1972 i.e., within 9 years from the date of the original loan, defendant's father gave him a 'hundi' of Kories 500/- drawn on one Naranji. Plaintiff's father credited to the defendant's father's account this sum and debited Naranji with the sum on the latter making an endorsement of presentation on the hundi.

This court held that this transaction amounted to 'vahiva' within the meaning of that term used in S. 547 of a book titled "Collection of Native Customs". It was conceded that the customs mentioned in this book were judicially recognized. It was urged that this court erred in interpreting the word 'vahivat' as payment by book adjustment entries. As stated

above it could not have been urged that there was error of law apparent on the face of record. What was urged was that there was sufficient reason to review the judgment on this ground as error was committed in properly appreciating the custom as published in the book mentioned above.

(7) The expression "sufficient reason" used in R. 1, O. 47, Civil P. C. has been judicially interpreted by the then highest court in — 'Chhajju Ram v. Neki', AIR 1922 PC 112 to mean a reason sufficient on the grounds at least analogous to those specified immediately previously. Now it will appear from the judgment of this court that the question now raised was discussed at length in the light of arguments submitted before this court. There was no failure to consider any important evidence or fact. Having regard to the fact that Limitation Act is now made applicable, it cannot be urged that the point involved is of general importance. What was argued was that word 'vahivat' means actual payment and not merely a 'havala' transaction effected. Now this contention should have been raised before this court when the application for revision was being argued. If it was raised it is apparent that it was not accepted. This court observed as under:

"This term is more comprehensive and may include other instances such as an attempted payment which might not have resulted in actual payment."

It is thus apparent this contention was considered. This is therefore a case in which review is asked to enable the applicant to raise points which he could and which he had raised in the revision application. In other words another opportunity is being sought to convince this court that the applicant's contention is worth accepting. This would mean that this court must sit in judgment over its judgment and not review it. It may be that this particular point was not placed before the court in the manner in which it is now sought to be placed if an opportunity is given. In — 'U. Po Thein v. O. A. O. K. R. M. Firm', AIR 1928 Rang 34 it was held that the ground that a point was not fully argued is not sufficient ground for review. It follows that the contention that the applicant now be allowed to reargue the matter in a different perspective cannot be allowed. Hence the application for review to this extent will be dismissed.

(8) Result is that the application is allowed to the extent the judgment of this court awards interest to the plaintiff as claimed in the suit. The application for review of the judgment for other part of the claim is dismissed. A note be made accordingly in the Register of Revision applications and the lower courts be informed of this order. The revision application be fixed for hearing so far as the question of interest allowed by the judgment is concerned. No order as to costs.

C/V.R.B.

Order accordingly.

A.I.R. 1953 KUTCH 31 (Vol. 40, C. N. 18)

VAKIL J. C.

Pratapsangji Khanji, Applicant v. Gulabsinhji and others, Opponents.

Misc. Civil Appln. No. 2 of 1952, D/- 5-12-1952.

(a) Limitation Act (1908), S. 12 — Computation.



In computing the time for appeals from decree, it is legitimate (in a proper case) to exclude the period requisite for obtaining a copy of the decree even when no application for copy was made till after the expiration of time for appeal. AIR 1937 Bom 162 (FB), Rel. on. (Para 4) Anno: Lim. Act, S. 12 N. 7.

(b) Limitation Act (1908), S. 5 — Applies to application for leave to appeal as pauper — Civil P.C. (1908), O. 44, R. 1). AIR 1928 All 499, Rel. on and AIR 1927 Nag 197, Dissented from. (Para 5)

Anno: Lim. Act, S. 5 N. 29; Civil P.C., O. 44, R. 1, N. 12.

(c) Limitation Act (1908), S. 5 — Sufficient cause.

Application for leave to appeal in 'forma pauperis' by a lady belonging to family of Jagirdar of Chitrod, not possibly knowing distinction between period of limitation for appeal and that for leave to appeal in 'forma pauperis' — Delay of one day condoned. (Para 6)

Anno: Lim. Act, S. 5 N. 25.

K. D. Shah, for Applicant; R. R. Thacker (for No. 1), K. N. Mankad (for No. 2), U. K. Gor (for Nos. 3 and 4) and G. U. Bhansali (for No. 5), for Opponents.

REFERENCES: Courtwise/Chronological/ Paras  
(23) AIR 1928 All 499: (111 Ind Cas 655) 5  
(37) AIR 1937 Bom 162: (ILR (1937) Bom 443 FB) 4

(27) AIR 1927 Nag 197: (101 Ind Cas 320) 5

ORDER: This is an application for leave to appeal in forma pauperis. The applicant filed application Ex. 6 for condoning delay of 16 days in filing the application for leave to appeal as a pauper. Notice of this application was given to the opponents for decision of the question under S. 5, Limitation Act by parties. The opponents except the sons of the applicant have opposed condonation.

(2) The question to be determined is whether there is sufficient cause. The applicant has filed an affidavit stating that she was ignorant of the fact that the period of limitation prescribed for making an application to appeal as a pauper was thirty days though the period for preferring an appeal to the Court of the Judicial Commissioner was ninety days. There was no counter affidavit filed by the contesting opponents.

(3) Now ignorance of law cannot by itself be regarded as sufficient cause. But the fact is that there is no delay of sixteen days as alleged by the applicant. The decree was made on 26-2-52 and the application was made on 10-4-52. Out of the total period of 43 days, the applicant is entitled to exclude 12 days spent for obtaining a copy of the decree. What happened was that the applicant applied for certified copies on 29-3-52, that is, on 31st day, computed from the date of the decree. As the period to make application for leave to appeal as a pauper expired on 27th March, the application for copies was apparently made after the expiry of the period of limitation. On the assumption that for this reason the applicant was not entitled to exclusion of time under S. 12(2), Limitation Act, it was stated that delay of 16 days has taken place. Even the

period of 16 days was erroneously computed as the month of February had only 29 days. Now the period of limitation is to be computed as under:

	Total days.
Date of the application 10-4-52 )	3 . . February.
Date of the decree 26-2-52 )	31 . . March.
	9 . . April.
	43 days.
Exclusion of time — S. 12 (2):	
Date of the application for copy	—29-3-52) —12 days
Date on which copy was delivered	—10-4-52) (deduct)
	31 days.
Deduct period of 30 days for limitation )	—30 days.
	1 day's delay.

(4) In — 'Murlidhar v. Motilal', AIR 1937 Bom 162 (FB), it was held that in computing the time for appeals from a decree, it is legitimate (in a proper case) to exclude the period requisite for obtaining a copy of the decree even when no application for copy was made till after the expiration of time for appeal. In arriving at this conclusion the Bench reversed the two previous decisions to the contrary of the same Court. With respect I follow the principle laid down in this ruling. It shows that there was a delay for one day only.

(5) Next question for consideration was whether S. 5, Limitation Act is applicable to an application for leave to appeal as a pauper. Leave to appeal as a pauper is an application for leave to appeal. This was the view accepted in — 'Ram Charan v. Bansidhar', AIR 1928 All 499. The contrary view adopted in — 'Sabuddin v. Pundlik', AIR 1927 Nag 197 cannot be accepted as it is based on a decision of the Calcutta High Court decided before the amendment of the section by which 'application for leave to appeal' was introduced. It must therefore be held that S. 5 is applicable to application for leave to appeal as a pauper.

(6) Now it cannot be denied that the Limitation Act was made applicable to this State in 1949 and as such there is no recent change in the law on the subject. But the fact is that the applicant is a lady belonging to the family of a Jagirdar of Chitrod and she could not have known the distinction between period of limitation for appeal and period of limitation for leave to appeal when few appeals are filed in pauperism. As the delay is for one day, discretion can be better exercised in excusing it.

(7) Result is that the application is held to have been filed in time. The question involved is whether the applicant is entitled to a share on partition effected or whether she is only entitled to maintenance. There is therefore an important question of law to be considered. I therefore see no reason to reject the application. It is admitted under O. 44, R. 2 and it is directed that an inquiry as to pauperism of the applicant be made by the trial Court (District Court). The trial Court shall complete the inquiry within 3 months and certify its finding to this Court within that time.

B/R.G.D.

Order accordingly.



A. I. R. 1953 KUTCH 33 (Vol. 40, C. N. 19)

VAKIL J. C.

Devraj Hira and others, Defendants-Applicants v. Karson Naran, Plaintiff-Opponent.

Civ. Revn. Appln. No. 142 of 1951, D/- 22-2-1952.

(a) Easements Act (1882), S. 12 — Parties claiming only occupancy rights in land and vadi can possess right of easement — Suit to restrain defendant from obstructing plaintiff's right of way — Government is not necessary party (Civil P. C. (1903), O. 1 R. 10).

(Para 5)

Anno: Easements Act, S. 12 N. 1; Civil P.C., O. 1 R. 10 N. 25.

(b) Easements Act (1882), Ss. 13, 23 and 20 — Right of easement of way claimed on basis of express grant by partition — No question of unreasonableness of right arises — Fact that plaintiff can make use of another equally convenient way is no answer to the claim.

(Para 5)

Anno: Easements Act, S. 13 N. 2; S. 23 N. 1 S. 20 N. 1.

(c) Easements Act (1882), Ss. 20 and 22 — Acquisition of easement of right of way by express grant — Servient owner cannot compel the owner of the dominant tenement to accept a different way. AIR 1943 Mad 741, Rel. on.

(Para 6)

Anno: Easements Act, S. 22 N. 1; S. 20 N. 1.

K. N. Mankad, for Applicants; S. U. Bhanushali, for Opponent.

REFERENCES: Courtwise/Chronological/ Paras  
(22) AIR 1922 Bom 407: (46 Bom 910) 6  
(30) 32 Bom LR 1001: (127 Ind Cas 906) 7  
(43) AIR 1943 Mad 741: (1943-2 Mad LJ 519) 6

ORDER: This is an application for revision of a decree passed by the Additional Subordinate Judge, Bhuj, in Regular Civil Suit No. 156 of 1949, confirmed by the District Court in Regular Appeal No. 54 of 1951.

(2) Suit No. 156 of 1949 was brought by the opponent to obtain a perpetual injunction restraining the applicants from obstructing him in passing over their fields with bullock carts etc., on a defined path way for going to his field and in carrying water over their fields to his field in a defined channel. Plaintiff claimed the aforesaid right on the basis of an express grant made when a partition of the joint family properties was effected in Samvat 1948 and alleged obstruction by the defendants in the exercise of the said right.

(3) Defendants by their written statement denied the alleged grant, pointed out a different path way to go to the plaintiff's field, contended that Government was a necessary party to the suit, disputed the Court's jurisdiction to hear the suit and in the alternative contended that the right was extinguished by non-user for more than 20 years.

(4) The trial Court decided all the contentions in plaintiff's favour except his right to carry a water course and decreed the suit directing that the question about the width of the way be determined in execution. Plaintiff and defendant both preferred appeals to the District Court. The District Court dismissed both the appeals and confirmed the decree of the trial Court.

(5) Plaintiff has, therefore, preferred the present application for revision on the grounds that both the parties had mere occupancy

rights in the lands and hence the Court had no jurisdiction to entertain the suit; that no right of easement to have a path way through the centre of the applicants' vadi could be claimed and that the opponent had other path way which he must use. It is not necessary to consider all these grounds in detail as they are not seriously pressed at the hearing by the learned pleader for the applicants. The vadi and the field were the joint family property of the parties. In a partition effected, vadi was assigned to the share of defendants and the field was assigned to the share of the plaintiff. At that time, the right of way claimed was expressly granted. It may be that the parties have only occupancy rights in the field and the vadi. Even an occupier of land can possess a right of easement. The Court has, therefore, jurisdiction to decide the question raised and Government is not a necessary party to such a suit. As the right was claimed on the basis of an express grant, the question about unreasonableness of the right claimed did not arise. The fact that the plaintiff can make use of another equally convenient way is no answer to such a suit based on express grant.

(6) The learned pleader for the applicants contended that under S. 22, Indian Easements Act, applicants were entitled to demarcate a passage which was least onerous to them and that the opponent should enter their vadi from its north-east corner to go to his field. Illustration A to S. 22 of the Act provides that if A had a right of way over B's field, A must enter the way at either end and not at any intermediate point. Similarly, where between two termini, a way is not a demarcated one, the servient owner is entitled to demarcate it so as to be least onerous to him. But where a defined way is claimed to have been acquired by express grant, the servient owner cannot compel the owner of the dominant tenement to accept a different way. Reason is that the provision of S. 22 of the Act can apply, where exact way to be taken over the premises of the servient owner has not been ascertained, vide — *Dhundaraj Balkrishna v. Ramchandra Gangadhar*, AIR 1922 Bom 407. In — *Venkatarama Ayyar v. Rangaswamy Ayyar*, AIR 1943 Mad 741, it was held that in case of an easement by grant, the servient owner was not entitled to substitute a new path way for the old one and to ask the dominant owner to take a substituted path. Mr. Joshi in his work on Easements and Licenses (2nd Edition) has remarked at page 179 that the servient owner has the option of confinement which he could exercise at the earliest opportunity after completion of prescriptive period. In case of an easement of a defined way acquired by grant, there is no question of exercising option of confinement.

(7) If the applicants had any such option of confinement, it should have been exercised at the earliest opportunity when the suit was filed. No such offer for the exercise of option of confinement was made in the written statement of the applicants. If such an offer was made, the trial Court would have considered whether it could be allowed without detriment to the dominant owner. It was urged that the option could be exercised at any time and the matter, if necessary, be remanded to the trial Court for consideration of this question. It is true that in — *Purshottam v. Kasturbhai*, 32 Bom L R 1001, a case under S. 23 of the Act,



the High Court directed that it would be permissible for the defendant as owner of servient tenement under S. 22 to demarcate a passage of eight feet in a manner so as to be least onerous to him. It does not appear from the reported facts of this case whether the way claimed was a defined one between two termini. The facts of this case clearly show that the way claimed lies between the vadi land divided in two survey numbers on their borders. It was an established path. It appears that the question of demarcating the path arose in the Bombay case as eight feet of width for the path was allowed. Moreover, the altered way suggested is from the north-eastern side, access to which could be had by passing over other land. Hence, apart from the question of detriment to the exercise of the right, it may become an impracticable proposition.

(8) Result is that the application fails and it is dismissed with costs.

C/R.G.D.

Application dismissed.

**A. I. R. 1953 KUTCH 34 (Vol. 40, C. N. 20)**

VAKIL J. C.

Dharshi Tulsidas's widow Radhabai, Plaintiff-Applicant v. Pathai Punja being deceased heirs Lalji Vithaldas and others, Defendants-Opponents.

Civil Revn. Appln. No. 114 of 1951, D/- 9-11-1951.

**Civil P.C. (1908), O. 21 R. 66(2)(c) — Immovable property of judgment-debtor attached in execution — Application by A under O. 21 R. 58 of Code — Allegation that he had secured debt on property attached — Order that mortgage debt together with 'Kharkharjat' mentioned in mortgage deed be declared in sale proclamation — A's legal representatives on his death applying for specifying 'Kharkharjat' amount in sale proclamation — Specification ordered — Fact that decree-holder did not admit claim also ordered to be stated — Order held should be set aside and encumbrance as per previous order be mentioned in sale-proclamation.**

(Para 4)

Anno: C.P.C., O. 21 R. 66 N. 11.

K. K. Chhaya, for Applicant; K. N. Mankad, for Opponent 4.

**ORDER:** This is an application for revision of an order dated 20-7-1951 made by the Sub-Judge, Lakhapat in an execution proceeding which was started in St. 2000 (1944 A.D.) but which was lately given No. 8 of 1951.

(2) The facts are that the applicant obtained a decree for payment of money against opponent 4 as legal representative of one Ramji Mulji and in execution of that decree attached immovable property belonging to the deceased debtor for sale. One Pathai Poonja whose legal representatives are opponents 1 to 3 made an application in that execution proceeding under O. 21, R. 58, Civil P.C. alleging that he had a secured debt on the property attached to the extent of 4250/- Kories. Pathai Poonja produced two documents in that proceeding. One document was a registered mortgage deed for Kories 1000/- and another document was an unregistered document for 3250/- Kories. A moiety of the consideration in the second deed as stated in it was paid in cash to the mortgagor and second moiety was due to the mortgagee for expenses incurred in repairing the property mortgaged.

The Court passed an order presumably under O. 21, R. 62, Civil P.C. that the mortgage debt of 1000/- Kories together with 'Kharkharjat' mentioned in the mortgage deed be declared in the sale proclamation. In other words Pathai Poonja's claim to the extent of 1000/- Kories as mortgage debt together with such sum of money to which he might be entitled in accordance with the terms of the mortgage bond as spent for effecting repairs etc., on the property was allowed. The claim to 3250/- Kories due on the unregistered deed was not allowed. Pathai Poonja then filed a regular suit for establishment of his claim rejected. He unsuccessfully pursued the litigation to the highest Court in the State.

Opponents 1, 2, 3 then made an application to the lower Court in the execution proceeding that in sale proclamation it be mentioned that they were entitled to get 1632/4 Kories as 'Kharkharajat'. The application was made presumably under O. 21, R. 66, Civil P.C. The applicant did not admit this claim and pointed out this very sum was mentioned as part of the consideration of the unregistered deed and Pathai Poonja's claim to it was rejected in the miscellaneous application as well as by all the three Courts in a regular suit filed. The Court made an order that in the sale proclamation the fact that opponents 1 to 3 claimed that much amount due on the property be stated and it be also stated that the present applicant did not admit the claim. It is against this order that the present application for revision is preferred.

(3) The learned Advocate for the applicant contended that as Pathai Poonja's claim petition was rejected and as the suit filed by him was finally decided against him, his legal representatives were not entitled to re-agitate the same matter over again and the lower Court erred in making the order under revision. It is true that Pathai Poonja's claim petition on the basis of the unregistered mortgage bond was rejected. The rejection was obviously due to the fact that there was no mortgage in the eye of law as it was not evidenced by a registered instrument.

What was urged by the learned Advocate for the opponents was that the debt existed and so far as 'Kharkharajat' amount which formed moiety of the consideration of the unregistered mortgage bond was concerned, the mortgagee was entitled to recover it in accordance with law along with the mortgage property. The learned Advocate for the applicant submitted that the lower Court in its first order had stated that mortgage debt of 1000/- Kories together with 'Kharkharajat' as mentioned in it be shown in the sale proclamation and the applicant was bound by that order. What he contended was that 'Kharkharajat' amount as stated by opponents 1 to 3 should not have been specified to be noticed in the sale proclamation.

It is true that the lower Court had further ordered that it be stated in the sale proclamation that the applicant did not accept that amount. It was, therefore, contended by the learned Advocate for the opponents that applicant was not prejudiced. It is not necessary for me to say how the applicant is prejudiced but there is no reason why in settling the terms of the sale proclamation the Court should go beyond the order first made by the Court in deciding Pathai Poonja's claim petition. It could not have been argued that the



said order is not now binding on opponents 1 to 3. It is not necessary to unfold implications of that order for greater specifications. It was argued by the learned Advocate for the opponents that it was necessary to enable the intending buyers to know the value of the property. As the amount is not settled it might cause prejudice to the applicant. Moreover terms of the sale proclamation have been already settled before and a sale proclamation was issued. After a protracted unsuccessful litigation the opponents cannot say that now under O. 21, R. 66, Civil P.C. a specification as desired by them should be made.

(4) Result is that application is allowed, Rule is made absolute and the order made by the lower Court is set aside. It is directed that an encumbrance as per order made by the Court in the claim petition of Pathai Poonja be mentioned in the sale proclamation. Opponents to pay the applicant's costs.

C/V.R.B.

Application allowed.

**A. I. R. 1953 KUTCH 35 (Vol. 40, C. N. 21)**

VAKIL J. C.

Dangar Bharmal Hadhu, Plaintiff-Applicant v. Soni Devkaran Raghavji and others, Defendants-Opponents.

Civil Revn. Appln. No. 70 of 1952, D/- 30-12-1952.

**Civil P.C. (1908), O. 23, R. 1 — Withdrawal of suit.**

Applicant-plaintiff applying for withdrawal of suit alleging that opponents 2 to 4, his co-plaintiffs were not necessary parties — Co-plaintiffs not giving consent to withdrawal of suit — Court should have dismissed application under O. 23, R. 1(4) — Instead, Court considering that application as for withdrawal from suit and transposing applicant as co-defendant — Order was erroneous and liable to be set aside — Subsequent prayer in revision to allow applicant to withdraw from suit was not maintainable — (Distinction drawn between application for withdrawal of suit and application for withdrawal from suit).

(Paras 5, 6, 7)

Anno: Civil P. C., O. 23 R. 1, N. 19, 27 28.

P. P. Vaidya, for Applicant; K. N. Mankad, for Opponent No. 2.

**REFERENCE.....**

(43) AIR 1943 Cal 427: (ILR (1943) 1 Cal 205)

**JUDGMENT:** This is an application for revision of an order made by the Subordinate Judge, Anjar on an application for withdrawal of Suit No. 19 of 1952 brought by the applicant and opponents 2 to 4 against opponent 1 for redemption of a mortgage.

(2) It was alleged in the plaint that the grandfather of the applicant had mortgaged the suit property with the grandfather of opponent 1 and that opponents 2 to 4 were joined as co-plaintiffs as the applicant had agreed to mortgage with the latter one of the mortgaged lands. Opponent 1 resisted the suit raising various contentions of which one was that opponents 2 to 4 were not necessary parties to the suit.

(3) The applicant then applied for withdrawal of the suit alleging that opponents 2 to 4, his co-plaintiffs, were not necessary parties.

The application was opposed by opponents 2 to 4 on the ground that they had interest in the subject-matter of the suit and as such necessary parties and that applicant was colluding with opponent 1 to defeat their claim.

(4) The trial Court ordered that the applicant be transposed as a co-defendant. The trial Court seems to have thought that the applicant was not entitled to withdraw without the consent of his co-plaintiffs and that all he could do was to withdraw from the suit. It further seems to have been thought that as applicant's withdrawal from the suit might cause prejudice to his co-plaintiffs, due to want of necessary parties, it was ordered that the applicant be transposed as a co-defendant.

(5) It is quite clear that the trial Court did not appreciate the distinction between withdrawal 'of' a suit provided in O. 23, R. 1(1) and withdrawal 'from' a suit provided in O. 23, R. 1(2). When a plaintiff withdraws a suit, it results in its dismissal. But when a plaintiff withdraws from a suit, the suit does not result in dismissal. Order 23, R. 1(3) provides that where a plaintiff withdraws from a suit without permission referred to in sub-r. (2), he shall be precluded from instituting a fresh suit in respect of the same subject-matter. If a plaintiff withdraws from his suit with permission mentioned in O. 23, R. 1(2), the suit is regarded as never brought. If he withdraws from the suit without obtaining permission, he is precluded as stated above.

(6) In the present case, the applicant had applied for withdrawal of the suit. As there were co-plaintiffs who did not consent to the withdrawal of the suit, the trial Court should have dismissed this application in view of the imperative provisions of O. 23, R. 1(4). The trial Court very rightly remarked that in view of the provisions of O. 23, R. 1(4), the applicant could not have been allowed withdrawal of the suit without the consent of his co-plaintiffs. However, the trial Court instead of dismissing the application, mixed up the question of withdrawal of a suit with the question of withdrawal from his suit, and considered the question of withdrawal from a suit by one of the several plaintiffs without consent of others. It is true that for such a withdrawal from a suit, consent of the co-plaintiffs is not necessary. The trial Court, relying on — '*Baidyanath Nandi v. Shyama Sundir Nandi*', AIR 1943 Cal 427, observed that it had inherent powers apart from the provisions of sub-r. (4) to impose restrictions on the applicant withdrawing from the suit without consent of other co-plaintiffs. Hence, the order made by the trial Court transposing the applicant-plaintiff as a co-defendant was on the face of it erroneous.

(7) The learned pleader for the applicant contended that in this suit, the right of action was not jointly vested on all the plaintiffs and as the co-plaintiffs were not necessary parties to the suit, the applicant should have been allowed to withdraw from the suit. Firstly the applicant had not applied for withdrawal from the suit. Secondly, having agreed to the institution of a suit by him and his co-plaintiffs, in accordance with the provisions of law contained in O. 1, R. 1, C.P.C., it did not lie in applicant's mouth to say that his co-plaintiffs were not necessary parties to the suit. It was pointed out that opponent 1 had contended that the suit was bad for misjoinder as oppo-



nents 2 to 4 were not necessary parties to the suit. It was open to opponent 1 to raise that contention and to join an issue on that contention with the plaintiffs. But the applicant himself cannot challenge the constitution of the suit by him and his co-plaintiffs. It follows that the order under revision would have been confirmed if the applicant had applied for withdrawal from the suit. It cannot be confirmed as the applicant's application was for withdrawal of his suit.

(8) Result is that the application is partially allowed, the order made by the trial Court is set aside and the applicant's application for withdrawal of the suit is dismissed. It is directed that the applicant be reinstated as a co-plaintiff. Looking to the result, there will be no order as to the costs of the parties in this Court.

C/H.G.P.

Order accordingly.

A. I. R. 1953 KUTCH 36 (Vol. 40, C. N. 22)

VAKIL J. C.

Dharamshi Ambavi, Creditor-Applicant v. Vala Veera, Debtor-Opponent.

Civil Revn. Appln. No. 77 of 1952, D/- 6-12-1952.

(a) **Debt Laws — Bombay Agricultural Debtors' Relief Act (28 of 1947) (as applied to Kutch), Ss. 4, 46 — Application under — Dismissal for default — (Civil P.C. (1908), O. 9, R. 8).**

Apart from the fact that O. 9, R. 8, Civil P.C. will not in terms apply to the proceedings under the Act as S. 46 of the Act is not made applicable to the State of Kutch, it is apparent that an order dismissing an application for default is not contemplated by the provisions of the Act as its object is adjustment of debts.

On consolidation being made, the Court can proceed 'ex parte' not only against a debtor or a creditor who has made the application, but also against a debtor or a creditor who is served with the statutory notice and remains absent. (Para 3)

Anno: C.P.C., O. 9 (Gen.), N. 3.

(b) **Civil P.C. (1908), S. 115 — Interference by Court on its own motion — (Debt Laws — Bombay Agricultural Debtors' Relief Act (28 of 1947), S. 4).**

Ordinarily, it is not the practice of the High Courts to exercise its powers in revision except on an application by a party. But the powers must be exercised by the Court of its own motion where the lower Court has acted against the imperative provisions of law in making the order of dismissal for default of an application under S. 4 of the Bombay Act 28 of 1947, to prevent grave injustice being perpetrated. (Para 5)

Anno: C.P.C., S. 115 N. 3.

D. C. Gor, for Applicant.

**JUDGMENT:** This is an application for revision of an order dated 25-6-52 made by the Joint Subordinate Judge, Rapar, dismissing an application for restoration of debt adjustment application No. 12909, dismissed for default on 23-1-52 and for obtaining such relief as the applicant may be entitled to according to law.

(2) The facts are that the applicant filed an application under S. 4, Bombay Agricultural Debtors' Relief Act, 1947, as applied to the

State of Kutch (hereinafter referred to as 'the Act') for adjustment of debt due from the opponent. The application was given serial No. 12909 by the lower Court. On completion of the procedure prescribed by S. 13 of the Act, the application was given consolidation case No. 757. On 11-1-52, the creditors were present but the debtor was absent. On the day statutory preliminary issues were raised and the case was adjourned to 23-1-52, presumably for hearing the preliminary issues. On 23-1-52, the applicant and the debtor were absent. The other creditor was present. The lower Court dismissed application No. 12909 for default. The applicant then applied to the lower Court for setting aside the order of dismissal for default. That application was dismissed on 25-6-52. The applicant has therefore approached this Court for revision of the said order as stated in para. one above.

(3) There is no provision in the Act for dismissing an application for default. The lower Court seems to have made the order dated 23-1-52 under O. 9, R. 8, C.P.C. Apart from the fact that O. 9, R. 8, C.P.C. will not in terms apply to the proceedings under the Act as S. 46 of the Act is not made applicable to the State of Kutch, it is apparent that an order dismissing an application for default is not contemplated by the provisions of the Act. Section 36 of the Act provides that though a debtor or any of his creditors has not appeared on the date fixed for hearing of the application, the Court has to proceed 'ex parte' to hear the application. On consolidation made, the Court can proceed 'ex parte' not only against a debtor or a creditor who has made the application, but it can also proceed 'ex parte' against a debtor or a creditor who is served with the statutory notice and remains absent. The object of the Act being adjustment of debts, dismissal for default, a procedure provided in the Code of Civil Procedure for suits and proceedings, is inapplicable to proceedings under the Act. The lower Court had therefore to proceed 'ex parte' and to decide the statutory preliminary issues. The order made by the lower Court was without jurisdiction.

(4) The applicant, however, made an application contemplated by the provisions of O. 9, R. 9, C.P.C. and on dismissal of that application has approached this Court for revision of the said order. It is clear that if an application can be made under O. 9, R. 9, an appeal against dismissal of such an application is provided in O. 43 of the Code. Here no such application could have been made by the applicant. It follows that the present application for revision of the order dismissing that application is not competent.

(5) It was urged that the lower Court having made an order of dismissal without jurisdiction, this Court be pleased to revise that order of its own motion. Ordinarily, it is not the practice of this Court to exercise its powers in revision except on an application by a party. But in the present case, the said powers must be exercised by this Court of its own motion as the lower Court has acted against the imperative provisions of law in making the order of dismissal for default. Interference is necessary, though of its own motion, to prevent grave injustice being perpetrated.

(6) Result is that though the application for revision of the order dated 25-6-52 is dis-



missed, the Court of its own motion sets aside the order dated 23-1-52 made by the lower Court dismissing the applicant's application for default and directs the lower Court to re-admit it in application register and consolidation register and to decide it in accordance with law.

B/D.R.R.

Order accordingly.

**A. I. R. 1953 KUTCH 37 (Vol. 40, C. N. 23)**

**VAKIL J. C.**

Somchand Vikamshi, Applicant v. Panachand Keshavji, Opponent.

Civil Revn. Appln. No. 85 of 1951, D/- 6-12-1951.

**(a) Civil P.C. (1908), O. 20, R. 6 — Decree in account suit — Provision as to costs.**

It is true that O. 20, R. 6, C.P.C. provides that a decree shall state the amount of costs incurred in the suit. But the general rule as to costs in a suit for accounts is that they are to be given at the time of final decree, though they could be awarded in a preliminary decree. Hence, the mere fact that costs were not taxed in the preliminary decree would not show that the decree was not a preliminary decree. AIR 1934 Pat 146, AIR 1939 Lah 255 and AIR 1930 All 72, Ref. (Para 8)

Anno: C.P.C., O. 20 R. 6 N. 6.

**(b) Civil P.C. (1908), O. 20, R. 16 — Preliminary decree in suit for account — Form of.**

There is no form of a preliminary decree to take accounts provided in the Civil Procedure Code. An order in an account suit that an account should be taken for ascertaining the amount due from one party to the other by the appointment of a commissioner in the light of discussions made in the judgment on a certain issue is not a mere finding but amounts to a preliminary decree. (Para 7)

Anno: C.P.C., O. 20 R. 16 N. 2.

J. K. Dholakia, for Applicant; J. G. Vaidya, for Opponent.

**REFERENCES:** Courtwise/Chronological/ Paras  
(30) AIR 1930 All 72: (121 Ind Cas 550) 8  
(39) AIR 1939 Lah 255: (182 Ind Cas 830) 8  
(34) AIR 1934 Pat 146: (148 Ind Cas 572) 8

**ORDER:** This is an application for revision of a decree of the District Court in Civil Appeal No. 30 of 1951, confirming a decree of the Subordinate Judge, Mundra in Suit No. 11 of 1950.

(2) Suit No. 11 of 1950 was brought by the opponent against the applicant for an account of the dealings between the parties being taken and for a decree for the amount due to the opponent from the applicant. The applicant did not deny existence of dealings between him and the opponent. He contended that account was settled between them and some amount was due to him from the opponent. He disputed his liability to pay interest.

(3) What the applicant meant as account settled was that he had sent statements of accounts to the opponent. This did not mean that the account was settled. If as a result of accounts taken it was found that some amount was due to the applicant, he was entitled to get a decree for that amount from the opponent. But there was liability to render account. The only question that the trial Court had to decide was whether opponent was entitled to interest.

(4) The applicant filed a statement of account with his written statement. The items in this statement appear to have been surcharged and falsified by the opponent. A Commissioner was appointed to look into these items. After the report was submitted trial was held. The trial Court held that opponent was entitled to interest. The trial Court referred to the disputed items in the judgment. Eventually on 18-11-50 the trial Court passed a preliminary decree as under:

"A preliminary decree is passed for taking account in the light of discussion in the judgment on issue 2 and for finding out what is due to one party from the other on the foot of dealings between them by appointment of a Commissioner."

(5) The applicant did not prefer any appeal against the preliminary decree passed. It will appear that by the preliminary decree the question about rate of interest to which opponent was entitled and certain disputed items were decided. The applicant seems to have been led to believe that he need not file an appeal against the preliminary decree passed. After the Commissioner submitted his report, no objections were filed probably because there was nothing in the report of the Commissioner for which objection could be filed. The trial Court confirmed the report of the Commissioner and passed a decree for Rs. 740/8/- against the applicant.

(6) The applicant preferred an appeal to the District Court. A preliminary decree having been drawn up, the contention that there was no preliminary decree or that applicant was not aware of it was not tenable. The applicant had therefore nothing to urge before the District Court who dismissed the appeal.

(7) It was urged in revision that in fact no preliminary decree was passed. It was contended that drawing of a preliminary decree did not mean that a preliminary decree was passed and that it was an order for an appointment of a Commissioner for taking accounts in a specified manner. There is no form of a preliminary decree to take accounts provided in the Civil Procedure Code. Order 20, R. 16, C.P.C. provides as under:

"In a suit for an account of pecuniary transactions between a principal and an agent, and in any other suit not hereinbefore provided for, where it is necessary, in order to ascertain the amount of money due to or from any party, that an account should be taken, the Court shall before passing a final decree, pass a preliminary decree — directing such accounts to be taken as it thinks fit."

It was stated in the preliminary decree that an account should be taken for ascertaining the amount due to one party from the other. It was therefore compulsory that a preliminary decree be passed. It was directed in the preliminary decree that account be taken in the light of observations made in the discussion on issue 2 of the judgment. Thus it was not a mere finding but a preliminary decree passed.

(8) The other contentions are apparently untenable. It was contended that applicant's pleader did not know that a preliminary decree was passed. The applicant's pleader has signed the preliminary decree drawn. In the order appended below the judgment it is stated that a preliminary decree be drawn up. It is strange that the applicant's pleader who signed the preliminary decree was not aware of the



preliminary decree passed. Another contention was that as there was no order as to costs and consequently no schedule of costs, there was no preliminary decree passed. It is true that O. 20, R. 6, C. P. C. provides that a decree shall state the amount of costs incurred in the suit. But the general rule as to costs in a suit for accounts is that they are to be given at the time of final decree, though they could be awarded, in a preliminary decree. In — ‘Mahomed Abdul Rahim v. Mt. Izzatunnissa Bai’, AIR 1930 All 72, it was held that there was nothing in principle which precluded a Court from assessing costs and passing a decree as to costs in favour of a successful party — in a suit for accounts in the course of a preliminary decree. In — ‘Har Gobind Rai v. Dulhin Sanichra Kuer’, AIR 1934 Pat 146, it was held that actual decree for costs should not ordinarily be made until the stage of final decree was reached. In — ‘Jai Bhagwan Dass v. Om Parkash’, AIR 1939 Lah 255, the same principle was affirmed. There are therefore respectable authorities for the proposition that costs need not be taxed in an account suit at the stage of preliminary decree. Hence, the fact that costs were not taxed would not show that the decree was not a preliminary decree.

(9) The other contention relates to the amount found due by the Commissioner. No objection to the amount due was taken before the trial Court. The applicant is therefore not entitled to raise these contentions in revision. Result is that the application fails and it is dismissed with costs.

C/K.S.

Revision dismissed.

**A. I. R. 1953 KUTCH 38 (Vol. 40, C. N. 24)**

BAXI J. C.

Bhawanji Velji Defendant-Applicant v. Chandaji Merawanji Plaintiff-Opposite Party.

Civil Revn. Appln. No. 25 of 1951 D/- 25-7-1951.

**Civil P. C., (1908), S. 115 — New pleas in revision — Maintainability.**

When in a suit for ejectment the tenant contests the suit only on the question of costs of improvements made by him without raising the pleas of permanent tenancy, want of proper notice to quit or that the suit is premature, he cannot be allowed to raise those pleas for the first time in revision. 15 All 359, Disting.

(Paras 3, 4 and 5)

Anno. C. P. C., S. 115 N. 2 Pt. 8.

M. M. Mehta for Applicant; Dayaram C. Gor for Opposite Party.

**REFERENCE.....**

(‘93) 15 All 359; (1893 All W. N. 113) /Para 5

**ORDER:** The opponent filed the suit in the Court of the Sub Judge Mandvi Taluka for possession of a field and for recovery of two years’ arrears of rent. His case was that the field in question was rented to the applicant’s father for 15 years by a rent-note dated Jeth Sud 4th., St. 1964, at a yearly rent of 125 Koris. After the expiry of the term the rent note was renewed for a further period of 10 years on the same terms. After his father’s death the applicant continued to till the land till the date of the suit in St. 2005. Though there has been no fresh renewal of the rent-note the applicant has paid rent upto the year St. 2003. The opponent contracted to sell this field to another and gave notice to the applicant to quit. He also

demanded arrears of rent for the years St. 2004 and 2005.

(2) The applicant’s defence was that he was a tenant of the field for a very long time and could not be evicted. He further claimed Koris 4,000/- as the cost of the improvements incurred by him during all these years. He also claimed 75/- Koris for the cost of constructing a water-channel in the field. According to him, his improvements have enormously enhanced the fields’ value. During the trial the only issues framed were about the applicant’s right to recover the cost of improvements and of the construction of the water channel. The learned trial Judge held against the applicant on all the issues and decreed the opponent’s claim. In appeal the learned Additional District Judge confirmed the trial Court’s decree. The applicant has now applied to this Court in revision.

(3) It was urged that the applicant was a permanent tenant. There is nothing in the written statement to justify this plea. All that the applicant says in his written statement is that he has been tilling the field for many years. But the original rent notes are conclusive against the applicant’s contention. They were for periods of 15 and 10 years respectively and militate against the plea of permanent tenancy. No issue was raised in the trial Court about the alleged permanent tenancy and the applicant cannot be allowed to raise this plea in appeal or revision.

(4) It was further urged that the lease, being of agricultural land could only be terminated by six months’ notice. In the present case, the opponent gave only 4 days’ notice. The learned Advocate argued that the suit should have been dismissed on the ground of insufficiency of notice. This plea was not taken up in the written statement and no issue was sought on it. The applicant must, therefore, be deemed to have waived notice.

(5) It was then urged that the tenancy could only terminate on Vaisakh Sud 3rd. The suit was, however, filed on Fagan Sud 9th (9-3-1949) i.e. about more than a month and a half before the expiry of the lease. It should, therefore, have been dismissed as disclosing no cause of action. Reliance was placed on — ‘Mansab Ali v. Nihal Chand’, 15 All 359. In that case, it was held that in the absence of proof or admission or default of pleading the plaintiff is not entitled to a decree in his suit unless he shows that when he instituted the suit he was entitled to a decree. The present case, however, is distinguishable because the applicant nowhere pleaded that the suit was premature. The opponent was induced to fight the suit on totally different issues. If this objection had been taken earlier the opponent could have rectified the mistake by withdrawing the suit or by bringing a fresh suit. The applicant chose to hold on to the land and waste time on side issues. He cannot now be permitted to raise this plea which he never took up and which on the date of this judgment no longer exists.

(6) The learned Advocate for the applicant contended that his client should be awarded the costs of improvements and construction of the channel. Under the agreement he has to make improvements at his own cost and the channel should have been constructed after taking the opponent’s permission. He has not done that. His claim was, therefore, rightly rejected by both the Courts below.



(7) The revision fails and is ordered to be dismissed with costs.

C/K.S.

Revision dismissed.

**A. I. R. 1953 KUTCH 39 (Vol. 40, C. N. 25)**

VAKIL J. C.

Dhanji Bhimjee, Appellant v. Mavji Leemba, Opponent.

Civil Revn. Appln. No. 94 of 1952, D/- 3-2-1953.

(a) Civil P. C. (1908), S. 2(2) — "Any question."

The expression 'any question' must be construed in the light of the first part of the definition of the term 'decree' and it must be held to mean a question relating to rights of the parties in controversy in the proceeding. (Para 6)

Anno: C.P.C., S. 2(2) N. 14.

(b) Civil P. C. (1908), S. 47 — Interlocutory order in execution proceedings.

Though an order may be interlocutory if it is one which in substance determines a question relating to execution between the decree-holder and the judgment-debtor, it will be appealable as a decree: Chitale and Rao's C. P. C. Vol. I, p. 616 cited with approval.

An interlocutory order deciding the question whether or not an execution petition is barred by limitation substantially determines the right to execute the decree and is therefore, appealable as a decree: AIR 1914 Lah 415; AIR 1924 Pat 683 and AIR 1936 Mad 801, Ref. (Para 6)

Anno: C.P.C., S. 47 N. 86.

K. J. Dholakia, for Applicant; U. B. Mankad, for Opponent.

#### CASES CITED:

(A) ('43) AIR 1943 Lah 140: 208 Ind Cas 89 (FB)

(B) ('14) AIR 1914 Lah 415: 110 Pun Re 1913

(C) ('24) AIR 1924 Pat 683: 85 Ind Cas 576

(D) ('36) AIR 1936 Mad 801: 164 Ind Cas 670

(E) ('21) AIR 1921 PC 23: 48 Ind App 45 (PC)

**ORDER:** This is an application for revision of an order of summary dismissal of Civil Appeal No. 27 of 1952 made by the District Judge, Kutch.

(2) The facts which gave rise to Civil Appeal No. 27 of 1952 are that the opponent decree-holder-auction-sale-purchaser made an application numbered as Execution Petition No. 6 1951 to the Court of the Subordinate Judge, Bhuj for delivery of possession of the property purchased by him. The applicant opposed the application on various grounds one of which was that the application was barred by limitation. The trial Court held that the application was not barred by limitation. The applicant, therefore, preferred Civil Appeal No. 27 of 1952, which was summarily dismissed by the District Judge, Kutch.

(3) The appeal to the District Court was preferred presumably as the question of limitation decided was a question relating to execution, discharge and satisfaction of a decree under S. 47, C. P. C. The learned District Judge did not decide the question though he styled the appeal as one from an order. He held on the assumption that the matter fell under S. 47, C. P. C., that no appeal lay as there was a mere finding on a preliminary issue. In revision, it was submitted that the lower appellate Court was

wrong in holding that no appeal lay and thus it refused to exercise jurisdiction vested in it.

(4) This revision application is to be decided on the assumption that the question about delivery of possession relates to execution, discharge and satisfaction of the decree. The learned pleader for the opponent contended that the question about delivery of possession did not relate to execution, discharge and satisfaction of the decree and therefore, the appeal to the District Court was incompetent. As the District Court did not decide this question, it will not be proper for this Court to decide it in revision. It may be that this particular contention of the opponent may be accepted with the result that it may not be necessary to decide the question of limitation. But the District Court preferred not to decide that question and to decide the appeal on the assumption that the question related to execution, discharge and satisfaction of the decree. This Court can, therefore, consider the only question decided by the District Court. That question is whether an appeal lay to the District Court from a decision of a preliminary point—whether the application for delivery of possession was not barred by limitation.

(5) It was contended on behalf of the opponent that an application for revision was not competent as there was no case decided. It is quite obvious that the District Court proceeding on the assumption that the case fell under S. 47, C. P. C. should have treated the appeal as a regular one and not one from an order. As a Regular Appeal, a Second Appeal would lie under S. 100, C. P. C. But treating it as an appeal from an order, there was a case decided as the appellate Court dismissed the appeal as incompetent. This was not an interlocutory order made by the District Court. If it was found that the appellate Court was wrong in holding that the appeal was not competent, it certainly refused to exercise the jurisdiction vested in it. Thus, either a second appeal or a revision is competent.

(6) Now the applicant had resisted the application of the opponent on various grounds one of which was that it was barred by limitation. The trial Court had decided only one of these grounds. Though S. 47, C. P. C. provided that all questions arising between the parties to the suit in which the decree was passed and relating to execution, discharge and satisfaction of the decree, must be determined by the Court executing the decree, the question whether decision of any such question amounts to a decree must be determined with reference to the definition of the term 'decree' as given in S. 2 of the Code. That definition requires conclusive determination of the right of the parties with regard to all or any of the matters in controversy and further provides that it shall be deemed to include determination of any question within S. 47. The expression 'any question' must be construed in the light of the first part of the definition of the term 'decree' and it must be held that 'any question' meant was a question relating to rights of the parties in controversy in the proceeding. In this particular case, the controversy was whether the applicant's right to get possession by execution was barred by limitation. It was conceded by the learned pleader for the opponent that if the question related to execution, discharge and satisfaction of the decree, the decision on the question of limitation



against him would have been a conclusive determination of his right in controversy. It was, however, contended that so far as the applicant was concerned, there was no such conclusive determination of the right in controversy as there were other contentions raised and there was no formal decision granting or refusing the relief sought by him. It is plain that so far as the trial Court was concerned, the question of limitation was conclusively determined by it. If there was no other contention raised, relief sought would have been granted. As other contentions were raised, the order deciding the question of limitation would become an interlocutory one. In this connection, it is important to cite with approval the remarks made by Messrs. Chitale and Rao in their Commentaries on the Code of Civil Procedure Volume I, 5th Edition at page 616. These remarks are as under:

"But though an order may be interlocutory if it is one which in substance determines a question relating to execution between the decree-holder & the Judgment-debtor, as for instance, when it has the effect of reviving an application for execution which was dismissed for default of the decree-holder, especially when a fresh application would be barred by limitation it will be appealable as decree".

By deciding the question of limitation, the trial Court substantially determined the opponent's right to execute a decree. It was contended that the decision that the petition for delivery of possession was not barred by limitation was analogous to a decision that an executing Court had jurisdiction to hear an objection application of the judgment-debtor and such a decision was not held a decree in — 'Bharat National Bank v. Bhagwan Singh', AIR 1943 Lah. 140 (FB) (A). In — 'Ramchand v. Sham Prasad', AIR 1914 Lah. 415 (B), the Lahore High Court held that the decision of a question of limitation which might arise in execution proceedings was the decision of a question within the purview of S. 47, C. P. C. and was therefore a decree as defined by the Code. The Patna High Court in — 'Shiva Narayan Lal v. Narayan Prasad', AIR 1924 Pat 683 (C) held that the question whether or not the execution was time-barred was a question within S. 47 C. P. C. arising between the parties and relating to execution and therefore a decree as defined in S. 2. In — 'Rama Rao v. Sreeramamurthi', A. I. R. 1936 Mad 801 (D), following the Patna case cited above, it was held that whenever a plea of limitation was raised in execution petition and there was a finding thereon, if the plea was allowed, it must be an appealable order, and similarly, if it was rejected, it was an appealable decree. It was further held that an order dismissing a plea of limitation as regards an execution petition in execution proceeding was an appealable decree under S. 47, C. P. C. It was therefore held that it was not right under the circumstances to wait till some other order was made in execution petition. The Madras view was based on the decision of the Judicial Committee in — 'Raja of Ramnad v. Velusami Tevar', AIR 1921 P. C. 23 (E), wherein it was held that when a plea of limitation was raised inter alia in defence to an execution application and the application was granted, the plea was barred by *Res judicata*. It is true that in this case there were other contentions. But having regard to

the nature of these contentions, it is quite obvious that the trial Court by deciding the question of limitation must be deemed to have virtually granted the application.

(7) It must, therefore, be held that the decision of the trial Court that the petition was not barred by limitation was a decree if the question related to execution, discharge and satisfaction of the decree and falling under S. 47, a question not decided by the appellate Court. As the appellate Court proceeded on the assumption that the question did fall under S. 47, this Court has not to decide the question, whether the appellate Court was right in holding that the appeal did not lie, on making similar assumption. Making that assumption, I hold that the appeal did lie to the District Court. Hence the following order is made:

(8) The application is allowed, the rule issued is made absolute, the order made by the lower appellate Court dismissing the appeal as incompetent is set aside and the appeal is remanded back to the lower appellate Court for its being admitted in its original number in the register of Civil appeals and for its disposal in accordance with law. It will be open to the opponent to contend before the lower appellate Court that as the question about delivery of possession did not fall under S. 47, C. P. C. the appeal was not competent. There will be no order as to costs of the parties in this application.

A/G.M.J.

Order accordingly.

**A. I. R. 1953 KUTCH 40 (Vol. 40, C. N. 26)**

**BAXI J. C.**

Kunvarji Shivji, Plaintiff-Applicant v. Kunvarbai Jetha Teja and another, Defendants-Nos. 1 and 2, Opposite Party.

Civil Revn. Appln. No. 140 of 1950, D/- 11-1-1951.

**Civil P. C. (1908), S. 115 — Finding of fact — Interference.**

The question whether execution of a document is proved or not is a question of fact, the decision on which, if based on analysis of the evidence by the lower Court, would be binding in revision.

(Para 4)

Anno: C.P.C., S. 115 N. 2.

J. K. Dholakia, for Applicant; D. P. Joshi and U. Bhansari, for Opposite Party Nos. 1 and 2 Respectively.

**ORDER:** The applicant filed a suit in the Court of the Sub-Judge, Mandvi for specific performance of an agreement to sell certain land against Kunvarbai original defendant 1. Opponent 2 is the usufructuary mortgagee of the land from Kunvarbai and the agreement provided that Kunvarbai should redeem the mortgage and obtain possession of the property from him. Koris 25/- were paid to Kunvarbai at the time of the execution of the agreement and Koris 357/- were to be paid on her obtaining possession from the opponent 2, and delivering it to the applicant. The applicant filed the present suit against Kunvarbai and opponent 2 on the above agreement. Kunvarbai died during the pendency of the suit and opponent 1 was substituted in her place as her legal representative. She is Kunvarbai's daughter.

(2) The learned Sub Judge decreed the suit. The defendants preferred separate appeals against his decree. In appeal the learned Addi-



tional District Judge reversed the trial Court's decree and dismissed the suit. The applicant has preferred this revision, against the Additional District Judge's decree.

(3) The learned Judge in appeal held that the execution of the agreement by Kunvarbai was not proved. He also held that the applicant gave grossly inadequate price for the land to Kunvarbai who was an old woman of 70 and who was mentally weak. Her consent to the agreement was, therefore, not free. He thought that there was no legal necessity for the alienation by Kunvarbai who held a widow's estate, the opponent 1 being her reversioner. This point however be kept open as the opponents had not raised the issue of legal necessity. Finally he decided that the applicant's suit was for specific performance of the contract against Kunvarbai and for redemption of the mortgage against opponent 2. Such a suit was incompetent. The revision, however, must fail on the question of the proof of the execution of the agreement, and the rest of the points do not fall to be considered.

(4) The learned Advocate for the applicant argued that the learned Judge erred in holding that the execution of the agreement by Kunvarbai was not proved. He pointed out that the opponent 1 herself had admitted execution and this admission has been overlooked by the learned Judge. Now the question whether execution of a document is proved or not is a question of fact the decision on which by the lower Court is binding on this Court in revision. The learned Judge analysed the evidence of the applicant, the writer of the document and the attesting witnesses and came to the conclusion that their evidence was mutually contradictory and could not be accepted. There is, however, the opponent 1's statement that the applicant got the document from Kunvarbai. But on the applicant's own showing the only persons who were present at the time of execution were himself, Kunvarbai the writer & the attesting witnesses. Opponent 1's admission is, therefore, obviously based on hearsay and would not justify upsetting the learned Judge's finding based on an analysis of the evidence of these persons.

(5) As the document on which the suit is based, is not proved, the applicant must fail. It is unnecessary in view of this finding to enter into other points decided against the applicant. The application is therefore dismissed with costs. The opponents shall be entitled to separate sets of costs.

C/K.S.

Revision dismissed.

#### A. I. R. 1953 KUTCH 41 (Vol. 40, C. N. 27)

VAKIL J. C.

Mulji Jethabhai Complainant-Applcant v. Meghji Govindji, Accused-Opponent.

Criminal Revn. Appln. No. 32 of 1951, D/- 3-10-1951.

**Criminal P. C. (1898), S. 439 — Revision against acquittal — Appreciation of evidence by lower Court — Interference by High Court — Criminal P. C. (1898), S. 367.**

The High Court will not ordinarily interfere in revision with orders of acquittal based on appreciation of evidence on the ground that evidence was not properly appreciated. It is open in such a case to

complainant to move the District Magistrate in the matter and the District Magistrate, if satisfied, that the order of acquittal was wrongly passed may move the State Government to lodge an appeal against the order. The fact that certain evidence is not specifically referred in the judgment of the Court does not mean that it was not in the mind of the Court when the finding impugned was recorded. The High Court will not, therefore, go into evidence for finding out whether the appreciation of evidence was proper and to see whether the particular evidence was so left out of consideration that if considered it would have turned the result of the case.

(Para 2)

Anno. Cr. P. C., S. 439 N. 12.

S. U. Bhansali for Applicant; D. P. Joshi for Opponent.

**ORDER:** The applicant lodged information before the Police that the opponent committed theft of standing crop on a field in his possession. The opponent, on being charge-sheeted by the Police, the Magistrate F. C. Adasa, tried him and acquitted him. The defence of the opponent who admitted removal of the crop was that he was in possession of the land on which crop was grown. The applicant approached the Sessions Court, Kutch for revision of the order of acquittal but the application was dismissed. The applicant has, therefore, approached this Court for revision of the order of acquittal.

(2) Under S. 439, Criminal P. C., this Court will not ordinarily interfere in revision with orders of acquittal based on appreciation of evidence on the ground that evidence was not properly appreciated. It is open in such a case to a complainant to move the District Magistrate in the matter and the District Magistrate, if satisfied, that the order of acquittal was wrongly passed may move the State Government to lodge an appeal against the order. The fact that certain evidence is not specifically referred in the judgment of the Court does not mean that it was not in the mind of the Court when the finding impugned was recorded. I cannot, therefore, go into evidence for finding out whether the appreciation of evidence was proper and for the matter to see whether particular evidence was so left out of consideration that if considered would have turned the result of the case.

(3) It was urged that opponent was out of Kutch at the time of agricultural season. That does not prevent him from getting lands cultivated by his family members or by hired labour. It was further urged that the learned Magistrate considered some evidence about damage caused but it was not legally admissible. If the learned Magistrate was not satisfied with the main evidence led by the prosecution about possession, exclusion of the evidence alleged to have been illegally admitted would not make any difference.

(4) I, therefore, do not think that this is a matter which calls for interference in revision. The application is dismissed.

C/K.S.

Revision dismissed.



A. I. R. 1953 KUTCH 42 (Vol. 40, C. N. 28)

VAKIL J. C.

Madhavji Sakarchand and others, Appellants  
v. Gopal Mansang and another, Respondents.

Second Appeal No. 3 of 1952, D/- 8-1-1953.

(a) Civil P. C. (1908), S. 96, O. 41, Rr. 1, 2  
— New plea.

Question of jurisdiction can be raised for the first time in appeal. AIR 1924 Lah 328, Disting. (Para 3)

Anno: C.P.C., O. 41, R. 1 N. 12; R. 2 N. 6.

(b) Civil P. C. (1908), Ss. 2(2), 96 — Appeal against finding. AIR 1941 Nag 180, Dissented from.

Adjudication that some of the defendants were not partners not followed by further adjudication that suit stood dismissed against them — No appeal lies against such adjudication — Decree of appellate Court is nullity. Case law discussed. (Paras 4, 5)  
Anno: C.P.C., S. 2(2) N. 8; S. 96 N. 2.

M. M. Mehta, for Appellants Nos. 1, 2 and 3; L. L. Thacker, for Respondent No. 1.

#### CASES CITED:

- (A) ('24) AIR 1924 Lah 328: 71 Ind Cas 826
- (B) ('36) AIR 1936 Pesh 155: 164 Ind Cas 181
- (C) ('33) AIR 1933 All 762: 147 Ind Cas 865
- (D) ('41) AIR 1941 Nag 180: 197 Ind Cas 275
- (E) ('45) AIR 1945 All 268: ILR (1945) All 798 (FB)
- (F) ('24) AIR 1924 Bom 33: 76 Ind Cas 1014
- (G) ('24) AIR 1924 Lah 352: 69 Ind Cas 558
- (H) ('49) AIR 1949 EP 400: 51 Pun LR 305

**JUDGMENT:** This second appeal arises out of a suit brought by respondent 1 against respondents 2/1, 2/2 and against the appellants for taking accounts of a dissolved partnership. The appellants did not admit that they were partners in the plaint mentioned partnership. On the contentions of the parties, the trial Court raised issues one of which was whether the appellants were liable for the suit claim. The trial Court held that the appellants were not partners and found that issue in the negative. In view of the findings on that issue and other issues raised, the trial Court directed a preliminary decree to be made, declaring that respondent 1 and Dhanjee, father of respondents 2/1, and 2/2, since deceased, were the only partners having each a moiety of share and giving directions for taking accounts on the foot of settled accounts upto a certain period and on the foot of unsettled accounts thereafter. It was directed that a receiver to be appointed will take accounts and submit his report before 11-12-49. The suit was adjourned till 30-12-49 for making a final decree. The trial Court did not draw a preliminary decree.

(2) Respondent 1 feeling aggrieved by the findings of the trial Court that appellants were not liable for his claim preferred appeal No. 28 of 1950 against the judgment of the trial Court to the District Court, Kutch. The District Court held that appellants were partners. Accordingly the District Court passed a decree modifying the decretal order in the judgment of the trial Court by providing that all the defendants were partners. The appellants first preferred an application for revision of the decree of the District Court. As a second appeal under Kutch (Province) Courts Order, 1948, was competent in view of the valuation of the suit, the application for revision was converted into second appeal. A number of grounds in support of the appeal are stat-

ed in the memo. Most of them are argumentative. In short, the appellants challenge the finding of the appellate Court that they were partners. At the hearing, the appellants applied under O. 41, R. 2, C. P. C. for leave to urge a new ground that the District Court was not entitled to entertain the appeal and the decree made by it, being a nullity, must be set aside. The application was opposed on behalf of Respondent 1. The application was granted. It was stated in the order made that reasons would be given in the judgment. Accordingly, I proceed to give reasons granting the application.

(3) Order 41, Rule 2, C. P. C. gives wide discretion to a Court of appeal to permit urging of a ground of objection not set out in the memo. It was argued on behalf of respondent 1 that the appellants, who were respondents to his appeal before the District Court, did not object in that Court that as no preliminary decree was drawn up, no appeal lay and hence they should not be allowed to raise that contention now. It is apparent that the appellants want to raise a pure question of law based on the facts on record. Respondent 1 was given notice of the new point sought to be raised and there was no question of surprise caused to him. If the respondent 1 was not entitled to prefer an appeal against a judgment, with the result that the appellate Court, in entertaining the appeal and making a decree, acted without jurisdiction, the appellants cannot be estopped from raising this contention. It was argued that the contention raised was a technical one and it could not be allowed to be taken for the first time in appeal. Reliance was placed on — 'Budha Mal v. Shib Dayal', AIR 1924 Lah 328 (A). In that case, the new point sought to be urged was that the suit was premature. It was held that the plea taken was technical and could be met by a technical plea that it should have been taken in the Court below so as to enable a plaintiff to take such action as he thought right. Under S. 96 of the Code, an appeal can be preferred and can be entertained by a Court of appeal against a decree. If a Court of appeal cannot entertain an appeal from a judgment or finding, it is a question of jurisdiction of the Court of appeal to entertain that appeal. When such a question of jurisdiction is raised, obviously not falling within the purview of S. 21, C. P. C. or S. 11 of the Suits Valuation Act, it cannot be said that it is a merely technical plea which could not be allowed to be raised for the first time in appeal. So to the general rule that a point not taken in the lower Court, cannot be allowed to be urged for the first time in appeal, there are exceptions, one of which is that a question of jurisdiction can be allowed to be so urged. It is true that if this objection was taken in the Court below, respondent 1 would have moved the trial Court for drawing up of a decree. This may affect the question of costs but it cannot estop the appellants from raising that contention involving the jurisdiction of the Court below to entertain an appeal against a judgment or finding. The appellants were therefore allowed to raise that contention.

(4) The suit was valued in the trial Court at 5225 Kories for the purposes of court-fees and jurisdiction. The appeal to the District Court was preferred on a fixed court-fees of Rs. 10 under Art. 17 Sch. 11 of the Court-Fees Act as it was not an appeal against a decree requiring payment of ad valorem court-fees on the subject-matter. The appeal was thus preferred against a judgment. No doubt, the judgment contained a decretal order for asking a preliminary decree. The



question whether a Court of appeal had jurisdiction to entertain an appeal from a decretal order not followed by drawing of a preliminary decree will be considered presently. The appeal was preferred for setting aside the judgment that the appellants were not partners. In the decretal order of the judgment, the finding that appellants were not partners was not incorporated. The effect of the finding that the appellants were not partners was that the suit was liable to be dismissed against them. In that case, the decree to be drawn up would have been final so far as the appellants were concerned and preliminary so far as Respondents 2/1, and 2/2 were concerned. It follows that the appeal was against a finding. It is apparent that the lower Court could not have entertained an appeal against a finding. It was pointed out that in the decretal portion of the judgment, it was stated that only Dhanjee and the plaintiff were partners implying that the appellants were not partners and that it was so stated in the decretal order of the judgment in view of the finding that the appellants were not liable.

It was therefore contended that the appeal to the District Court was not merely against a finding. Assuming that by implication the decretal order of a judgment meant that the appellants were not partners, there was no order made dismissing the suit against them and that, at the most, it could be said that the appeal was against the decretal order of the judgment that the appellants were not liable as they were not partners. Because of this interpretation of the decretal order contained in the judgment the position is not at all improved. It is all the same an appeal against a finding. Unless there was a decretal order in the judgment that the suit was dismissed against the appellants, followed by a decree drawn up accordingly the appeal preferred was against the finding and the lower appellate Court was not entitled to entertain an appeal against the finding. Hence, apart from the question whether an adjudication should be regarded as a decree in the absence of its formal expression in a decree actually drawn up, it is clear that the adjudication that the appellants were not partners, not followed by a further adjudication that the suit stood dismissed against them, did not conclusively determine the right of the parties as regards that matter in controversy between them and therefore, it remained as a mere finding against which the lower appellate Court was not entitled to entertain an appeal.

(5) It was contended by the learned pleader for Respondent 1 that in the decretal order of the judgment there was a formal expression of adjudication which conclusively determined the rights of the parties as regards the controversy between respondent 1 and Dhanjee and between respondent 1 and the appellants and that the absence of a formal decree would not make the adjudication any the less a decree, as in point of law, it operated as a decree. As stated in preceding para, so far as the appellants are concerned, the adjudication would have conclusively determined the rights of the parties as regards the matters in controversy, if it was ordered that the suit stood dismissed against them. It is true that this would be the necessary result of a finding that as the appellants were not partners, they were not liable. But unless it was adjudicated that the suit stood dismissed against the appellants, there was no conclusive determination of the rights as regards the matters in controversy between them. Assuming, however, that it was so, the question is whether

the absence of a formal decree would not make the adjudication any the less a decree. In other words, the question is whether an adjudication operating as a decree would be sufficient in law in the absence of a formal decree drawn up. Section 96 of the Code provides that save as when otherwise expressly provided in the body of the Code or by any other law for the time being in force, an appeal shall lie from a decree passed. A decree is a formal expression of adjudication. It follows that where no decree is drawn, there is no formal expression of adjudication and hence a Court of appeal is not entitled to entertain an appeal from a mere finding or a decretal order contained in a judgment. It is true that on a judgment a decree has to follow. But a judgment is different from a decree and a judgment cannot take the place of a decree, nor can it be substituted for a decree which must follow. It is thus clear that unless a decree is drawn up it will not operate as such.

The learned pleader for the respondent 1 relied on —‘Feroz Shah v. Kalu Ram’, AIR 1936 Pesh 155(B). In that case, the plaint was rejected. First an appeal was filed with a memo of costs prepared. It was held that the appeal need not be accompanied by a separate decree sheet. It was held that rejection of the plaint was itself as equivalent to a decree and hence necessity for a separate decree sheet was eliminated. An order rejecting a plaint does not conclusively determine the rights of the parties with regard to all or any of the matters in controversy. It is, however, regarded as a decree by virtue of the definition of decree. That case is therefore not applicable to the facts of the present case. Reliance was also placed on —‘B. Surendra Narain Singh v. Raja Lal Bahadur Singh’, AIR 1933 All 762(C). In that case, it was held that an order containing formal expression of the decision should be taken to have a dual character of a judgment and an order and as the appellants had filed a copy of such an order with the memo of his appeal, there was sufficient compliance with the provisions of law. That was a case of an appeal against an order under O. 43, C. P. C. As regards an appeal under O. 41, it was observed that presentation of a memo of appeal from a decree which was accompanied by the judgment, but not by the decree, was no appeal in law.

In —‘Vilayat Ali Khan v. Khairunnissa’, AIR 1941 Nag 180(D), it was observed that an order or a judgment could be treated as a decree within the meaning of S. 2 and an appeal could be filed. It is not possible to accept this view having regard to the provisions of S. 96, C. P. C. When an appeal preferred is against a decree, no appeal can be filed or entertained unless the memo of the appeal is accompanied by a copy of the decree. In *Mt. Chauli v. Mt. Meghoo*, AIR 1945, All 268 (F.B.) (E), it was held that a decree was formal document which must be drawn up in accordance with some decision of a Court. In —‘Vamanacharya v. Govind Madhavacharya’, AIR 1924 Bom 33(F), it was observed as under :

“Sections 2 and 96 of the Code, upon which alone the right of appeal is based must be construed with reference to S. 33 which distinguishes between a judgment and a decree, and O. 20 R. 6 which prescribes the contents of a decree. If no such formal decree has been drawn up, then, no decree has been ‘passed’ from which an appeal can be brought under S. 96 or 97.”



With respects, I entirely agree with these observations.

(6) As the District Court was not entitled to entertain an appeal from a judgment, the decree made by it was a nullity. It was so held in — *Sher Mahomad v. Mahomad Khan*, AIR 1924 Lah 352(G), and I agree with that decision. It is true that in this case a decree was not prepared. In — *Banwari Lal v. Amritsagar*, AIR 1949 E. P. 400(H), it was held that under such circumstances an appeal was not maintainable. It must therefore be held that as a decree was not drawn up, the lower appellate Court had no jurisdiction to entertain the appeal which was not maintainable. In any case, a preliminary decree that might have been prepared, as directed by the trial Court could not have contained an order that the suit was dismissed against the appellants and as there was no such decree against them, the appeal against them was not maintainable.

(7) The decree made by the appellate Court must therefore be set aside and the case be sent back to the trial Court for making a proper order and drawing up of the decree. As regards costs, it is apparent that the present appeal is not heard on merits. But the appeal to the District Court was heard on merits and the respondent 1 had succeeded. The appellants did not raise this particular objection in that Court. Hence the proper order as to costs will be that the appellants shall pay costs of the respondent 1 in appeal to the lower Court independently of the result. Each party shall bear its own costs in this second appeal. The trial Court was the Court of the Civil Judge (S. D.) who designated itself as the Court of the Extra Assistant Judge. As that Court has ceased to exist and as the jurisdiction to hear this suit is with the Court of the Subordinate Judge, Rapar, the suit will be remanded back to that Court. Hence the following order is made :

(8) The appeal is allowed, the decree passed by the lower appellate Court is set aside and the suit is remanded back to the trial Court (the Court of the Subordinate Judge, Rapar) for making a decretal order dismissing the suit, with or without costs as it deems fit, against defendants 2 to 4 in view of the finding on issue No. 7 and drawing of a decree (final against defendants 2 to 4 and preliminary against defendant 1) in accordance with the judgment, after hearing the parties and their pleaders. It shall be open to the trial Court to vary, add to or delete directions in para 36 of the judgment so far as they appertain to the taking of the accounts. The appellants shall pay respondents' costs of the first appeal and bear their own. There shall be no order as to the costs of the parties to this second appeal.

B/D.H.

Order accordingly.

A. I. R. 1953 KUTCH 44 (Vol. 40, C. N. 29)

BAXI J. C.

The State v. Osman Juma and another,  
Accused-Respondents.

Cri. App. No. 2 of 1951, D/- 20-6-1951.

**Influx from Pakistan (Control) Act (23 of 1949), S. 5 — Prosecution under — Burden of proof — Evidence Act (1872), Ss. 101-103.**

The burden of proving that the accused has committed the offence always rests on the prosecution. Thus where certain per-

sons are tried under S. 5, Influx from Pakistan (Control) Act, 1949, for returning from Pakistan without a permit, the prosecution must *prima facie* establish that the accused had gone to Pakistan. After the prosecution establishes it, if the accused plead that they were at some other place, the burden of proving that fact would lie on them. But if prosecution has proved nothing more than that the accused were not in their village in 1949, it is not enough to shift the burden of proof on the accused and they are not bound to show where they were during their absence from the village. (Para 5)

C. P. Pandya, Public Prosecutor, for the State; Padmakant P. Vaidya, for Respondents.

**JUDGMENT:** The respondents were acquitted by the First Class Magistrate of the charge under S. 5, Influx from West Pakistan Ordinance 23 of 1949\*. The Government have preferred the present appeal against the order of acquittal.

(2) The respondents originally belonged to Bhadra. The prosecution case is that they left their village for West Pakistan in 1948 and returned without a permit on 27-8-1950. The learned Magistrate held that it was not proved that the respondents had ever gone to Pakistan and acquitted them.

(3) (After stating the evidence produced by the prosecution the judgment proceeds as under:

(4) The above evidence proves that when the list Ex. S A was prepared in 1949 the respondents were not in Bhadra. The value of this list is very much discounted on account of the fact that it was prepared on information received from the merchants of the village. One of them was Jadavji and Jadavji admits being the respondents' debtor who is interested in their externment from India. There is not the slightest evidence to show that the respondents had gone to Pakistan or that they returned from there.

(5) It was, however, argued on behalf of the Government that the whereabouts of the respondents were within their special knowledge and they must, therefore, prove where they were during this period. To this the learned Advocate for the respondents replied that until the prosecution produced some evidence that his clients had gone to Pakistan, they were under no obligation to disclose their whereabouts. I agree with this view. The burden of proving that the accused has committed the offence always rests on the prosecution. It must *prima facie* establish that the respondents had gone to Pakistan. After the prosecution established it, if they pleaded that they were at some other place, the burden of proving that fact would lie on them. The prosecution has proved nothing more than that the respondents were not in Bhadra in 1949. That is not enough to shift the burden of proof on the respondents and they are not bound to show where they were during their absence from the village.

(6) The learned Public Prosecutor suggested that additional evidence may be taken under S. 428(1), Cr. P. C. and the prosecution should be given an opportunity of proving by documentary evidence that the respondents' pro-

\*This should be Influx from Pakistan (Control) Act (23 of 1949)—Ed.



erty had been treated as Evacuee property. This evidence the prosecution had already in its possession and did not produce it. Besides the prosecution evidence does not definitely establish that the respondents' property was listed as Evacuee property. The only person who deposes to it is Mulvaji the Police Patel. Jadavji Ex. 6 was not present when it was listed. Against this evidence P. W. Mangaldas Ex. 7 states that respondent 1's wife is actually in the possession of his house. He is a resident of Bhadra and does not know whether the property was listed by the Government. In view of this conflicting prosecution evidence about the fact of the property having been listed as evacuee property, I am not inclined to allow the prosecution a chance to produce further evidence. I may observe that the prosecution of an important case of this nature has been left to either unskilled or negligent persons. The result is that it has been unable to produce an iota of evidence that the respondents had committed the offence. It is not fair that in the absence of any evidence against them they should be subjected to further harassment by giving the prosecution a chance to produce materials which so far as the respondents are concerned may or may not be of any value to the prosecution.

(7) The appeal is, therefore, ordered to be dismissed.

C/D.R.R.

Appeal dismissed.

#### A. I. R. 1953 KUTCH 45 (Vol. 40, C. N. 30)

VAKIL J. C.

Lalbai Naran, Applicant v. Shivji Ramji, Opponent.

Misc. Civil Appln. No. 4 of 1952, D/- 29-1-53.

#### (a) Civil P. C. (1908), S. 24 — Grounds of transfer.

Convenience of parties should be regarded as a sufficient ground for taking action under S. 24 particularly when parties are required to approach specific different forums such as a Court of a subordinate Judge and a Court of a District Judge, to urge their causes of action. (Para 5)

Anno: C.P.C., S. 24 N. 13.

#### (b) Civil P. C. (1908), S. 24 — "At any stage".

Though, an action under S. 24 can be taken at any stage, delay from which want of bona fides can be inferred, has to be taken into consideration in deciding whether an application for transfer should be granted or not. (Para 5)

Anno: C.P.C., S. 24 N. 6.

#### (c) Civil P. C. (1908), S. 24 — Grounds of transfer.

No doubt, possibility of conflicting decisions by two different Courts on same question is a good ground of transfer but when, only one ground out of several urged in two different proceedings is common, possibility of conflicting decisions by two different Courts is considerably minimised as the judgment in each Court may as well turn on decision of other grounds which are not common. (Para 5)

Anno: C.P.C., S. 24 N. 13.

K. P. Kotwal, for Applicant; D. P. Joshi, for Opponent.

ORDER: This is an application under S. 24, C. P. C., for withdrawal of Civil Appeal No. 74 of 1952 pending in the District Court, Kutch and for its disposal along with Civil First Appeal No. 12 of 1952 pending before this Court.

(2) The facts giving rise to this application are that the opponent sued the applicant in the Court of the Subordinate Judge, Mandvi for restitution of conjugal rights. The applicant sued the opponent in the District Court, Kutch for obtaining divorce. The applicant's suit was dismissed. The opponent's suit was decreed. The applicant, therefore, preferred Civil Appeal No. 74 of 1952 to the District Court against the decree for restitution of conjugal rights and Civil First Appeal No. 12 of 1952 against the decree dismissing her suit to obtain divorce. By this application, she prays that her Appeal No. 74 of 1952 preferred to the District Court be withdrawn and disposed of by this Court along with her Appeal No. 12 of 1952.

(3) The only ground urged in support of the application was that a common question whether the applicant was deserted by her husband would arise for consideration in both the appeals and withdrawal would tend to convenience of parties as it would avoid any possibility of conflicting decisions by two different Courts on the same question.

(4) The opponent, resisting the application, contended that in the suit for restitution of conjugal rights, the applicant had not raised the question of desertion and that this request for transfer was a belated one.

(5) It is a principle of law which admits of no doubt that convenience of parties should be regarded as a sufficient ground for taking action under this section particularly when parties are required to approach specific different forums such as a Court of a Subordinate Judge and a Court of a District Judge, to urge their causes of action. The opponent had to sue in the Court of the Subordinate Judge, Mandvi for restitution of conjugal rights while the applicant had to sue in the Court of the District Judge, Kutch for obtaining divorce. It cannot, however, be accepted that in a suit by a husband for restitution of conjugal rights and in a suit by a wife for obtaining divorce, common questions of facts or mixed questions of facts and law do necessarily arise. It had to be conceded by the learned Pleader for the applicant that the common question of desertion was sought to be urged for the first time in appeal before the District Court. Moreover, besides the ground of desertion, there were other grounds urged for obtaining divorce. When, only one ground out of several urged in two different proceedings is common, possibility of conflicting decisions by two different Courts is considerably minimised as the judgment in each Court may as well turn on decision of other grounds which are not common.

Lastly, though, an action under this section can be taken at any stage, delay from which want of bona fides can be inferred, has to be taken into consideration in deciding whether an application for transfer should be granted or not. The applicant sued to obtain divorce after the opponent sued her for restitution of conjugal rights. She should have made an application under this section to the District Court for withdrawal of the opponent's suit at that stage. She, however, tried to obtain a stay of the suit filed by her husband. It was only



after both the suits were decided against her and she preferred appeals as stated above that she has now applied for transfer to avoid conflicting decisions which so far have not taken place. The request made is a belated one apparently disclosing want of bona fides.

(6) Result is that the application fails and it is dismissed with costs.

B/K.S.

Application dismissed.

**A. I. R. 1953 KUTCH 46 (Vol. 40, C. N. 31)**

VAKIL, J. C.

Hasanali Fazal, and another Appellants v. Firm Vora Karimji Adamji, and others, Respondents.

First Appeal No. 18 of 1951, D/- 14-4-1953.

**(a) Court-Fees Act (1870), S. 7(1) Sch. I, Art. 1, Sch. II Art. 17 — Court-fee on future interest.**

Where in a suit, grant of future interest is discretionary with the Court, it is not a subject matter in dispute, the amount or value of which is ascertainable. But the subject-matter in a suit and the subject-matter in an appeal are different though in many cases they may be identical. On the trial court exercising discretion one way or other, its grant or refusal becomes a subject-matter in dispute in appeal and the memo of appeal directed against its grant or refusal as the case may be must bear court-fees either under Article I, Schedule I or under Article 17, Schedule II as it is or it is not possible to estimate at a money value the subject-matter in dispute. (Para 3)

Anno: Court-Fees Act, S. 7 (i), N. 11; Sch. I, Art. I, N. 15; Schedule II, Art. 17(1), N. 6.

**(b) Court-Fees Act (1870), S. 7(1), Sch. I, Art. 1 — Court-fee on future interest.**

When a suit is dismissed without necessity of determining the question about future interest and the plaintiff appeals or when a suit is decreed and the defendant preferring an appeal does not specifically challenge the grant of future interest, the relief in respect of which must go with the dismissal of the suit by the Court of appeal, future interest is not the subject-matter in dispute and the question whether it is estimable in money value does not arise. But where the question of future interest is decided, in appeal, it becomes a subject-matter in dispute and interest pendente lite is ascertainable. AIR 1947 Lah 40 (FB), explained; AIR 1934 All 805, AIR 1914 All 510 (FB); AIR 1931 All 351, 17 Bom 41, Foll; Case law referred.

(Para 4).

Anno: Court Fees Act S. 7 (1), N. 11, Sch. I, Art. 1, N. 15.

**(c) Civil P. C. (1908), S. 149 — Discretion of Court.**

Non-payment of proper court fees cannot be called a deliberate act on the part of the appellants or their legal advisers when it could not be said that the position in law was as clear as in case of a suit for a definite sum of money or a suit for specific performance. Having regard to the facts that the question raised was not

so simple and that no objection was raised as to insufficiency of Court-fees by the Office, the discretion under S. 149, Civil P. C., must be exercised in favour of the appellants. (Para 6)

Anno: Civil P. C., S. 149, N. 5.

P. R. Thacker, for Appellants, K. N. Mankad, for Respondents, (Nos. 1 and 2.).

#### CASES CITED:

- (A) ('47) AIR 1947 Lah 40: ILR (1946) Lah 805 (FB)
- (B) ('27) AIR 1927 Pat 230: 108 Ind Cas 592
- (C) ('34) AIR 1934 All 805: 57 All 71
- (D) ('14) AIR 1914 All 520: 36 All 40 (FB)
- (E) ('31) AIR 1931 All 351: 52 All 1029
- (F) ('93) 17 Bom 41
- (G) ('22) AIR 1922 Pat 386: 6 Pat LJ 676
- (H) ('23) AIR 1923 Pat 28: 77 Ind Cas 1054
- (I) ('45) AIR 1945 Pat 145: 23 Pat 905

**JUDGMENT:** The appellants sued the respondents to recover a sum of money as damages with future interest. The trial Court decreed the suit with future interest from the date of the decree. The present appeal is directed against the decree of the trial Court in so far as it did not allow interest pendente lite. The memo of appeal bore a court-fee stamp of Rs. 4. No. objection as to adequacy of court-fees paid on the memo of appeal was raised by the office and the appeal was admitted in due course.

(2) A preliminary objection was raised by the learned pleader for the respondents that the memo of appeal was not sufficiently stamped and therefore the appeal be dismissed. On behalf of the appellants, it was submitted that the appeal having been directed against future interest only, no court fee was payable on the memo and that a court fee of Rs. 4/- was paid as was payable on an application made.

(3) Court fees on suits and appeals for money are payable under S. 7, para. 1 and are assessed under Article 1, Schedule 1 to the Court-Fees Act. The appellants proceeded on the analogy of future interest claimed in a suit. Whereas in a suit grant of future interest is discretionary with the Court, it is not a subject-matter in dispute, the amount or value of which is ascertainable. But the subject matter in a suit and the subject matter in an appeal are different though in many cases they may be identical. On the trial court exercising discretion one way or other granting or refusing future interest, its grant or refusal becomes a subject matter in dispute in appeal and the memo of appeal directed against its grant or refusal as the case may be must bear court fees either under Article I, Schedule I or under Art. 17, Schedule II as it is or it is not possible to estimate at a money value the subject matter in dispute.

(4) The learned pleader for the appellants relied on the observations made by Messrs. Chitley and Rao in their work on the Court-Fees Act at page 87 under the Caption 'Court-fees on future interest'. The learned authors observe that on the principle under which court-fee is not payable for future interest in a suit, a plaintiff appealing against the dismissal of his suit is not liable to pay court fee on interest subsequent to the institution of suit. In support of this view reliance is placed on cases cited in the foot note. First case cited is — 'Mahommad Saeed v. Abdul Alim', AIR 1947 Lah 40 (A). The facts in that



case are that a suit to recover mortgage amount with future interest was dismissed and the appeal was directed against the decree dismissing the suit. By this time, interest upto the date of the decree had become ascertainable. It was held that no court-fees in addition to what was paid on the plaint was payable. This decision was arrived at following a decision of the Patna High Court in — ‘Sadhusaran Rai v. Barhamdeo Lall’, AIR 1927 Pat 230 (B). This view is explainable. When a suit is dismissed without necessity of determining the question about future interest and the plaintiff appeals or when a suit is decreed and the defendant preferring an appeal does not specifically challenge the grant of future interest, the relief in respect of which must go with the dismissal of the suit by the Court of appeal, future interest is not the subject matter in dispute and the question whether it is estimable in money value does not arise, vide — ‘Mithoo Lal v. Mt. Chameli’, AIR 1934 All 805 (C), and — ‘Raghbir Prosad v. Shanker Bux Singh’, AIR 1914 All 520 (FB) (D). But where the question of future interest is decided, in appeal it becomes a subject-matter in dispute and interest pendente lite is ascertainable, ‘Damodar v. Hardeo’, AIR 1931 All 351 (E). Another case cited is — ‘Vithal Hari v. Govind Vasudeo’, 17 Bom 41 (F). The decision in that case can be supported on facts as future interest from the date of the decree was not ascertainable. The claim for future interest was placed on par with the case for future mesne profits which according to the procedural law then in force could be determined in execution. Mesne profits when ascertained according to the procedural law now in force, either before or after passing of a preliminary decree, becomes a subject-matter in dispute in appeal capable of ascertainment. Some more cases are relied on at page 436 of the work. In — ‘Bhagwati Prasad v. Bishun Pragash’, AIR 1922 Pat 386 (G), it was held as a fact that the amount of future interest was not ascertainable. In — ‘Kali Prasad Singh v. Mathura Singh’, AIR 1923 Pat 28 (H), the trial Court dismissing the suit did not decide whether future interest be granted or not.

(5) The principles of law stated in para. 3 above are clearly applicable to the facts of the present appeal directed against refusal to grant interest pendente lite. In — ‘Jagarnath Prasad v. Bhala Prasad Singh’, AIR 1945 Pat 145 (I), such an appeal was preferred. In — ‘AIR 1931 All 351 (E)’, appeal was directed against a part of the claim dismissed and also against pendente lite interest disallowed. It is unnecessary to refer to other decided cases cited at the Bar. There are some decided cases which held that in appeal it was not necessary to pay court-fees for future interest becoming due from the date of the decree. However, as that question does not arise in this appeal, it is not necessary to consider those cases in detail. It must be held that the court fees ad valorem should have been paid on the amount of interest pendente lite disallowed by the trial Court.

(6) The appellants’ request that under S. 149, Civil P. C., they be given time to pay court-fees. This is objected to by the learned pleader for the respondents who submitted that the appeal be dismissed. It was not disputed that time to pay deficit court-fees could be granted under S. 149, Civil P. C. It was contended that the appellants did not deliberately pay

proper court-fees by valuing the appeal accordingly and in any case there was negligence and want of bona fides. I do not appreciate how this was a deliberate act on the part of the appellants or their legal advisers when it could not be said that the position in law was as clear as in case of a suit for a definite sum of money or a suit for specific performance. It was urged that it was not understood as to how a court fee of Rs. 4/- was paid and it was contended that it was deliberately done to pass the memo from the office. I accept the explanation that Court fee of Rs. 4/- was paid as would be paid on an application made to a High Court. It was urged that if the law on the subject was properly read, the appellants would have paid proper court fees and this was negligence. Having regard to the facts that the question raised was not so simple and that no objection was raised as to insufficiency of Court fees by the office, the discretion under S. 149, Civil P. C., must be exercised in favour of the appellants. It is not necessary to refer to some decided cases cited at the Bar on behalf of the respondents as negligence in those cases was patent.

(7) The appellants are therefore allowed 7 days’ time to value the appeal and pay deficit court fees.

B/H.G.P.

Order accordingly.

#### A. I. R. 1953 KUTCH 47 (Vol. 40, C. N. 32)

VAKIL J. C.

Kantasing Vahejnath Accused-Applicant v. The State.

Criminal Revn. Appln. No. 31 of 1951, D/- 6-10-1951.

#### (a) Motor Vehicles Act (1939), S. 116 — Offence under — Evidence.

In deciding whether an offence under S. 116 of the Act is committed, the Court has to consider whether the speed with which or the manner in which the vehicle was driven was dangerous to the public. In deciding this question, the Court has to take into consideration circumstances of the case. (Para 4)

Anno. Motor Vehicles Act S. 116 N. 1

#### (b) Criminal P. C. (1898), S. 439 — Finding of fact — Interference in revision.

As a general rule the High Court will not interfere in revision with findings of fact unless they are not based upon evidence or are based on inadmissible evidence or are patently erroneous. (Para 6)

Anno. Cr. P. C., S. 439 N. 15.

C. B. Thacker for Applicant; C. P. Pandya Public Prosecutor for the State.

ORDER: The applicant was convicted of an offence punishable under S. 116, Motor Vehicles Act (Act 4 of 1939), by the Magistrate F. C. Anjar and was sentenced to pay a fine of Rs. 40/-. The applicant moved the Sessions Court, Kutch for revision of that order but his application was dismissed. He has, therefore, approached this Court for revision of the said order.

(2) The indictment against the applicant was that on 11-2-1951 he was driving a Motor truck from Gandhidham to Kandla. Near Kotha of Gadhvadi, a touring car driven by the prosecution witness Kasim was coming from the opposite direction. There is a curve at this place. The applicant, while negotiating the curve, did not sound horn and collided with the



touring car, though the driver of the touring car had applied brakes on seeing the truck and brought the car driven by him to a stand-still.

(2) The applicant denied having committed the offence and alleged that the touring car was driven by one Hemchand son of Sheth Kalyan-jeo and not by Kasim.

(4) In deciding whether an offence under S. 116 of the Act is committed, the Court has to consider whether the speed with which or the manner in which the vehicle was driven was dangerous to the public. In deciding this question the Court has to take into consideration circumstances of the case. The nature of the place was that there was a curve. Hence it was necessary before negotiating curve to sound the horn. The trial Court believed the evidence led that Kasim had applied the brakes on seeing the truck coming. If the applicant had sounded the horn and negotiated the curve with care, he could have avoided the collision.

(5) It was no longer urged that driver was not Kasim but Hemchand. It was urged that there was evidence of a mechanic who stated that the car had slipped and it showed that the car was running at a speed of 45 miles. It was submitted that the trial Court did not consider this part of the evidence. Where there was direct evidence which the trial Court was prepared to believe it found unnecessary to refer to expert evidence.

(6) As a general rule this Court will not interfere in revision with findings of fact unless they are not based upon evidence or are based on inadmissible evidence or are patently erroneous. The applicant's case does not fall under any of the categories mentioned above. There is, therefore, no scope for interference in revision. The application is accordingly dismissed. C/K.S.

Revision dismissed.

A. I. R. 1953 KUTCH 48 (Vol. 40, C. N. 33)

VAKIL J. C.

Gangji Liladhar, Applicant v. Dana Khiara, Opponent.

Civil Revn. Appln. No. 4 of 1953, D/- 21-3-53.

**Debt Laws — Bombay Agricultural Debtors' Relief Act (28 of 1947), S. 15(2) — Acceptance of statement.**

Where the opponent made an application under S. 15 (2) alleging that the applicant had permitted him to believe that he was not a debtor under the Act and his debt was not extinguished the Court has jurisdiction to decide the question. If the legal effect mentioned in sub-s. (1) of S. 15 does not take place by virtue of the fact that the case falls under sub-s. (2), a statement can be accepted after the time prescribed.

(Paras 2, 4)

R. B. Mehta, for Applicant; M. H. Dholakia, for Opponent.

**ORDER:** This is an application for revision of an order dated 5-12-52 made by the Subordinate Judge, Mundra in consolidated case No. 1373 under S. 15 (2) of the Bombay Agricultural Debtors' Relief Act, 1947, (hereinafter referred to as the Act) as applied to the State of Kutch.

(2) The facts are that two creditors of the applicant made applications Nos. 1134 and 1237 under section 4 of the Act for adjustments of the debts due to them. The opponent was not mentioned in the said applications as another creditor of the applicant. Notices under S. 14 of the Act were issued and were duly served. The opponent did not file a statement

in compliance with the notices within the time prescribed. He made an application under S. 15(2) of the Act alleging that the applicant had permitted him to believe that he was not a debtor under the Act and his debt was not extinguished. He therefore requested that his statement be accepted and debt due be adjusted. The applicant opposed the application. The trial Court recorded evidence on the question of fact raised and found it in favour of the opponent. The opponent's statement was therefore accepted. As no appeal against an order made under S. 15(2) of the Act is provided, the applicant preferred the present application for revision of the said order.

(3) It is clear that the trial Court had decided a question of fact. It could not have been urged that the trial Court was exercising jurisdiction which it had not got. It was urged that there was a material irregularity in the exercise of jurisdiction. It was pointed out that there was misappreciation of some evidence. Material irregularity in the exercise of jurisdiction is some error in procedure which is material in that it has affected the ultimate decision in the case. Moreover, exercise of revisional jurisdiction is discretionary and the applicant would be entitled to urge this contention in an appeal preferred from the award made in view of the provisions of S. 105, C. P. C. It is thus evident that this Court in the exercise of the powers of revision will not interfere with this finding on a question of fact.

(4) It was contended that as the legal effect under S. 15 of the Act had taken place, the Court should not have entertained and considered any question raised under sub-s. (2) of S. 15. The legal effect mentioned in S. 15 takes place when no application under S. 4 is made and no statement in compliance with the provisions of S. 14 is filed. Sub-s. (2) to S. 15 is virtually a proviso to S. 15(1). If the case falls under sub-s. (2), the legal effect mentioned in sub-s. (1) of S. 15 does not take place. The Act does not make any provision as to whether the Court administering the Act should or should not consider such a contention. But it is obvious that if the legal effect mentioned in sub-s. (1) of S. 15 does not take place by virtue of the fact that the case falls under sub-s. (2), a statement can be accepted after the time prescribed. Acceptance of statement does not amount to extension of time. Extension of time results in non-incurring of the penalty provided in S. 15. But where there is no question of incurring of penalty, a statement can be accepted on an order made in favour of a creditor under sub-s. (2). It is true that when a creditor does not make any such application, the Court administering the B.A.D.R. Act will treat the debt as extinguished and the question whether the person for the adjustment of whose debts an application is made was a debtor & whether the case fell under sub-s. 2 of S. 15 will have to be decided by the ordinary Court before whom they are raised. But if a question under sub-s. (2) of S. 15 is raised before the special court, it must be decided by it. The reason is that if the decision is against the creditor, the award will proceed on the footing that the debt is extinguished and if the decision is against the debtor, the debt will be subjected to adjustment as provided in the Act. It was not intended that debt of debtor be not extinguished and at the same time, he should not get the benefit of the Act. The trial Court had therefore, jurisdiction to decide the question.

(5) Result is that the present application for revision fails and it is dismissed with costs.

B/D.H.

Revision dismissed.



**A.I.R. 1953 KUTCH 49 (Vol. 40, C. N. 34)**

VAKIL J. C.

Sengabhai Nayani, Applicant v. Khima Vala Nayani and others, Opponents.

Civil Revn. Appln. No. 20 of 1952, D/- 27-3-1953.

**(a) Debt Laws — Bombay Agricultural Debtors' Relief Act (28 of 1947) — Applicability to Kutch.**

Though the Act was made applicable to Kutch in July 1949 the Act had to be re-extended with certain modifications and the Act must be held to have come into operation from the date on which it was re-extended. AIR 1952 Kutch 87, Rel. on. (Para 4)

**(b) Debt Laws — Bombay Agricultural Debtors' Relief Act (28 of 1947), Ss. 2(4), 17(1)(b) — Debt.**

The debts contracted on the security of immovable property situated in Pakistan are to be regarded as debts. (Para 5)

C. B. Thacker, for Applicant; L. L. Thacker, (for No. 2), K. J. Dholakia, (for Nos. 4 and 8), U. K. Gor, (for Nos. 5 and 7), for Opponents.

**CASE REFERRED TO:**

(A) ('52) AIR 1952 Kutch 87

**ORDER:** This is an application for revision of a decree dated 31-1-52, made by the Additional District Judge, Kutch, in Civil Appeal No. 131 of 1951, confirming an order made by the Subordinate Judge, Nakhatrana in consolidated case No. 805.

(2) The few facts necessary to be stated are that the applicant applied for adjustment of his debts under S. 4 of the B. A. D. R. Act as amended and applied to this State. In the said application, the applicant had mentioned the debts due to some of the opponents. In the course of time, it was found out that the applicant was also indebted to other opponents. The trial Court settled statutory issues and on evidence recorded in the case held that the applicant was not a debtor and total amount of his debts exceeded Rs. 15000. The applicant was not held a debtor as he had not been cultivating land personally for the cultivating seasons in the two years immediately preceding the date of the coming into operation of the Act. It was admitted that the total amount of the debts due from the applicant exceeded Rs. 15000. It was however contended that substantial portion of the debts was contracted in Pakistan on the security of the immovable property situated in that territory and hence the said debts could not be regarded as such for considering the total amount of indebtedness. This contention was not accepted by the trial Court. On appeal, the Additional District Judge upheld the aforesaid findings of the trial court. The applicant has therefore approached this Court in revision.

(3) It is plain that if the findings recorded by the Courts below were erroneous, the lower courts did not exercise the jurisdiction vested in them and therefore the application in revision was competent on the ground of non-exercise of jurisdiction vested.

(4) The first point urged was that the lower courts erred in holding that the applicant had not complied with the requirement No. (iii) of S. 2(5) of the Act. That sub-section requires that the applicant must have been cul-

tivating lands personally for the cultivation seasons in the two years immediately preceding the date of the coming into operation of the Act. The Act was first made applicable to this State by the Application of Laws Order, 1949 in the month of July 1949 and the courts below held that the applicant had not cultivated lands personally from July 1947 to July 1949. If, however, the Act came into operation in 1950, there was no dispute that the applicant had complied with the provisions of the said sub-section. No doubt the Act was made applicable in July 1949. But as pointed out in — 'Rajkuverba v. Dr. Karsondas', AIR 1952 Kutch 87 (A), the Act had to be re-extended with certain modifications and the Act must be held to have come into operation from the date on which it was re-extended. That being the case, the decision of the courts below on the first point was wrong. It must be held that the applicant was a debtor as defined by the Act.

(5) But the applicant had further to show that the total income of his debts did not exceed Rs. 15000. This he could not have denied. But his contention was that if the debts contracted in Pakistan on the security of immovable property situated in that territory were included, (sic, excluded?) his total debts would be less than Rs. 15000. It was urged that as these debts were contracted in Pakistan on the security of immovable property situated in that territory, the trial court had no jurisdiction over the said territory and as such, the trial court could not have considered such debts as debts within the meaning of that expression used in section 17(1)(b) of the Act. In Section 17(1)(b), the term used is 'debts'. That term used in the section is not qualified. It must therefore be understood to have been used in the sense in which it is defined by the Act. The definition of the word 'debt' is given in S. 2(4) of the Act. That definition does not qualify the meaning of the word debt, as debt contracted within the jurisdiction of the court or within the territory of India. It does not provide that the debts contracted on the security of immovable property situated in Pakistan are not to be regarded as debts. It is possible that a person to whom such debts are due, may sue a debtor in India particularly if he has lost the property on which they were secured.

To accept the contention of the learned pleader of the applicant would amount to making an addition to the definition of the term given in the Act. The addition would be as under:

"but does not include ..... and debts contracted in Pakistan on the security of immovable property situated in that territory." This would be legislating and not interpreting a definition given by an Act. If the Legislature intended that such debts contracted on the security of property situated in the territory of Pakistan be not regarded as debts and be not included in total debts not exceeding Rs. 15000, it should have made its intention clear by making a provision to that effect. It is true that a creditor to whom such debts are due may be a 'displaced creditor' within the meaning of that term used in the Displaced Persons (Debts Adjustment) Act, 1951. If a debtor is a debtor as defined by the B. A. D. R. Act and a creditor is a displaced creditor as defined by the Displaced Persons (Debts Adjust-



ment) Act, 1951, complications may arise. But it was for the State Legislature to amend the definition of the word 'debt' after the Displaced Persons (Debts Adjustment) Act, 1951 was passed to avoid possibility of any such complication. Till it is not so done, this Court must interpret the definition of the word 'debt' as it finds it without any addition or subtraction. It is therefore not possible to accept the contention of the learned Pleader for the applicant. It must be held that the finding of the Courts below that the total indebtedness of the applicant exceeded Rs. 15000 is correct. The applicant was therefore not entitled to the benefit of the Act. His application was rightly rejected by the trial Court.

(6) Result is that the application fails and it is dismissed with costs.

B/D.H.

Revision dismissed.

### A.I.R. 1953 KUTCH 50 (Vol. 40, C. N. 35)

VAKIL J. C.

The State of Kutch v. Aher Vasta Hadhu and others, Accused Respondents.

Criminal Appeal No. 12 of 1953, D/- 7-5-1953.

(a) Criminal P. C. (1898), Ss. 498, 427, 561-A

— Powers of High Court to grant bail.

Section 498 does not apply to the case of a person who has been tried, acquitted and is arrested under S. 427 on admission of an appeal by the State under S. 417. But the Court which issues a warrant for arrest has the power to admit such a person to bail and that power is not specifically excluded by the provisions of S. 427. As the Code does not make specific provision for the exercise of that power, it can be exercised under S. 561-A, Cr. P. C. AIR 1945 PC 94, Disting. and Explained. (Paras 2, 3)

Anno: Criminal P. C., S. 498 N. 1; S. 427 N. 1; S. 561-A N. 1.

(b) Criminal P. C. (1898), S. 497 — General principles to grant bail.

The respondents who were acquitted are in a better position than what they were before judgment. Where, therefore, it was not alleged that they were likely to abscond and they were persons with property, the mere fact that the appeal was admitted against them would not be sufficient for rejection of their application for bail.

(Para 4)

Anno: Criminal P. C., S. 497 N. 4.

C. P. Pandya, Public Prosecutor, for the State; C. B. Thacker, for (Nos. 1, 3, 4, 5, 7) and P. R. Thacker, for (Nos. 2, 6 and 8), for Respondents.

CASE REFERRED TO:

(A) ('45) AIR 1945 PC 94: 46 Cri LJ 662

ORDER: The petitioners along with the petitioners in application Exhibit 4 were acquitted of a charge of murder by the Additional Sessions Judge, Kutch. The present appeal was preferred by the State under S. 417, Cr. P. C. against the order of acquittal. A warrant as provided in S. 427, Cr. P. C. was issued for the arrest of the respondents. On their arrest, the respondents were produced before the Additional Sessions Judge, Kutch as directed in the warrant. The respondents applied for being released on bail. The Additional Sessions Judge

rejected their application for bail and committed them to prison pending the disposal of appeal. The respondents have, therefore, by their applications Exhibits 3 and 4, applied to this Court for being released on bail.

(2) A question arose whether this Court was competent to release the respondents on bail, when under S. 427, Cr. P. C., the power to release them on bail was conferred on the Court before whom they were produced in accordance with the direction in the warrant. It was conceded that the respondents were not moving this Court for revision of the order made by the learned Additional Sessions Judge. It was submitted that the respondents' application could be considered under S. 498, Cr. P. C. It was pointed out that under that section the High Court could release on bail any person in any case, whether there was an appeal on conviction or not. The section in terms does not provide for a case in which there is an appeal against acquittal order, though it may be contended with some force that the expression 'any case' is wide enough to include the case of a person against whom an appeal under S. 417 is filed and is arrested on a warrant issued under S. 427, Cr. P. C. Chapter 39 of the Code makes provisions for grant of bail to 'accused persons'. It was contended that in S. 427, Cr. P. C., the same expression was used. It was further contended that Chap. 39 of the Code together with S. 426 contained a complete and exhaustive statement of the power of a High Court to grant bail as held by the Privy Council in — '*Jairam Das v. Emperor*', AIR 1945 PC 94 (A). In that case it was held that the only granting of bail which was referred to in that chapter was the granting of bail to accused persons and there was no reference therein to the granting of bail to persons who have been tried and convicted. What was held was that the provisions of S. 498 were meant for those accused persons who were not tried. If an accused person has been tried and convicted, he can apply for bail under S. 426, Cr. P. C. only. An accused person who has been tried and acquitted has not to apply for bail. Such a person could be arrested on admission of an appeal under S. 417, Cr. P. C. on a warrant issued under S. 427, Cr. P. C. Hence, that section made provisions for release on bail of a person arrested in execution of a warrant issued under it. It follows that S. 498, Cr. P. C. does not apply to the case of a person who has been tried, acquitted and is arrested under S. 427, Cr. P. C. on admission of an appeal by the State under S. 417, Cr. P. C.

(3) While on the one hand S. 498, Cr. P. C. does not apply, on the other hand S. 427 empowers the Court before whom the accused person is directed to be produced to commit him to prison or to admit him to bail. It can therefore be contended that the subordinate Court before whom the respondents were produced under S. 427, Cr. P. C. having refused to admit them to bail, this Court has no power under that section or under any other provision of law to do so. It can further be urged that the Privy Council, in the case cited above held that any inherent power of the Court, to grant bail in addition to what is provided in Chap. 39 and S. 426, Cr. P. C., was excluded. The Judicial Committee in that case held that besides the provisions contained in Chap. 39 and S. 426, Cr. P. C., there were no additional inherent powers in a High Court to admit an accused person convicted of an offence to bail. The Privy Council in that case was not considering



the case of a person who was acquitted but against whom an acquittal appeal was admitted and he was arrested under S. 427, Cr. P. C. Under S. 427, Cr. P. C., an accused person arrested can be produced before a subordinate Court, if so directed. The subordinate Court had to be expressly empowered to admit such a person to bail or to commit him to prison. But the Court which issued a warrant for arrest had the power to admit such a person arrested to bail and that power was not specifically excluded by the provisions of S. 427. It follows that as the Code does not make specific provision for the exercise of that power, it could be exercised under S. 561-A, Cr. P. C. and that the Privy Council case referred to above is not an authority for the proposition that in such a case, exercise of inherent power is excluded by the provisions of Chap. 39 and S. 426, Cr. P. C.

(4) As regards merits, it is plain that the respondents who were acquitted are in a better position than what they were before judgment. It is not alleged that they are likely to abscond and they are persons with property. Hence, the mere fact that the appeal is admitted against them will not be sufficient for rejection of their application for bail. The learned Additional Sessions Judge was much impressed with the fact that the respondents whom he tried and acquitted were charged with commission of a serious offence. The reasons given by the learned Sessions Judge for not admitting the respondents to bail are not sound. I grant both the applications and order that the respondents shall be admitted to bail pending the decision of the appeal. It appears that according to the prosecution, respondents 1 and 2 were principal offenders. Hence their term of bail will be stiff. Respondents 6 and 8 were found not guilty by the assessors and respondents 3 and 8 were on bail during the trial. Hence their terms of bail will be easy. I direct that the respondents be released on bail during the pendency of the appeal, on respondents 1 and 2 executing a bond with one surety for Rs. 5000/- each, on respondents 4, 5 and 7 executing a bond with one surety for Rs. 2500 each and on respondents 3 and 6 and 8 executing a bond with one surety for Rs. 1000 each, for appearance when called upon by this Court to do so and for respondents 1 and 2 appearing before the Taluka Police Station on Monday of each week for notifying their presence.

C/H.G.P.

Order accordingly.

cases of defamation, which affect private parties and not public, Government would usually be unwilling to interfere. But where the applicant was a member of the State police force and there were serious allegations made against him which were disparaging of him and which if true were such as to render him unfit to continue in service, obviously it was a matter in which the State Government was vitally concerned. The applicant therefore should have approached the Government for lodging an appeal under S. 417 from the order of acquittal and as he has not done so, High Court would not consider whether the finding of the Magistrate was so erroneous as to enable High Court sitting in revision to come to a contrary conclusion and to direct a retrial. At the same time, High Court cannot over-emphasise the fact that publishers must use great care and caution than what is expected of a man in the street, before any imputations are published. (Paras 7, 9)

Anno: Cr. P. C., S. 439 N. 12; S. 417 N. 1.

M. M. Mehta, for Applicant; D. P. Joshi, for Opponent.

#### CASE CITED:

(A) ('41) AIR 1941 Bom 410: 43 Cri LJ 174

JUDGMENT: This is an application for revision of an order of acquittal in a defamation case.

(2) There were three imputations published in a local daily by the opponent. These imputations made were concerning the applicant. They were disparaging of the applicant and the opponent knew or had reason to believe that they were so disparaging.

(3) The opponent relied on Exceptions 1 and 9 to S. 499, I. P. C. The trying Magistrate held that the case of the opponent fell under these two exceptions. The opponent was therefore acquitted.

(4) The applicant moved the Sessions Court in revision as a preliminary to his approaching this Court, if that Court did not accept the application. The Sessions Judge observed that the findings about truth of the two defamations were far fetched and inferential. It may be stated that evidence about truth of the defamatory statements made was given in respect of one dated 29-8-50 only. As regards Exception No. 9, the learned Sessions Judge observed that the Magistrate had material before him for arriving at that conclusion and though there was room for differing from the conclusion of the Magistrate, it was not possible to say that the said finding was perverse or manifestly wrong.

(5) The applicant has therefore approached this Court in revision. The applicant seems to have thought that this Court can convert the finding of acquittal into one of conviction. It is with this erroneous view that the applicant has not moved the State Government to lodge an appeal under S. 417, Cr. P. C. In the revision application before me, the conclusions arrived at by the trying Magistrate that the case of the opponent fell under Exception No. 9 were challenged. Of course, the finding that the case of the opponent in respect of the statement dated 29-8-50 fell under Exception No. 1 was also challenged.

(6) First thing necessary to be considered is the approach this Court should have in the

**ALLR. 1953 KUTCH 51 (Vol. 40, C. N. 36)**  
VAKIL J. C.

Jeeva Sata, Complainant-Applicant v. Pranlal Nanchand, Accused-Opponent.

Criminal Revn. Appln. No. 26 of 1952, D/- 24-6-1953.

Criminal P. C. (1898), Ss. 439, 417 — Revision against acquittal.

Unless interference is demanded in the interest of public justice, an application for revision against an order of acquittal cannot be entertained. Under S. 439 the High Court can only direct a retrial.

(Para 6)

To this general principle of law, personal cases such as of defamation may be treated as an exception, the reason being that in



disposal of this application. The established practice of the High Courts in considering such applications was stated by Broomfield J. on review of authorities in — 'Vinayak v. Shantaram', AIR 1941 Bom 410 (A). His Lordship observed as under:

"It is clear from these cases that for a long time past this Court, like most of the other High Courts, has consistently declined to interfere in revision with orders of acquittal except when interference is demanded in the interest of public justice."

The reasons for these observations are quite apparent. The law does not allow a private complainant to prefer an appeal against an order of acquittal. Such a complainant must move the State Government for preferring an appeal under S. 417. Even in cases of an appeal against an order of acquittal under S. 417, it has been held that there is what is aptly termed as a double presumption of innocence and unless the conclusion in question is impossible, it cannot be disturbed. Under S. 439, this Court can only direct a retrial. Hence, unless interference is demanded in the interest of public justice, such an application would not be entertained. There is no question of appreciation of evidence on a question of fact as would be done by a Court of appeal.

(7) The learned pleader for the applicant contended that the above observations would not apply to personal cases and in support of his contention, he relied on the Bombay case cited above. No doubt that case is an authority for the proposition of law contended for. But it is necessary to consider the reasons which led their Lordships to treat personal cases as an exception to the general principle of law stated. His Lordship Broomfield J. expressed the reason as under:

"The reason is that in cases of defamation, which from their very nature affect private parties and not the public, Government would usually be unwilling to interfere."

It will be seen that in the present case, the applicant is a member of the State police force. There were serious allegations made against him which were disparaging of him and which if true were such as to render him unfit to continue in service. Thus the allegations affected a public servant concerned with preservation of law and order. If these allegations were true, Government would be unwilling to continue him — (the applicant) — in service. If they were not true, the Government was bound to afford protection to its servants by assisting the applicant in prosecuting persons who were making such allegations against him. It is thus obvious that this is a matter in which the State Government was vitally concerned. Yet there is nothing to show that the applicant approached the Government to prefer an appeal against the order of conviction. In view of the facts stated above, the applicant's case is taken out of the exception mentioned in the Bombay case stated above.

(8) Thus the question to be considered is whether interference is demanded in the interest of justice. As regards statement dated 29-8-50, evidence was led by the opponent and it was believed by the trial Court. As regards two other statements, it was not contended that the imputations made were made maliciously and not for the protection of the public good. So the only question was whether they were made in good faith, and is with due care and

caution. The question whether it was so done would not be entirely a question of fact. It was pointed out that the opponent had not made any enquiries before the publication of the charge and that he had not at his disposal or within his knowledge any of the materials which were sought to be established in the cross-examination of the applicant. It was therefore contended that there was no good faith established. The opponent could show that at Maska and thereabouts, many thefts committed were not detected, the applicant's son was suspected in one of the cases, the applicant used to remit money at Vagad though his income from the avocation followed by him was not such that he could do so and that the opponent was addressed two letters by some two persons suspecting the applicant in connection with certain thefts. These matters may be regarded as sufficient to raise a cloud of suspicion but not sufficient to definitely charge a person or to show good faith. It was for this reason that the learned Sessions Judge remarked that there was room for differing from the conclusions of the learned Magistrate.

(9) The question then is whether a retrial be directed on setting aside a finding that the case falls under Exception No. 9. It was observed in the Bombay case cited above, and with respects I agree with these observations, that the case would call for imposition of a sentence of fine and that it would be waste of time and money to direct a retrial. I would add that the applicant being a Government servant should have approached the Government for lodging an appeal from the order of acquittal and as he has not done so, this Court would not consider whether the finding of the learned Magistrate was so erroneous as to enable this Court sitting in revision to come to a contrary conclusion and to direct a retrial. At the same time, this Court cannot over-emphasise the fact that publishers must use great care and caution than what is expected of a man in the street, before such imputations are published.

(10) Result is that the application fails and it is dismissed.

C/H.G.P.

Application dismissed.

# **A.I.R. 1953 KUTCH 52 (Vol. 40, C. N. 37)** **VAKIL J. C.**

Hasanali Fazal and another, Plaintiffs-Appellants v. Karimji Adamji and Co. and others, Defendants-Respondents.

First Appeal No. 18 of 1951, D/- 8-5-1953.

(a) Civil P. C. (1908), S. 34 — Decree for payment of money.

The expression "decree for payment of money" used in S. 34 is not used in any technical or restrictive sense. It means every decree by which payment of money is directed. Thus a decree in a suit to recover damages is a decree for payment of money. AIR 1940 Bom 369; AIR 1946 Bom 1; AIR 1924 Cal 637, Foll.; AIR 1931 Bom 386; AIR 1920 Cal 737, Not foll. (Para 3)

Anno: Civil P. C., S. 34 N. 2.

(b) Civil P. C. (1908), S. 107 — Competence of appellate Court to interfere with discretion of Court below.



Discretion is to be exercised on sound principles and where it is so done, the Court of appeal has no reason to interfere with the order made. (Para 4)

Anno: Civil P. C., S. 107 N. 12.

(c) Civil P. C. (1908), S. 34 — Award of interest under Section is discretionary.

Whether future interest should be allowed in a particular case is a question which must be decided on the facts of each case. There must be reasons both for grant or refusal. (Considering the nature of the suit, the get up of the plaint, the way in which the suit was conducted by the plaintiffs, held that this was not a fit case in which interest could be granted). Case law considered. (Paras 4, 5)

Anno: Civil P. C., S. 34 N. 3.

P. R. Thacker, for Appellants; K. N. Mankad, for Respondents Nos. 1/1 and 1/2.

CASES REFERRED TO:

- (A) ('31) AIR 1931 Bom 386: 133 Ind Cas 861
- (B) ('40) AIR 1940 Bom 369: ILR (1941) Bom 71
- (C) ('46) AIR 1946 Bom 1: ILR (1946) Bom 218
- (D) ('20) AIR 1920 Cal 737: 60 Ind Cas 288
- (E) ('24) AIR 1924 Cal 637: 80 Ind Cas 87
- (F) ('49) AIR 1949 All 440: ILR (1949) All 735
- (G) ('46) AIR 1946 Pat 154: 226 Ind Cas 97
- (H) ('43) AIR 1943 Nag 240: ILR (1943) Nag 555
- (I) ('32) AIR 1932 Lah 312: 143 Ind Cas 257
- (J) ('49) AIR 1949 Kutch 6

**JUDGMENT:** The appellants have valued their memo as directed by the interim judgment delivered and have paid court-fees ad valorem on the valuation made. The only question that arises in this cognate appeal is whether the appellants are entitled to interest pendente lite and if yes, at what rate.

(2) The suit from which this appeal has arisen was brought by the appellants to recover damages from the respondents. The trial Court decreed the damages claimed with future interest from the date of the decree but did not grant future interest before judgment. The trial Court was of the opinion that future interest in a suit to recover damages could be allowed for special reasons. It held that there were no special reasons for allowing future interest before judgment.

(3) It was contended by the learned pleader for the respondents that no interest before judgment could be allowed on the amount adjudged as damages and reliance was placed on — 'Ratanlal v. Brijmohan', AIR 1931 Bom 386 (A). Section 34, C. P. C. provides that the Court may, in a decree for payment of money, order interest to be paid from the date of the suit to the date of the decree. Unless, therefore it was held that a decree for payment of money in a suit for damages is not a "decree for payment of money" within the meaning of that expression used in S. 34, C. P. C., interest before judgment can be awarded. The expression "decree for payment of money" used in S. 34, C. P. C. is not used in any technical or restrictive sense. It means every decree by which payment of money is directed. A suit for money due for rent or for price of goods sold may result in a decree for payment of money in the same way a suit for recovery of damages may result. Thus a decree in a suit to recover damages is a decree for payment of money. It is thus apparent that the Bombay view in the case

cited above is against the plain provisions of S. 34, C. P. C. In the judgment delivered in that case, no reference was made to S. 34, C. P. C. The Bombay view expressed in that case was not followed in subsequent rulings of the Bombay High Court. The question came for consideration in — 'Bhagwant Genuji v. Ganganbisan Ramgopal', AIR 1940 Bom 369 (B). The Court in that case preferred to follow decided cases of the Madras and Calcutta High Courts and held that even in a suit for damages interest before judgment could be awarded. Referring to the previous case, it was observed that it was doubtful that the said case meant to lay down a general rule of law. In a still later case of that High Court, — 'Anandram Mangtaram v. Bholaram Tanumal', AIR 1946 Bom 1 (C), it was held that the important thing to be considered was whether the decree was for payment of money. Chagla J. remarked that he could not understand why the learned Chief Justice took the view that the Court could not grant interest from the date of the filing of the suit. Thus the Bombay view expressed in the case relied on by the learned pleader for the respondents has not been followed by the later cases which held to the contrary. Some support for the early Bombay view is to be found in a Calcutta case, — 'Crewdson v. Ganesh Das', AIR 1920 Cal 737 (D). That case proceeded on the view that on principle, no distinction between interest before suit and interest before judgment could be made and when interest before the suit could not be had, interest before judgment could not be allowed. Section 34 provides for payment of interest before judgment in a decree for payment of money and apart from the question that discretion may be properly exercised in refusing interest before judgment in a case in which interest before suit could not be allowed, the principle sought to be enunciated is against the plain provisions of S. 34, C. P. C. In a later ruling of that High Court, interest before judgment in a suit for damages was allowed — 'Pannalal v. Radha Kissen', AIR 1924 Cal 637 (E). Hence, the particular contention raised cannot be accepted.

(4) Next contention urged was that grant of future interest being discretionary with the trial Court and the trial Court in the exercise of discretion, having held that interest before judgment could not be allowed, this Court in appeal should not interfere with the order made by the trial Court. Discretion is to be exercised on sound principles and where it is so done, the Court of appeal has no reason to interfere with the order made. The trial Court seems to have thought that though interest from the date of the decree should be awarded, interest from the date of the suit could only be awarded for special reasons and as there were no such special reasons, interest from the date of the suit to the date of the decree could not be awarded. In support of the observations made, the learned trial Judge relied on — 'AIR 1940 Bom 369' (B). In that case, the question considered was whether the fact that damages were awarded was a ground for refusing to award interest from the date of the suit. It was held that if circumstances justified award of future interest upto the date of the decree, it could be so awarded even in a case where damages were awarded. The learned trial Judge did not properly understand the decision in that case. The learned pleader for the appellants contended that ordinarily interest before judgment should



not be refused except for sufficient reasons and reliance was placed on the observations to that effect made by Messrs. Chitlay and Rao in their work entitled commentaries on the Code of Civil Procedure, 5th Edition at page 435 under the caption "award of interest under the section is a matter of discretion." In support of the observations aforesaid, the learned authors have relied on the following cases cited in the foot note: — 'Hari Krishna v. K. C. Gupta', AIR 1949 All 440 (F); — 'Kamakshya Narain Singh v. Bhuramull', AIR 1946 Pat 154 (G); — 'Yadao-rao v. Ramrao', AIR 1943 Nag 240 (H); — 'AIR 1940 Bom 369' (B) and — 'Murlidhar v. Hukam Chand', AIR 1932 Lah 312 (I). In the Bombay case, long delay under vexatious and oppressive circumstances in payment of contract money was taken into consideration as a reason in awarding interest before judgment. In the Nagpur case, the debt had remained unpaid since long and it was held as sufficient reason for allowing future interest. In the Lahore case, there was considerable delay in bringing the suit and that fact was considered sufficient for not awarding future interest. In the Patna case there was a claim for cess extending for a long period and that fact was held sufficient for awarding future interest. In the Allahabad case, there was a breach of contract for sale of immovable property. The trial Court did not give reason for not granting future interest. No general principle of law can be said to have been laid down in these cases. Whether future interest should be allowed in a particular case is a question which must be decided on the facts of each case. There must be reasons both for grant or refusal.

(5) Now the facts in this case are that the appellants sued the respondents to recover damages on the allegation that the latter did not act according to their instructions in conducting the business of the agency. The respondents were the agents of the appellants for sale of dates and it was alleged that they delivered the dates to the vendors without taking cash. The suit was filed immediately and interest upto the date of the suit was not claimed. The respondents did not specifically deny the term about cash against delivery but they relied on a business usage according to which delivery was to be given before cash and they contended that there was ratification by the appellants. In that state of pleadings it was evident that the suit could have been decided soon if it was intelligently tackled. Unfortunately, the appellants filed their plaint against a dead person and it was not till 29-9-48 that the plaint was allowed to be amended. After the written statement was filed, the appellants should have seen that proper issues were raised and the suit was fixed for hearing soon. Instead of doing so, the respondents were given an opportunity to deny the term and arguments were addressed to the Court to show that the term existed. Not only that but the appellants, suing the respondents for damages, in the alternative sued the vendors to recover price of goods. It was clear that if the vendors were able to pay the price, no loss was sustained. Further the fact to be considered is that the appellants were not entitled to interest before the suit. Thus considering the nature of the suit, the get up of the plaint, the way in which the suit was conducted by the appellants, this does not appear to be a fit case in which interest should be granted. The question of interest pendente lite became important as considerable period elapsed between the date

of the institution of the suit and the date of judgment. Apparently the appellants were, if not mainly, substantially responsible for the delay caused. The learned pleader for the appellants contended that as defendants denied their liability, plaintiffs were entitled to interest pendente lite as compensation and reliance was placed on — 'Jethi Lalji v. Ghandhi Karson', AIR 1949 Kutch 6 (J). What that case laid down was that interest pendente lite was payable as compensation. At the time that case was decided, Civil Procedure Code, Act 5 of 1908, was not in force and hence it was laid down that interest pendente lite could be awarded as compensation. Now the provisions of S. 34, C. P. C. apply.

(6) I therefore hold that in this case discretion could properly be exercised in refusing interest before judgment. The decree passed by the trial Court is therefore confirmed and the appeal is dismissed with costs.

B/H.G.P.

Appeal dismissed.

**A.I.R. 1953 KUTCH 54 (Vol. 40, C. N. 38)**  
**VAKIL J. C.**

Sindhu Resettlement Corporation Ltd. Complainant-Applicant v. Thakarshi Moti and others, Accused, Opponents.

Criminal Revn. Appln. No. 17 of 1953, D/- 5-8-1953.

Penal Code (1860), S. 120B — Charge: AIR 1938 Mad 130, Dissented from.

Criminal conspiracy, defined in S. 120A and made punishable under S. 120B, is a new substantive offence introduced by Chap. VIA in the Criminal Law of India. It follows that where it was alleged and prima facie shown that an offence of criminal conspiracy was committed, a charge under that section could be framed. If in pursuance of the said criminal conspiracy, offences were committed, there is nothing in the Code of Criminal Procedure which prohibits framing of charges for those offences along with the charge for criminal conspiracy. Charge for other offences may be for commission of substantive offence by one or more of the conspirators and abetment by others. There is nothing illegal in framing a charge of criminal conspiracy against certain persons and at the same time, framing charges of other offences, substantively or by abetment, alleged to have been committed in pursuance of the conspiracy. AIR 1938 Mad 130 Dissented from; Case law discussed.

(Paras 6, 8)

Anno: Pen. Code S. 120B N. 3.

L. L. Thacker, for Applicant; K. N. Mankad for Opponents Nos. 1-2.

CASES REFERRED TO:	/Paras
(A) ('38) AIR 1938 Mad 130: 39	Cri LJ 266 3
(B) ('32) AIR 1932 Bom 406: 33	Cri LJ 666 7
(C) ('34) AIR 1934 Mad 88: 35	Cri LJ 631 7
(D) ('22) AIR 1922 Cal 107: 23	Cri LJ 657 7
(E) ('33) AIR 1933 Oudh 86: 34	Cri LJ 124 7
(F) ('38) AIR 1938 Nag 328: 39	Cri LJ 810 7
(G) ('36) AIR 1936 Pat 346: 37	Cri LJ 893 7
(H) ('16) AIR 1916 Sind 95: 17	Cri LJ 366 7
(I) ('26) AIR 1926 Sind 171: 27	Cri LJ 243 7
(J) ('44) AIR 1944 Sind 225: 46	Cri LJ 739 7



(K) ('15) AIR 1915 Cal 688(2): 16 Cri LJ 3 8  
 (L) ('30) AIR 1930 Rang 114: 31 Cri LJ 387 8  
 (M) ('38) AIR 1938 Bom 481: 40 Cri LJ 118 8

**ORDER:** This is a petition for revision of an order dated 18-6-1953, made by the Additional Magistrate, F. C. Anjar, in a criminal proceeding initiated by the petitioner, indicting commission of offences under S. 420, and S. 477A read with S. 109, Penal Code by opponents 1 to 3 and one Soni, since deceased. At the stage of framing charges, the learned Magistrate discharged opponent 3, held that a charge under S. 120B, Penal Code, could not be framed according to law and directed framing of charges under S. 420 against opponent 1 and under S. 420 read with S. 34 and S. 477A read with S. 109 against opponent 2. As the order discharging opponent 3 could be revised by the Sessions Court, Kutch, the petitioner was directed to move that Court for obtaining the relief sought.

(2) The facts of the case are that opponent 1 had taken a contract from the Sindhu Re-settlement Corporation, represented by the petitioner, for construction of cement foundations; opponent 2 was working as a manager of opponent 1; opponent 3 was supervising the work on behalf of the Corporation; all the opponents and Soni since deceased, conspired to defraud the Corporation and in pursuance of that conspiracy, false measurements were entered, running bills were encashed and thus the Corporation was cheated.

(3) It seems that at the stage of framing charges, the learned Magistrate was requested on behalf of the petitioner to frame a charge under S. 120B, Penal Code. The learned Magistrate, without considering the evidence led, observed that the section applied only when no offence was committed. In support of his observation, he relied on — 'In Re Venkata-ramia', AIR 1938 Mad 130 (A). He also mentioned the fact that the petitioner had not specifically mentioned indictment under S. 120B, Penal Code, in his complaint. It is urged on behalf of the petitioner that the view held by the learned Magistrate is not correct and therefore, the order be set aside.

(4) It is rare that this Court interferes in revision with interim orders made by Subordinate Courts in pending proceedings. The question of law raised for consideration by this petition is one of general importance which might govern other cases. Moreover, the position created by the order made is quite peculiar. The opponents are neither discharged nor charged, so far as the offence under S. 120B, Penal Code, is concerned. This Court has, therefore, to consider the legality of the order made.

(5) In Ratanlal's Law of Crimes, Edn. 18 at page 207, it is observed that S. 120B only applies where no offence has been actually committed. In support of this observation the learned authors have relied on the Madras case cited in para 2 above. The decision in that case mainly rested on the ground that sanction was necessary for initiation of a proceeding indicting commission of an offence under S. 120B. Incidentally, it was observed that where the matter had gone beyond the stage of mere conspiracy and offence was alleged to have been actually committed in pursuance thereof, these two sections were wholly irrelevant. The reasons stated were that where the

offence was alleged to have been committed by two or more persons, such of them as actually took part in the commission should be charged with the substantive offence, while those who were alleged to have abetted it by conspiracy should be charged with the offence of abetment under S. 109, Penal Code.

(6) Criminal conspiracy, defined in S. 120A and made punishable under S. 120B, is a new substantive offence introduced by Chap. VIA in the Criminal Law of India. It follows that where it was alleged and prima facie shown that an offence of criminal conspiracy was committed, a charge under that section could be framed. If in pursuance of the said criminal conspiracy, offences were committed, there is nothing in the Code of Criminal Procedure which prohibits framing of charges for those offences along with the charge for criminal conspiracy. Charges for other offences may be for commission of substantive offence by one or more of the conspirators and abetment by others. It, therefore, does not appear how a charge under S. 120B, under the circumstances, cannot be framed, according to law or is irrelevant. If it was intended that a charge under S. 120B could only be made in those rare cases where no crime has been committed in pursuance of a criminal conspiracy, the legislature would have made its intention clear by adding a suitable proviso to S. 120B. The legislature had made it clear that criminal conspiracy was punishable 'where no express proviso is made in this Code for punishment of such conspiracy.'

For accepting the Madras view, it will be necessary to read a further proviso in S. 120B as under:

'and where no crime has been committed in pursuance of such a conspiracy.'

It was not held by the Madras High Court in the case cited that provision for punishment of substantive offence and abetment thereof committed in pursuance of a criminal conspiracy, was express provision made in the Code for punishment of such a conspiracy.

(7) In view of the discussion in the preceding para, it will be necessary to consider the view held by other High Courts. The learned counsel for the petitioner relied on — 'Emperor v. Ramrao Mangesh', AIR 1932 Bom 406 (B); — 'Vankata Hanumantha Rao v. Emperor', AIR 1934 Mad 88 (C); — 'Abdul Salim v. King Emperor', AIR 1922 Cal 107 (D) and — 'Kunwar Sen v. Emperor', AIR 1933 Oudh 86 (E). These cases do show that charges for offences alleged to have been committed in pursuance of a criminal conspiracy were framed along with a charge for criminal conspiracy. But it does not appear that the question under consideration was raised in those cases. Reliance was also placed on — 'In re Surajpalsingh Indrapalsingh', AIR 1938 Nag 328 (F). Referring to the Madras case, it was observed by the Nagpur High Court, that it was legal to try an accused person on a charge of criminal conspiracy to commit an offence even though the substantive offence had been carried out.

The learned Pleader for the opponents relied on — 'Jugeshwar Singh v. Emperor', AIR 1936 Pat 346 (G). In that case, it was held that where a criminal conspiracy amounted to abetment under S. 107, it was necessary to invoke the aid of Ss. 120A and 120B. This view was based on the interpretation of the proviso



'where no express provision is made in this Code for the punishment of such a conspiracy' used in S. 120B. According to the view of the Patna High Court, S. 120B was designed to cover two classes of cases. First class is where conspiracy is found for commission of a serious offence but no act or illegal omission had taken place in pursuance of it. This is so because the proviso to the section provides that an agreement to commit an offence shall amount to a criminal conspiracy. Second class is where some act besides the agreement is done in pursuance thereof. It was observed that this conspiracy in no case would amount to abetment and where it amounted to abetment, it was unnecessary to invoke the aid of S. 120B. It was not held that a charge under S. 120B could not be framed under such circumstances. It seems that the view is expressed on the interpretation of the phrase 'where no express provision is made in this Code for the punishment of such a conspiracy.'

The Court of the Judicial Commissioner, Sind has come to a contrary conclusion — 'Udhasing Tahilsingh v. Emperor', AIR 1916 Sind 95 (H), followed in — 'Kishanchand v. Emperor', AIR 1926 Sind 171 (I). In — 'Emperor v. Pir Muindin', AIR 1944 Sind 225 (J), it was held that in such a case it would be sufficient that the persons concerned be proceeded against for the crime itself and abetment thereof and that they need not necessarily be charged also with criminal conspiracy.

(8) I prefer to follow the view of the Nagpur High Court and hold that there is nothing illegal in framing a charge of criminal conspi-

racy against certain persons and at the same time, framing charges of other offences, substantively or by abetment, alleged to have been committed in pursuance of the conspiracy. The view so held by me is supported by authorities vide — 'Superintendent and Remembrancer of Legal Affairs, Bengal v. Monmohan Roy', AIR 1915 Cal 688 (2) (K); — 'Ba Chit Maung v. Emperor', AIR 1930 Rang 114 (L), in which charges of offences committed in pursuance of the conspiracy were joined with the charge of conspiracy. In — 'Emperor v. Karamalli Gaulamalli', AIR 1938 Bom 481 (M), it was held that where conspiracy was charged, it was always open to the prosecution to charge further that the illegal acts which were the object of the conspiracy had been carried out and that the said illegal acts should be separately charged for being separately punished.

(9) Result is that the order made by the learned Magistrate, in so far as it held that no charge could be framed under S. 120B as it only applied when no offence had been committed, is set aside. This judgment may not be taken to have decided anything more than the question of law raised. It will be open to the learned Magistrate to consider such other contentions to the framing of a charge under S. 120B, such as insufficiency of prima facie evidence, absence of sanction etc. as may be raised before him.

A/M.K.S.

Order accordingly.

E N D



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**1953**

[ Vol. 40 ]

**MADHYA BHARAT SECTION**

*WITH COMPARATIVE TABLE FOR*

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# MADHYA BHARAT HIGH COURT

1953

## CHIEF JUSTICE :

The Hon'ble Shri Gobindrao Krishnarao Shinde, B.A., Bar-at-law.

## PUISNE JUDGES :

The Hon'ble Shri Purshottam Vinayak Dixit, B.Sc., B.A. (cant.), Bar-at-law.  
" " Vinod Markand Mehta, B.A., LL.B., Bar-at-law.  
" " Abdul Hakim Khan, M.A., LL.B., LL.M. (Lon.), Bar-at-law.  
" " Brij Kishore Chaturvedi, B.A., LL.B., Bar-at-law.  
" " Vishnu Raghunath Newaskar, B.Sc., M.A., LL.B.  
" " S. M. Samvatsar, M.A., LL.B.

## ADVOCATE-GENERAL :

Shri Krishnarao Anant Chitaley, B.A., LL.B.

## GOVERNMENT ADVOCATES :

Shri Shankarrao Trimbak Mungre, M.Sc., LL.B. (at Gwalior).  
" P. R. Sharma, B.Sc., LL.B. (at Indore).  
" Shiv Dayal Shrivastava, B.Sc., LL.B. (Deputy) (at Gwalior).  
" B. P. Gupta, M.A., LL.B. (Deputy) (at Indore).

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## REPORTERS :

Shri G. S. Garg, Advocate (Gwalior).  
" B. K. Vaidya, B.A., LL.B., Advocate (Indore).

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# THE ALL INDIA REPORTER 1953

## Madhya Bharat High Court

**A. I. R. 1953 MADHYA BHARAT 1**  
**(INDORE BENCH)**

**KAUL C. J. AND MEHTA J.**

State v. Ambaram and others, Opponents.  
Criminal Ref. No. 23 of 1950, D/- 4-10-1950.  
Criminal P.C. (1898), Ss. 350(1) Proviso (a)  
and 4(1)(k) — Trial — Meaning — Inquiry  
and trial — Distinction — Warrant case —  
Charge framed — Case taken up by another  
Magistrate — Charge is not wiped out.

The term "trial" as used in the Code pre-supposes the commission of an offence but an inquiry may cover inquiries into matters other than offences e.g. inquiries concerning disputes as to immovable property or as regards forfeiture of bonds executed by sureties etc. A trial means only the proceeding taken in Court after a charge has been drawn up. Although the law dispenses with the necessity of framing a formal charge in a summons case, it is incumbent upon the Magistrate to state to the accused the particulars of the offence and to ask him to show cause why he should not be convicted (Section 242). In summary trial also, the procedure prescribed for summons cases is to be followed in that class of cases, and that prescribed for warrant cases in cases of that class: Case law Rel. on. 25 Cal. 863 and AIR 1922 Lah. 49, Dissent. (Paras 5 & 6)

A proceeding before the Magistrate in a warrant case under Chapter XXI of the Code of Criminal Procedure is only an inquiry until a charge is framed. It becomes a trial only after a charge is framed.

(Para 7)

Hence, in a warrant case if a charge has been framed by one Magistrate and then the case is taken up by another Magistrate, the charge is not necessarily wiped out because the accused chooses to exercise the right given to him by proviso (a) to sub-section (1) of S. 350. AIR 1915 Mad. 23, Foll.

(Para 7)

Anno: Cr. P. C., S. 4 N. 2, 3, 4; S. 350 N. 7, 10.  
Government Advocate, for the State.

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KAUL C. J.: This case has been referred to a Bench by a learned Single Judge of this Court. A reference was made by the Additional District Magistrate Dhar, recommending that an order passed by the District Sub-Judge (First Class Magistrate) Sardarpur, dated 11th August 1949 be set aside. It came up before a learned Single Judge of this Court. He was of opinion that the question raised by the reference was one on which there was considerable difference of opinion among various High Courts in India, and accordingly has referred the matter to a Bench. The point of law which came up for consideration before the learned Judge arose thus:

Six persons were challaned by the Amzera Police to take their trial for various offences under sections 135, 314 and 444 of the Gwalior Penal Code (corresponding to sections 148, 452 and 323 of the Indian Penal Code). The case came up before the District Sub-Judge, Sardarpur, a first class magistrate. After recording some evidence, he framed the charges. After the prosecution evidence was closed and all the accused persons except one had been examined, the case was transferred under an order of the Law Department (Gwalior State) to another Magistrate—viz., Sub-Divisional Magistrate, Sardarpur. The case was taken up by the Sub-Divisional Magistrate on the 15th of April, 1949, and on that day the accused asked for a de novo trial. The learned Magistrate directed that the prosecution witnesses be examined afresh. In an order recorded on 11th August 1949, he held that under section 350 of the Code of Criminal Procedure though the accused were entitled to demand that the witnesses or any of them be re-summoned and re-heard, the transfer of the case, from the court of the District Sub-Judge, Sardarpur, to his court did not have the effect of wiping out the charges that were framed. The accused went in revision against this order before the Additional Sessions Judge, Dhar, who made this reference recommending that the order passed by the



Sub-Divisional Magistrate, Sardarpur, be set aside.

The question for consideration therefore is, whether on a correct interpretation of section 350 of the Code of Criminal Procedure if, a warrant case pending before a Magistrate is, as a result of his transfer or for some other reason taken up by another Magistrate, and the accused makes the demand referred to in Proviso (a) to sub-section (1), is the charge framed by the first Magistrate necessarily wiped out, and must the entire proceeding in the case, be commenced afresh before the second Magistrate? Section 350(1) reads as follows:

"Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself; or he may re-summon the witnesses and recommence the inquiry or trial:

Provided as follows:

- (a) in any trial, the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard;
- (b) the High Court, or, in cases tried by Magistrate subordinate to the District Magistrate, the District Magistrate may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the Magistrate before whom the conviction was held, if such Court or District Magistrate is of opinion that the accused has been materially prejudiced thereby, and may order a new inquiry or trial.

(2) An examination of Sub-s. (1) will show that of the two options given by it to the Magistrate, the first is controlled by two provisos. For the purposes of the present discussion we need consider only proviso (a). The Sub-section empowers the Magistrate:

- (1) Either to proceed on the evidence recorded by his predecessor or partly by his predecessor and partly recorded by himself, or
- (2) to resummon the witnesses and recommence the inquiry or trial.

If he adopts the latter course i.e., resummons the witnesses and recommences the entire pro-

ceeding, the charge is automatically wiped out with the rest of the proceeding, and the question which forms the subject-matter of this reference does not arise. In case, however, the Magistrate decides to proceed on the evidence recorded by his predecessor or partly by his predecessor and partly by himself, the accused, if he is on trial can demand that the prosecution witnesses or any of them whose evidence was not recorded by the second Magistrate be re-summoned and re-heard. This demand must be made at the commencement of the proceeding by the second Magistrate.

(3) It is noteworthy that the language used in the sub-section is different from that used in proviso(a). While under the sub-section, the Magistrate may if he so chooses, "recommence the inquiry or trial", but if he decides otherwise, the only demand an accused on trial can make is, "that the witnesses or any of them may be re-summoned and re-heard". We cannot assume that the distinction between the language employed at two places in the same sub-section is devoid of significance.

(4) Reading the words of sub-section and of proviso (a) in their ordinary natural meaning we find that it is open to the succeeding Magistrate either of his own accord or at the request of the accused, to re-summon all the witnesses and re-commence the entire proceeding. The question, however, is whether the accused has a right to insist that the entire proceeding should be re-commenced. As the proviso omits the word 'inquiry' and refers only to 'trial', it is clear that if the proceeding before the Magistrate is only an inquiry, the accused cannot make a demand that the witnesses be re-summoned and re-examined. He can do so only in a trial. We have, therefore, to determine when does a proceeding detailed in Chapter XXI of the Code of Criminal Procedure become a trial. Is it a trial from its inception as held in — 'Gomer Sirda v. Queen Empress', 25 Cal 863, i.e., when the case is called on with the Magistrate on the Bench, the accused in the dock, and the representatives of the prosecution and for the defence if the accused be defended, present in Court for the hearing of the case. Or is it that the proceeding till the stage before the charge is framed and is read out to the accused, or some analogous procedure is adopted is only an inquiry which develops into a trial only after this is done. A comparison of the definitions of certain terms in the Codes of 1861, 1872, 1882 and 1898 may be helpful in determining the question.

"Year"	"Inquiry"	"Enquired into"	"Trial"
1861	Not defined	Comprises every proceeding preliminary to trial.	Not defined.
1872	Includes every inquiry conducted by a Magistrate or Court under the Code.	Comprises every proceeding preliminary to trial.	Proceedings taken in Court after a charge had been drawn up.
1882	Do.	Not defined.	Not defined.
1898	Includes every inquiry other than a trial conducted by a Magistrate or Court under the Code.	Not defined.	Not defined.

(5) The Act of 1872 further provided that for purposes of Chapters XVI and XVIII a "trial" includes all proceedings from the time that accused appears in a Court. It will be noted that the Indian Legislature has always maintained a distinction between an inquiry and a trial and though the Code of 1882 did not contain any

definition of the expression "trial" and defined 'inquiry' as including every enquiry conducted by a Magistrate or a Court under the Code, the High Court of Calcutta held in — 'Haridas San-yal v. Saritulla', 15 Cal 608, that an inquiry did not include a trial. The Legislature made it clear in the Code of 1898 that the view taken



by the Calcutta High Court was correct. As has been seen the Code of 1872 expressly laid down that "trial" meant only the proceeding taken in court after a charge had been drawn up. The fact that this definition was dropped and not reproduced in the Code of 1882, need not lead to the inference that there was an intention to give the term "Trial" a connotation different from what it bore in the Code of 1872. Nor should the headings of Chapters XX and XXI lead us to a different conclusion. These chapters are headed "Trial of summons cases by Magistrate" and "Trial of Warrant cases by Magistrates". It does not necessarily follow from these headings that every section contained in these chapters relates to the proceeding known as "trial". The term "trial" as used in the Code pre-supposes the commission of an offence but an inquiry may cover inquiries into matters other than offences e.g., inquiries concerning disputes as to immovable property or as regards forfeiture of bonds executed by sureties etc. etc. See: — 'Hemasingh v. Emperor', AIR 1929 Pat 644; — 'Charan Mahto v. Emperor', AIR 1930 Pat 274; — 'Queen Empress v. Chotu', 9 All 52; — 'Palaniandy v. Emperor', 32 Mad 218; — 'Narayanaswami Naidu v. Emperor', 32 Mad 220; — 'Shriramulu v. K. Veerasalingam', 38 Mad 585; — 'S. Mohammad Husain v. Mirza Fakhrulla Beg', AIR 1932 Oudh 298; — 'Sher Muhammad v. Emperor', AIR 1923 Lah 270.

(6) I am aware that a different view has been expressed in some reported cases. These cases like — 'Gomer Sirda v. Queen Empress', 25 Cal 863, do not take into account the considerations to which reference has been made above and proceed mainly on the popular meaning of the word 'trial'. The view taken in — 'Sahib Din v. Emperor', AIR 1922 Lah 49 at p. 54 was that a trial cannot be said to commence only when a charge is framed. It was pointed out that if a trial be held not to commence before a charge is framed, then what is spoken of as a trial of summons cases and a summary trial are not really trials at all but only inquiries. With the greatest respect, I may point out that under our Code though the law dispenses with the necessity of framing a formal charge in a summons case, it is incumbent upon the Magistrate to state to the accused the particulars of the offence and to ask him to show cause why he should not be convicted (section 242). In summary trials also the procedure prescribed for summons cases is to be followed in that class of cases, and that prescribed for warrant cases in cases of that class. The only difference is that the record of the proceeding shall not be elaborate but will be as provided in sections 262 and 264.

(7) I respectfully agree with the view of law taken in — 'T. Shriramulu v. K. Veerasalingam', 38 Mad 585, that the proceeding before the Magistrate in a warrant case under Chapter XXI of the Code of Criminal Procedure is only an inquiry until a charge is framed. It becomes a trial only after a charge is framed. If this distinction is borne in mind, the answer to the question raised by this reference is clear. If in proceedings relating to a warrant case a charge has been framed by one Magistrate and then the case is taken up by another Magistrate the charge is not necessarily wiped out because the accused chooses to exercise the right given to him by proviso (a) to sub-section (1) of section 350. In the case under reference the

Sub-Divisional Magistrate, Sardarpur, decided not to re-commence the inquiry. He, however, acceded to the demand of the accused that the prosecution witnesses be re-summoned and re-examined. This in my opinion was sufficient compliance with the law.

(8) The reference made by the Additional District Magistrate, Dhar is therefore, rejected.

(9) MEHTA J.: I agree.

B/G.M.J.

Reference rejected.

### A. I. R. 1953 MADHYA BHARAT 3 (GWALIOR BENCH)

SHINDE J.

State v. Shyamlal and others, Opponents.

Criminal Ref. No. 15 of 1951, D/- 20-7-1951.

**Criminal P.C. (1898), S. 497 — Principles governing bail — Anticipatory bail.**

Anticipatory bail is repugnant to the provisions of the Code. (Para 5)

Bail under S. 497 cannot be granted merely because a person is accused of a non-bailable offence and he appears before the Court. There must be some restraint on the applicant and if he is not already arrested there must be a warrant for arrest against him. If under such circumstances he appears before Court and surrenders himself he may be released on bail: AIR 1950 EP 53 (F.B) and AIR 1950 Sind 19, Rel. on. (Para 5)

Where the applicants do not state that they are accused of any offence at all, much less of a non-bailable offence, and all that they state is that the police are trying to implicate them in some case and are about to arrest them, there is no case which would justify taking action under S. 497. (Para 6)

Anno: Criminal P.C., S. 497 N. 3, 4.

Dy. Govt. Advocate, for the State; Anand and Jairam Sharma, for Opponents.

REFERENCES: Courtwar/Chronological/ Paras  
(50) 5 Dom LR (EP) 43: (AIR 1950 EP 53:  
51 Cri LJ 480 FB) 4

(50) AIR 1950 Sind 19: (51 Cri LJ 705) 4

ORDER: This is a reference under S. 438 of the Code of Criminal Procedure. The facts of the case out of which this reference has arisen are briefly as follows:

Hirachand and others presented applications to the railway magistrate, Lashkar, that they had come to know that the police were trying to implicate them in some false case and arrest them. Hence, explanation be asked for from police and the applicants be admitted to bail. The railway magistrate asked for explanation from the police and released all the three applicants on bail of Rs. 2,000/-, with a surety of Rs. 4,000/- each. Against this order a revision was filed by the Government in the court of the sessions judge, Gwalior. The learned Sessions judge being of the opinion that the order of the lower court was improper has made this reference to set aside the order.

(2) The question for consideration in this case is whether a person, who is not under any restraint, can apply for what is known as anticipatory bail. Section 497 states that when any person accused of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, he may be



released on bail, etc. The section, no doubt lays down that a person accused of any non-bailable offence, who appears before a court, may be released on bail. The question for determination is "does the section contemplate that a person is to be released when he appears before a court even though he is under no restraint"?

(3) The word 'bail' is defined in Wharton's Law Lexicon as follows:

"to set at liberty a person arrested or imprisoned, on security being taken for his appearance on a day and at a place certain, which security is called bail, because the party arrested or imprisoned is delivered into the hands of those who bind themselves or become bail for his due appearance when required, in order that he may be safely protected from prison, to which they have, if they fear his escape, etc., the legal power to deliver him."

In Stroud's Judicial dictionary 'Bail' is described as follows:

"'Baile' is when a man is taken or arrested for felony, suspicion of felony, indicted of felony, or any such case, so that he is restrained of his liberty. And, being by law bailable, offereth surety to those which have authority to baile him, which sureties are bound for him to the King's use in a certain sum of money, or body for body, that he shall appear before the Justices of Gaol-delivery at the next sessions & c. Then upon the Bonds of these Sureties, as is aforesaid he is bailed, that is to say, set at liberty untill the day appointed for his appearance."

Both these definitions make it amply clear that it is only when a person's liberty is restrained that he is released on bail, that is, delivered into the hands of those, who stand surety for him.

Apart from the dictionary meaning of the word 'bail' a perusal of chapter XXXIX of the Code of Criminal Procedure, which deals with the subject-matter of bail, leads one to the same conclusion. Section 500 enjoins that as soon as the bond has been executed a person, for whose appearance it has been executed shall be released. Section 501 requires that if insufficient sureties have been accepted through mistake, fraud or otherwise or if afterwards they become insufficient, the court may issue a warrant of arrest directing that the person released on bail be brought before it and may order him to find sufficient sureties and on his failing so to do, may commit him to jail. Similar provisions are found in Section 502, under which all or any of the sureties may apply to the magistrate to discharge the bond. All these three sections indicate that a person is to be released from some custody and where sureties are found to be insufficient or where they become insufficient or where the sureties desire to discharge their bond, a person released is to be committed to the custody again. This lends support to the view that a person can be released on bail only when he is placed under some restraint.

(4) This question came up for consideration before a Full Bench of the East Punjab High Court (Vide — 'Amir Chand v. The Crown', Cri. Misc. Case No. 204 of 1949, reported in — '5 Dom LR (EP) 43') Khosla J. in that case came to the following conclusion:

"My conclusion may now be briefly summarised. The very notion of bail pre-

supposes some form of previous restraint. Therefore, bail cannot be granted to a person who has not been arrested and for whose arrest no warrant has been issued. Section 498, Criminal P. C., does not permit the High Court or the court of session to grant bail to any one whose case is not covered by Ss. 496 and 497, Criminal Procedure Code. It follows, therefore, that bail can only be allowed to a person who has been arrested or detained without warrant or appears or is brought before a court. Such person must be liable to arrest and must surrender himself before the question of bail can be considered. In the case of a person who is not under arrest but for whose arrest warrants have been issued bail can be allowed if he appears in court and surrenders himself. No bail can be allowed to a person at liberty for whose arrest no warrants have been issued."

Both the learned Judges Harnam Singh J. and Kapur J. who along with Khosla J. constituted the Full Bench agreed with Khosla J. With great respect I agree with the view taken by the East Punjab High Court. A similar view has also been taken by Sindh High Court in — 'Md. Abbas v. The Crown', AIR 1950 Sindh 19.

(5) From the discussion above, it is clear that bail under Section 497 cannot be granted simply because a person is accused of a non-bailable offence and appears before a court of law. He must be under some restraint. If he is not already arrested there must be at least a warrant of arrest issued against him. If there be a warrant of arrest and he appears before a court and surrenders himself then he may be released on bail. But anticipatory bail is repugnant to the provisions of the Code of Criminal Procedure.

(6) In the present case applications of Hira-chand, Nandlal and Shyamlal do not even state that they have been accused of any non-bailable offence. They do not even state that they have been accused at all. All that the applications state is that the police are trying to get them falsely implicated in some case and are about to arrest them. Such a case does not justify an action under Section 497 of the Code of Criminal Procedure. The persons released have neither specifically been accused of any non-bailable offence nor have they been arrested or detained nor has any warrant of arrest been issued against them. In these circumstances the railway magistrate was wrong in releasing Shyamlal, Hirachand and Nandlal on bail.

(7) The reference is, therefore, accepted and the orders passed by the railway magistrate releasing Hirachand, Shyamlal and Nandlal on bail are set aside.

B/M.K.S.

Reference accepted.

#### A. I. R. 1953 MADHYA BHARAT 4 (GWALIOR BENCH)

SHINDE C. J.

Ajudhya Prashad, Applicant v. The State.  
Criminal Revn. No. 141 of 1951, D/- 19-3-1952.

**Criminal P.C. (1898), Ss. 514 and 439 — Forfeiture of bond — Conditions which must be fulfilled before court can realise penalty — Realisation of penalty without notice to show cause is illegal.**



Before an order for forfeiture can be passed under S. 514, the court should come to a finding based on some evidence that the bond has been forfeited and then it has to record the grounds of such proof. It is only when this is done, that a notice is to be issued to show cause why the penalty should not be realised. (Para 2)

Where the Court realises the penalty without giving notice to surety to show cause why the penalty should not be paid, the order is illegal and would be set aside in revision. AIR 1949 EP 221 and AIR 1928 Cal. 261, Rel. on. (Para 3)

Anno: Cr. P. C., S. 514 N. 5, 6, 7 and 8.

Athawale, for Applicant; Dy. Govt. Advocate, for the State.

REFERENCES: Courtwar/Chronological/ Paras  
(28) AIR 1928 Cal 261 2  
(49) AIR 1949 EP 221: (50 Cri LJ 565) 2-3  
(40) AIR 1940 Pat 375: (41 Cri LJ 214) 2

ORDER: The only point raised in this case is that, the Sub-Divisional Magistrate was wrong in forfeiting security without issuing notice to the parties concerned. It appears that on 13-11-1950 the surety was asked to produce the accused before the court on 22-12-1950. On that date, neither the accused nor the surety was present in the court. Hence the Sub-Divisional Magistrate forfeited the security. Against that order, an appeal was preferred before the District Magistrate. That appeal was dismissed, and the order of the trial court was confirmed. Consequently the surety has filed this revision.

(2) Section 514, sub-section (1) of the Criminal Procedure Code reads as follows:

"Whenever it is proved to the satisfaction of the court, by which a bond under this Code has been taken, or of the court of a Presidency Magistrate or of the Magistrate of the First Class, or, when the bond is for appearance before a court to the satisfaction of such court, that such bond has been forfeited, the court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof, or to show cause why it should not be paid."

There are thus two stages which have to be followed according to section 514. First is that it must be proved to the satisfaction of the court that the bond has been forfeited whereupon the court is to record the grounds of such proof, and the second is that the court, on being satisfied as aforesaid, may call upon the person bound by such bond to pay the penalty thereof or to show cause why it should not be paid. The first stage, therefore, is that the court should come to a finding based on some evidence that the bond has been forfeited, and then, it has to record the grounds of such proof. It is only when this is done, that a notice is to be issued to show cause why the penalty should not be realised. The court in this case has not recorded the grounds of forfeiture. Therefore, the stage of giving notice has not yet arrived. The view I have taken is supported by — 'Mt. Taro v. The Crown', AIR 1949 EP 221, — 'Mon Mohan v. Emperor', AIR 1928 Cal 261 and — 'Ram Bilas v. Emperor', AIR 1940 Pat 375. The revision, therefore, has no force.

(3) It appears, however, that directly after the order of forfeiture was passed, the accused presented himself before the court and paid the penalty. If that be so, the trial court was wrong in realising the penalty without giving notice to show cause why it should not be paid. There

does not appear any order on record calling upon the surety to pay the penalty or to show cause why it should not be paid. Penalty, therefore, was illegally realized. In — 'Mt. Taro v. Crown', AIR 1949 EP 221, it has been held that where the action, under this section (514 Cri. Pro. Code) to recover the penalty is taken before the person bound by the bond is called upon to pay the penalty or to show cause why it should not be paid, it is illegal. The same view has been taken in — 'Mon Mohan v. Emperor', AIR 1928 Cal. 261. In these circumstances, realization of penalty without giving notice to show cause, was illegal.

(4) Accordingly, invoking the powers under section 439 of the Code of Criminal Procedure, it is directed that the penalty realized be refunded and after giving notice to the surety to pay the penalty or to show cause why it should not be paid, suitable orders be passed according to law. The revision petition is allowed.

B/K.S.

Revision allowed.

### A. I. R. 1953 MADHYA BHARAT 5 (INDORE BENCH)

KAUL C. J. AND MEHTA J.

Mulla Tyebali, Applicant v. Dwarka Harikishan, Opponent.

Civil Misc. Appln. No. 15 of 1950, D/- 20-9-1951.

**Houses and Rents — Madhya Bharat Sthan Niyantran Vidhan of S. Y. 2006 (15 of 1950) — Validity of, so far as it extended to Mhow — (Constitution of India, Art. 246 and Sch. 7, List I — Union List, Item 3).**

On the date when the Constitution of India came into force viz., 26-1-1950 and on the date when Sthan Niyantran Vidhan was made applicable to Mhow on 9-2-1950, Mhow was not Cantonment town and, therefore, Madhya Bharat Legislature had the authority to extend the provisions of Sthan Niyantran Vidhan to Mhow. Mhow ceased to be a Cantonment town by virtue of the notification No. 219, Political, published in Government of India Gazette Extra-Ordinary dated 12-8-1947 by the Government of India. It was not recognised as a Cantonment town by the Holkar State after it was retroceded by the Crown Representative nor was it recognised as a Cantonment by the Madhya Bharat State when Holkar State was integrated in Madhya Bharat. Hence on the 9th February, 1950, the Madhya Bharat Government was perfectly competent to extend the provisions of the Sthan Niyantran Vidhan and to repeal the Mhow Neemuch Rent Control Order. The Act was, therefore, not 'ultra vires' of the Constitution of India, Sch. 7, List 1, Union List, Item 3, so far as Mhow was concerned. (Para 15)

V. R. Dhodapkar, for Applicant; Advocate General, for the State as amicus curiae.

MEHTA J.: The facts leading to this miscellaneous application are as follows.

(2) There is a house No. 113-B situated in Bajaz Galli Mhow Cantt. The ownership of this originally vested in the Cantonment Mhow. Subsequently this house was purchased by Mulla Tyebali in September, 1946 under a registered sale-deed from Cantonment Board Mhow.

(3) At that time Dwarka, son of Harikishan, the opponent lived in the house as a tenant of the



Cantonment Board. Dwarka agreed to continue as tenant of Mulla Tyebali as the latter purchased the house from Cantonment Board.

(4) Mulla Tyebali wanted the premises for his own use and wanted to rebuild it. He, therefore, served a notice dated 25-10-1948, asking the non-applicant Dwarka to vacate the premises before the 30th of November, 1948.

(5) Under section 11 of the Mhow and Neemuch House Rent Control Law, 1946, a tenant can exercise option to renew or extend his tenancy. Dwarka, the tenant, sent a counter notice dated 10-11-1948, intimating his desire to extend the tenancy by one year, i. e. upto 1-12-1949 as provided in Section 11. The landlord made an application on 16-11-1948 to the Rent Controller, Mhow for disallowing the extension of tenancy. The Rent Controller, Mhow, after recording evidence disallowed the landlord's application with the result that the tenancy of Dwarka was extended to one year. On 8-11-1949, the landlord filed an appeal to the District Magistrate, Mhow.

(6) Pending the disposal of this appeal, the Sthan Niyamtran Vidhan of S. Y. 2006 was made applicable to Mhow on 9-2-1950. On 25-2-1950, the Additional District Magistrate Indore dismissed the appeal on the ground that the Sthan Niyamtran Vidhan of S. Y. 2006 had repealed the Mhow and Neemuch House Rent Control Law and therefore the appeal was competent.

(7) Now the main contention of Mr. Dhodapkar, learned pleader for the applicant, is that the Sthan Niyamtran Vidhan of S. Y. 2006 is ultra vires so far as Mhow Cantonment is concerned. He urged that having regard to the Seventh Schedule, List I-Union list, item No. 3, the delimitation of cantonment areas, local self-government in such areas, the constitution and powers within such areas of cantonment authorities and the regulation of house accommodation (including the control of rent) in such areas, shall be within the competence only of the central Legislature. According to Article 246 of the Constitution, Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule, Union List. Therefore, he contended that the Madhya Bharat Legislature was not competent to legislate for the Mhow cantonment.

(8) This will lead to a consideration whether Mhow was a Cantonment town on the date the Constitution of India came into force viz. 26-1-1950.

(9) If Mhow was a Cantonment town on 26-1-1950, then certainly the State legislature had no right to extend the provisions of Sthan Niyamtran Vidhan to Mhow Cantonment. If not, then the Madhya Bharat legislature had a right to extend the provisions of Sthan Niyamtran Vidhan to Mhow Cantonment.

(10) On the 14th August, 1947 Mhow was retroceded to Holkar State and the Maharaja Holkar assumed sovereignty over Mhow Cantonment.

(11) As a historical retrospect, it may be mentioned that Mhow was given to British for subsidiary treaty for the purpose of quartering British troops. As soon as the treaty rights came to an end on the 14th August, 1947, the Central India Agency issued a Notification dated 9-8-1947, Notification No. 219, Political, Government of India Gazette Extra-ordinary dated 12-8-1947, stating that all laws existing in Mhow Cantonment shall cease to exist. Subsequently, the Mhow Cantonment Act ceased to have operation from 9-8-1947. Then on 14th August, 1947, the Holkar State Notification No. 5012-R dated the 14th

August, 1947 stated that the Crown Representative has retroceded to the Holkar State with effect from the 14th August, 1947, the jurisdiction exercised by him in the area now comprising the Cantonment of Mhow. The Holkar Government Notification of 14th August, 1947 stated that all the laws of Holkar State shall apply to the Cantonment. Only such of the existing laws in force in the Cantonment as are hereinafter specified shall continue in force temporarily in the Cantonment after retrocession.

(12) In my opinion the Holkar State Government did not recognise Mhow as a Cantonment town after it was retroceded to the Holkar State by the Crown Representative. Holkar State did not recognise Mhow as a Cantonment after its retrocession but only continued some of the laws that were prevalent in Mhow Cantonment.

(13) Mhow was not declared a Cantonment town under the provisions of section 3 of the Cantonment Act of 1924. According to Section 3 of the Cantonment Act of 1924, the Local Government with the previous sanction of the Governor General in Council, may, by notification in the Local Official Gazette, declare any place or places in which any part of His Majesty's regular forces or regular air force is quartered or which being in the vicinity of any such place or places, is or are required for the service of such forces to be a cantonment for the purposes of this Act. Now in this particular case after retrocession there was no declaration by the Holkar State declaring Mhow as a Cantonment town.

(14) Mhow ceased to be a cantonment town by force of order dated 9-8-1947, Notification No. 290, Political, published in Government of India Extraordinary Gazette dated 12-8-1947. According to this Notification of the Government of India all laws existing in Mhow Cantonment ceased to exist and Cantonment Act also ceased to have any operation. The Notification of the Holkar State No. 5012-R dated 14th August, 1947 did not recognise Mhow as a Cantonment Town. Holkar State armies were not quartered at Mhow. It appears to me obvious that the intention of the notification of the Holkar State Gazette of 14-8-1947 was to continue some of the laws in Mhow Cantonment temporarily. Just because of the laws of the Cantonment of Mhow are continued, it would not tantamount to a declaration of Mhow as a Cantonment town as envisaged in Section 3 of the Cantonment Act of 1924. Supplement to the Madhya Bharat Government Gazette dated the 16th September, 1950 has reproduced the Central Act, Ordinance No. 18 of 1950 of the 8th July, 1950 issued by Ministry of Defence in the Gazette of India. The Notification of 8-7-1950 issued by the Government of India declared Mhow to be a Cantonment town for the purposes of Cantonment Act of 1924. This was for the first time that the Government of India declared on 8th July, 1950 that Mhow is a Cantonment town within the meaning of Section 3 of the Cantonment Act of 1924. If Mhow had been recognised as a Cantonment town under the Cantonment Act of 1924, it was not necessary to declare it as a Cantonment town on the 8th July, 1950.

(15) Thus, it is clear that on the date when the Constitution of India came into force viz. 26-1-1950 and on the date when Sthan Niyamtran Vidhan was made applicable to Mhow on 9-2-1950, Mhow was not a Cantonment town and, therefore, Madhya Bharat legislature had the authority to extend the provisions of Sthan Niyamtran Vidhan to Mhow. Mhow ceased to be a Cantonment town by virtue of the notification No. 219, Political,



published in Government of India Gazette Extraordinary dated 12-8-1947 by the Government of India. It was not recognised as a Cantonment town by the Holkar State nor was it recognised as a Cantonment by the Madhya Bharat State when Holkar State was integrated in Madhya Bharat. Hence I am clearly of opinion that on the 9th February, 1950, the Madhya Bharat Government was perfectly competent to extend the provisions of the Sthan Niyantiran Vidhan and to repeal the Mhow Neemuch Rent Control Order.

(16) The result is that I dismiss the application with costs.

(17) KAUL C. J.: I agree with the conclusion arrived at by Mehta J. and concur in the order passed by him.

B/G.M.J.

Application dismissed.

## A. I. R. 1953 MADHYA BHARAT 7

### (INDORE BENCH)

SHINDE C. J. AND KHAN J.

Ghisibai and another, Appellants v. P. Mangilal and another, Respondents.

Civil Special Appeal No. 1 of 1949, D/- 14-3-1952.

(a) Easements Act (1882), Ss. 4 and 15 — Applicability — Yajman Vriti — Right is not an easement right — Right cannot be held to have been acquired because it had been in existence for twenty years — (Hindu Law — Religious office — Yajman Vriti).

(Para 10)

Anno: Easements Act, S. 4 N. 2; S. 15 N. 14.

(b) Madhya Bharat High Court of Judicature Act (8 of 1949), S. 23 — Special appeal against judgment by High Court in second appeal — Court will not go behind concurrent findings of fact — Appellant will not be allowed to raise new and inconsistent pleas — Case law referred — (Letters Patent (Cal.), Cl. 15).

(Paras 11, 14, 17)

Anno: Letters Patent (Cal.), Cl. 15 N. 14.

(c) Hindu Law — Religious office — Yajman Vriti and Man Vriti compared — Divisibility of right of Yajman Vriti.

Both Yajman Vriti and Man Vriti are offerings made to a Purohit by a devout Hindu on the occasion of his officiating at religious ceremonies and functions. A Man Vriti, however, differs in this respect that the relation between a Yajman and Purohit is casual or temporary. There is no fixity of character and in consequence it is not a heritable asset. But a Yajman Vriti creates a permanent relation, which is regarded as a heritable property and some times transferable as well. The right to Yajman Vriti being a right in property which is heritable it is also divisible. Case law referred.

(Para 14)

(d) Civil P. C. (1908), S. 9 — Suits of civil nature — Plaintiff claiming along with defendant the right of Yajman Vriti filing suit for declaration of his right to share of income and recovery of amount to be found due on taking account — Suit is for establishing right in property and is of civil nature — Case law referred — (Hindu Law — Religious office — Yajman Vriti — Suit for recovery of share of income).

(Para 15)

Anno: C.P.C., S. 9 N. 17, 35.

(e) Hindu Law — Religious office — Yajman Vriti — Origin of right.

The right of Yajman Vriti is another name for the property which it represents and the property comes into being by operation of law. It is not a right or property which comes into existence as a result of contract of partnership between parties entitled to the right. Case law referred.

(Para 17)

Chitale, for Appellants; Newaskar, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('90) 17 Ind App 122: (18 Cal 23 PC)	11
('17) 39 All 196: (AIR 1917 All 115)	14
('21) 43 All 20: (AIR 1921 All 316)	15
('23) 1923-21 All LJ 358: AIR 1923 All 350	15-16
('42) AIR 1942 All 320: (ILR (1942) All 821)	14, 15, 17
('12) 15 Cal LJ 376: 14 Ind Cas 677	15
('18) AIR 1918 Oudh 62: (44 Ind Cas 645)	17
('17) AIR 1917 Pat 37: (42 Ind Cas 478)	15

KHAN J.: This is a Special Appeal under S. 23 of the Madhya Bharat High Court of Judicature Act (Act 8 of 1949) against the judgment and decree of Mr. Justice Mehta, in Civil Second Appeal No. 3 of 1948, decided by him on 18-10-1948, in which he set aside the judgment and decree of the two Courts below and non-suited the plaintiffs.

(2) I shall briefly state such facts of the case only as are necessarily for the purpose of this appeal without stating the case of parties in full.

(3) The plaintiffs, Ghisibai Brahmin, and Ram Kisan, the adopted grand-son of Bhawarlal, have brought this suit against the defendants on the allegation that the Yajman Vriti of Khandelwal Mahajan community of Indore was performed by the members of the family of the plaintiffs and the defendants, that the ancestors of the plaintiffs and the defendants had entered into an agreement regarding the division of income between them in the proportion of 2:3, that as a matter of fact the parties used to divide the income between themselves half and half. This suit was:

(1) For a declaration that the plaintiffs are entitled to 2/5th share of the income derived from the Yajman Vriti.

(2) for settlement of accounts.

(3) for the recovery of a sum that may be found due on the accounts being taken.

(4) The defence was that Yajman Vriti belonged exclusively to the defendants, and, that the plaintiffs were not entitled to any share from this income. It was admitted that Bhawarlal did officiate at the ceremonies but it was at the instance of the defendants, and this did not entitle the plaintiffs to any share in the Yajman Vriti.

(5) The trial court held that the plaintiffs were entitled to 40 per cent of the income from Yajman Vriti and ordered accounts to be taken of this income from 1-3-1937 to the date of the decree. In appeal the District Judge, Indore confirmed the decision of the trial Court and dismissed the appeal. In Second Appeal No. 3 of 1948 before the High Court, Mr. Justice Mehta stated that Yajman Vriti could be founded either on usage or it may be the result of a grant, and as there was no evidence on record to establish the nature and the origin of the right, he allowed the appeal and non-suited the plaintiffs.

(6) It is apparent from the judgment of Mr. Justice Mehta, that he addressed himself to the



question of discovering the origin of Yajman Vriti and expounded the proposition of law as to how it comes into existence. But let us consider whether for the purpose of this case it is necessary to trace the nature and the origin of Yajman Vriti.

(7) From a perusal of para 3 of the plaint and the corresponding para of the written statement, it appears that the plaintiffs based their claim on the fact that Yajman Vriti had been in existence in the families of the two (the plaintiffs and the defendants) for generations and that by an agreement between the ancestors of the two families, the profits accruing from Yajman Vriti were shared by them in the ratio of 2:3—the plaintiffs taking 2 parts and the defendants 3. In the written statement, the defendants admitted the existence of Yajman Vriti, but said that they were entitled to the income from the Yajman Vriti exclusively and that no offerings were divided as alleged.

(8) In view of what is stated in the pleadings, where the existence of Yajman Vriti is admitted by the parties and is a common ground, the only real dispute is with regard to the right of the plaintiffs in the Yajman Vriti and if that is proved, we have to ascertain the extent of the plaintiffs' share therein. This naturally obviates the necessity of going into the origin of the right. But I think that para 3 of the plaint and the written statement were not brought to the notice of Mr. Justice Mehta.

(9) It may also be stated that because there was no dispute as to the existence of the right of Yajman Vriti between the parties, no issue was deemed necessary and as a matter of fact no issue bearing on the point was framed by the Courts below.

(10) The learned counsel for the appellants has argued that the evidence in the case shows that for 20 years the conduct of the parties has been to divide the income from Yajman Vriti and this proves the establishment of the right of Yajman Vriti by usage, which fact Mr. Justice Mehta has overlooked. Mr. Chitale has referred to Easements and Licenses by K. N. Joshi 1948 Edition p. 141. As I have stated above, it is common ground that Yajman Vriti existed, so the point not being in issue, I need not look at the evidence which establishes the right. But I am afraid that a reference to Joshi's Law of Easements and Licenses is not helpful. It is a treatise on the well-known Law of Easements and Licenses. But nowhere has it been shown, nor can it be assumed that the right of Yajman Vriti is in the nature of a servitude, by reason whereof the Law of Easement becomes applicable to it. An Easement in English Law has been defined as a "privilege without profit which the neighbour of one neighbouring tenement has of another tenement" and the definition of the term Easement given in S. 4 of the Easements Act (Act 5 of 1882) needs only to be read to convince one that there is not even a remote affinity between the right of Yajman Vriti and the right of Easement. The learned counsel for the respondents has pointed out that there is nothing common between the two rights and that the Law of Easement and Licenses is a Law applicable to Easement and Licenses only, and, therefore, the argument that the right of Yajman Vriti was acquired by its existence for 20 years is not sustainable. I agree with the learned counsel for the respondents. The page

to which our attention has been invited is 141 of the book. The discussion on the page is under S. 15 of the Easements Act, which deals with the mode of acquisition of an easement by prescription. And the discussion in the main centres round the 'fiction of a lost grant' in India. But all this refers to the acquisition of an easement. On a careful consideration of the entire Law on the subject, I am of the opinion, that it is not proper to bracket the right of Yajman Vriti with the right of easement or treat the two as being on the same level and plane. The reason which perhaps induced the learned counsel for the appellant to refer to it is the use of the word 'grant' because a grant can be the basis of a right of easement as well as that of the right of Yajman Vriti.

(11) Issue No. 6, framed by the trial Court, was directed towards finding out whether "Yajman Vriti" was the indivisible right of the defendants and that plaintiffs had no share in the same? In the settlement of the issue, the court, on the basis of evidence adduced by the parties, recorded its finding that the plaintiffs were entitled to participate in the income of Yajman Vriti and that their share was 40 per cent of the yield. This finding of fact has been confirmed by the District Judge and in view of this concurrent finding, it is not open to us to go behind it in a second appeal, much less so in the third appeal, which the present appeal before us purports to be. In — 'Durga Chaudharani v. Jewahir Singh', 17 Ind. App. 122 (FC), the Privy Council has laid down that there is no jurisdiction to entertain a second appeal on the ground of erroneous finding of facts, however gross the error may seem to be.

(12) The learned counsel for the respondents has made several submissions which deserve to be noted. He has argued that the right in question is not Yajman Vriti, but it is Man Vriti, that as such the suit cannot be regarded as being one of civil nature under S. 9 of the Civil P. C., that income from the source is casual and personal and is not divisible and that even if it is proved that there was an agreement to divide the income, it should be deemed to have come to an end at the death of those who were parties to the contract. I propose to examine these submissions one by one.

(13) First, it is said that the right claimed is not Yajman Vriti, but Man Vriti. Before we proceed we must have a clear idea as to what Yajman Vriti and the Man Vriti are.

(14) There is no lack of decisions, which not only set out but also differentiate between the two rights. Both are offerings made to a Purohit by a devout Hindu on the occasion of his officiating at religious ceremonies and functions. A Man Vriti, however, differs in this respect that the relation between a Yajman and Purohit is casual or temporary. There is no fixity of character and in consequence it is not a heritable asset. But a Yajman Vriti creates a permanent relation, which is regarded as a heritable property. Yajman Vriti is a well-known institution which has been the subject of consideration in many cases. In — '43 All 356 (35?)', the right to the partition of Yajman Vriti was recognised. In — 'Sukhlal v. Bishambhar', 39 All 196, a mortgage of such right was given effect to. In short the right of Yajman Vriti has been held to be heritable and sometimes transferable as well. There is



a very able discussion of the entire question in — 'Sarda Kunwar v. Gajanand', AIR 1942 All 320. It may pertinently be asked if it is necessary for us to decide whether the right claimed is in the nature of Yajman Vriti or Man Vriti. I think it is not necessary to do so. The reason is that according to para of the plaint the right claimed is Yajman Vriti and the defendants in para 3 of their written statement have referred to the right of Yajman Vriti also. The position taken up by the parties in all the courts through which this case has passed was with regard to the right of Yajman Vriti and not Man Vriti. The plea of Man Vriti is a new one and obviously it is sought to shift the ground. But having adopted one attitude in the courts below, the defendants shall not be permitted to advance a new and inconsistent plea, so as to place the plaintiffs at a disadvantage.

(15) As to the argument that the present suit is not of a civil nature, I would only say that the claim, on the foundation of which the plaintiffs have instituted this suit, has been held to be in respect of the right of Yajman Vriti and there is authority galore that such a right is a right in property and further more, that it is heritable. See — 'Beni Madho v. Hiralal', 43 All 20; — 'Mt. Sarda Kunwar v. Gajanand', AIR 1942 All 320; — 'Narayanan Lal v. Chulhan Lal', 15 Cal L J 376: 14 Ind. Cas 677; — 'Ramchander v. Chhabhu Lal', 1923 All L J 358; — 'Lachman Lal v. Baldeo Lal', AIR 1917 Pat 37. The argument, therefore, that the suit is not of a civil nature under S. 9 of the C. P. Code is not well founded.

(16) No authority has been cited by the learned counsel for the respondents for the proposition that income derived from Yajman Vriti is personal and not divisible. The right to Yajman Vriti being a right in property is heritable and in consequence it is also divisible. — 'Ramchander v. Chhabhu Lal', AIR 1923 All 350 is a case in which partition of Yajman Vriti was held to be valid.

(17) Regarding the last contention of the learned counsel of the respondents, namely that even if the parties agreed to divide the income from Yajman Vriti, the agreement should be regarded to have come to an end by the death of the parties and no further division is now possible. This contention is based on an argument which overlooks the nature of the Yajman Vriti right. This right has been held to be a right in the property, which is also heritable — 'Sarda Kunwar v. Gajanand', AIR 1942 All 320. This right is another name for the property which it represents and the property comes into being by operation of law. It is not a right or property that has come into existence as a result of any contract of partnership between the claimants. In this view of the matter, the question of the agreement continuing after the death does not at all arise. Besides this I may as well state that the defendants have not taken that plea in any of the Courts below and at this stage of the case, they shall not be permitted to raise new pleas. — See 'Ganga Bakhsh Singh v. Gokul Prasad', AIR 1918 Oudh 62.

(18) In result, the appeal is allowed and setting aside the judgment and decree of this Court passed in Civil Second Appeal No. 3 of 1948, on 18-10-1948, we confirm the judgment

and decree of the courts below. The cost throughout would abide the event.

(19) SHINDE C. J.: I agree.

B/M.K.S.

Appeal allowed

**A. I. R. 1953 MADHYA BHARAT 9  
(INDORE BENCH)**

CHATURVEDI J.

Amarji S/o Nagaji Anjana, Applicant v. Joravarsingh Gabbaji, Opponent.

Civil Revn. No. 72 of 1949, D/- 29-3-1950.

(a) Civil P.C. (1908), S. 115 — **Interlocutory Orders — Word 'Case' in section can include interlocutory orders — Revision lies against such orders when the three conditions in first part of section are satisfied.** AIR 1943 Lah. 65 F.B., Rel. on.; AIR 1933 Oudh 345(1) and AIR 1927 Bom. 664, Ref. (Para 8)

Anno: Civil P.C., S. 115 N. 5.

(b) Civil P.C. (1908), S. 115 — **Jurisdiction — Irregular exercise — Rejection of evidence.**

Section 115 is not directed against conclusions of law and fact in which the question of jurisdiction, to which alone it applies, is not involved. AIR 1917 PC 71. Rel. on. (Para 8)

An erroneous decision of a subordinate Court does not by itself involve that the Court has acted illegally or with material irregularity so as to justify interference in revision under cl. (c). Nevertheless, if the erroneous decision results in that Court exercising a jurisdiction not vested in it by law or failing to exercise a jurisdiction vested in it by law a case for revision arises under cl. (a) or cl. (b). AIR 1949 PC 239, Rel. on. (Para 8)

Ordinarily an order rejecting certain evidence as inadmissible cannot be called an irregular exercise of jurisdiction. Even where the decision is wrong, it cannot be said that the Court had failed to exercise jurisdiction. But yet there may be interlocutory orders of an extraordinary character involving an erroneous decision resulting in the irregular exercise of jurisdiction, as where the Court, as a result of faults of procedure and of not applying its mind to all the mandatory provisions of law on the question or as a result of wrong interpretation, refuses to admit in evidence the single document upon which the plaintiff's whole case depended and proceeds with the suit. In such a case if the error is palpable and gross and results in injustice, interference in revision is called for. (Paras 10 & 12)

Anno: Civil P.C., S. 115 N. 2, 10, 11, 12.

(c) T. P. Act (1882), Ss. 58, 98 and 105 — **Mortgage or lease — Anomalous mortgage and simple usufructuary mortgage — Deed transferring possession to creditor for certain period — Discharge of debt to be out of income — Debtor also contracting for personal liability — Nature of transaction.**

Where under a deed possession was given to the creditor on the understanding that he was to retain the land for a period of 12 years and appropriate the income, determined at Rs. 100 a year, towards the discharge of the debt and in the same document the debtor also bound himself to pay the mortgage debt with interest



at a specified rate in the event of the debt not being repaid.

Held (i) that it was clear from the contents of the document that the parties intended to maintain the relation of debtor and creditor and to maintain accounts and determine the balance of debt due on taking of such accounts and that the transfer was made to secure the debt. (Para 15)

(ii) that though there was no express provision for redemption, the mortgagor was entitled to redeem because it was implied in the condition that the mortgagee's right to the land was to cease after the expiry of the stipulated period during which he was entitled to retain possession of it and appropriate its income and profits. (Paras 15)

(iii) that the transaction was not a simple usufructuary mortgage, because there was the personal liability of the mortgagor to pay the debt and also because there was his right to redeem, the absence of which characteristics was essential to a simple usufructuary mortgage, and (Para 15)

(iv) that therefore it was an anomalous mortgage, a combination of simple and usufructuary mortgage, and not a Zuri-peshgi lease and this nature of it was not altered by the fact that calculation was made beforehand of the period for which rent and profits would be sufficient to pay off the debt. (Para 15)

Anno: T. P. Act, S. 58 N. 36, 40, 41; S. 98 N. 3, 5; S. 105 N. 76.

**(d) Registration Act (1908), S. 49 — Mortgage — Anomalous mortgage — Personal liability to pay debt divisible from property obligation — Suit brought to recover money acknowledged to be due and not for enforcing lien, charge or for possession of property — Bond though not registered can be basis of suit and received in evidence in support of the money claim — (Evidence Act (1872), S. 91). (Paras 15 and 16)**

Anno: Registration Act, S. 49 N. 23; Evidence Act, S. 91 N. 3, 6.

V. R. Newaskar and S. R. Joshi, for Applicant; S. R. Pandit, for Opponent.

REFERENCES: Courtwar/Chronological/	Paras
('03) 25 All 115: (30 Ind App 54 PC)	14
('17) 40 Mad 793: (AIR 1917 PC 71)	8
('49) AIR 1949 PC 239: (76 Ind App 131)	8
('81) 3 All 229 (FB)	16
('37) ILR (1937) All 805: (AIR 1937 All 598 FB)	10
('45) ILR (1945) All 604: (AIR 1945 All 348)	11
('02) 26 Bom 252: (3 Bom I.R. 778 (FB))	15
('27) AIR 1927 Bom 664: (101 Ind Cas 385)	7
('33) AIR 1933 Cal 786: (146 Ind Cas 476)	16
('25) AIR 1925 Lah 356: (87 Ind Cas 609)	16
('32) AIR 1932 Lah 400: (137 Ind Cas 155)	16
('40) AIR 1940 Lah 401: (ILR (1941) Lah 71 FB)	13
('43) ILR (1943) Lah 257: (AIR 1943 Lah 65 FB)	8
('92) 15 Mad 253	16
('09) 32 Mad 410: (1 Ind Cas 1)	16
('33) AIR 1933 Oudh 345(1): (145 Ind Cas 810)	5
('40) 15 Luck 641: (AIR 1940 Oudh 342)	11
('36) AIR 1936 Pesh 48: (161 Ind Cas 155)	13

**JUDGMENT:** Plaintiff-petitioner filed a suit in the Court of Additional Munsiff, Hatod, against the defendant-opponent for a sum of Rs. 940/-. The facts of the case which gave rise to this suit are as follows: Plaintiff's father had money dealings with, and had lent money to, Kanhiram, brother of the defendant. On 3-5-1940 the accounts were settled and a balance was struck. Rs. 1200/- were found due to the plaintiff's father in Kanhiram's account. Kanhiram agreed to pay Rs. 1200/- and it was arranged that the plaintiff's father should take the defendant's field known as 'Khajurwala khet' for a period of 12 years and get his liability discharged by crediting Rs. 100/- every year for the enjoyment or occupation.

(2) The agreement was reduced to writing and recorded in the account-book of plaintiff's father and is alleged to have been signed by the defendant and his brother Kanharm. The agreement is in the following form:

"The balance due today is Rs. 1200/-. In lieu of this amount I give my field Khajurwala to the plaintiff for a period of 12 years. The Government dues will be paid by the plaintiff. I will have no objection to this. In case debt is not discharged I shall pay interest at the rate of Re. 1 annas 8 per month from this date and shall pay the debt in one lump sum."

(3) According to the plaint, the plaintiff's father continued in possession of the field for two years; but thereafter he was ousted. For a period of 4 years thereafter, the defendants paid Rs. 40/- every year upto Samvat 2002, but subsequently there was no payment. The plaintiff's father and Kanhiram are both dead. The plaintiff has, after giving credit to Rs. 360/- filed a suit for recovery of the balance.

(4) The defendant resisted the claim on many grounds, one of them being that the document of mortgage being unregistered is not admissible in evidence and it cannot be the basis of a suit. The learned Munsiff has decided this point in favour of the defendant.

(5) I am now asked by the petitioner, to interfere under S. 115, Civil P. C. and a preliminary objection has been raised on behalf of the opposite party that the order is not revivable. Reliance is placed by Mr. Pandit on — 'Raghubar Singh', AIR 1933 Oudh 345 (1), wherein a Division Bench held that an application under S. 115, Civil P. C. to revise the order of refusal to receive documentary evidence by the lower court does not lie as such order cannot be construed to be a decision of a case, nor is there any illegality in exercise of the jurisdiction which is vested by law. This was a suit for redemption wherein the defendants, after the issues had been framed, but before the evidence was commenced, filed an application for permission to tender in evidence certain documents in support of their defence. Permission was not granted by the trial Court and the order was held to be only an interlocutory one. The learned Judges, however, felt that the order passed by the subordinate Court was wrong and observed:

"We would, therefore, formally reject these applications, but we cannot take leave of them without pointing out to the learned Subordinate Judge that having regard to the nature of the documents which these appli-



cants tendered in evidence before the trial commenced, he would have been better advised to have received them and to have proceeded to decide the case on the merits. We trust that the learned Subordinate Judge will do so when he is moved in that behalf again by these applicants."

(6) With respect to the learned Judges, I fail to appreciate the effect of this formal rejection of the revision. For all practical purposes, the revision seems to have been accepted.

(7) In — *'Isa Adam v. Bai Mariam'*, AIR 1927 Bom 664 also it was held that an interlocutory order of the lower Court rejecting certain evidence as inadmissible during the pendency of a suit is not revisable.

(8) There has formerly been a divergence of judicial opinion on the question whether a revision could be entertained against an interlocutory order. The entire case law on the subject has been carefully considered by a Full Bench of the Lahore High Court in — *'Gurdevi Bibi v. Mohammad Bakhsh'*, I. L. R. (1943) Lah. 257, which has held that the word 'case' in S. 115, Civil P. C. is wide enough to include interlocutory orders. The High Court thus is competent to entertain revision against an interlocutory order provided the three conditions mentioned in the first part of S. 115 are satisfied. In — *'T. A. Balakrishna Udayar v. Vasudeva Ayyar'*, 40 Mad 793, the Privy Council pointed out that S. 115 applies to jurisdiction alone, the irregular exercise, or non-exercise of it, or the illegal assumption of it, and that the section is not directed against conclusions of law and fact in which the question of jurisdiction is not involved. In a recent case — *'Joy Chand Lal v. Kamalaksha Chaudhury'*, AIR 1949 P. C. 239, Sir John Beaumont, delivering the judgment of the Board observed:

"There have been a very large number of decisions of the Indian High Courts on S. 115, to many of which their Lordships have referred. Some of such decisions prompt the observation that High Courts have not always appreciated that although error in a decision of a Subordinate Court does not by itself involve that the Subordinate Court has acted illegally or with material irregularity so as to justify interference in revision under subsection (c), nevertheless, if the erroneous decision results in the subordinate Court exercising a jurisdiction not vested in it by law, or failing to exercise a jurisdiction so vested, a case for revision arises under subsection (a), or Sub-s. (b) and Sub-s. (c) can be ignored."

(9) It is difficult to lay down any hard and fast rule on the question, when does an erroneous decision result in Subordinate Court exercising a jurisdiction not vested in it by law or failing to exercise a jurisdiction so vested. Each case must be considered on the facts and circumstances of that case.

(10) Ordinarily an order of the lower Court rejecting certain evidence as inadmissible cannot be called an erroneous decision resulting in the irregular exercise of jurisdiction. The Lower Court has perfect jurisdiction to decide the question and it can decide it rightly as well as wrongly. Even if it decides wrongly it cannot be said that the Court failed to exercise a jurisdiction vested in it by law. But there may be interlocutory orders of extraordinary nature,

e.g., if a plaintiff comes to depose and he is not allowed to be examined, surely, this will be a case of an erroneous decision resulting in the irregular exercise of jurisdiction. Then, as Sir Lawrence Jenkins said in 41 Cal 323, S. 115 can be called in aid when the failure of justice has been due to one or other of the faults of procedure; and, where the Court fails to apply its mind at all to the mandatory provisions of law relevant on the question — *'Raghubir Singh v. Mulchand'*, I. L. R. (1937) All 805 (FB), it acts in the exercise of its jurisdiction with material irregularity.

(11) In — *'Mt. Sukhia v. Kirpa Ram'*, I. L. R. (1945) All. 604, a wrong interpretation of the provision of law rendered the orders of the lower Court open to revision; and in — *'Mahomed Intisham Ali v. Lachhman Prasad'*, 15 Luck. 641, it was held that where a Judge proceeds with a suit as a result of misinterpretation of law he acts with material irregularity.

(12) So if a plaintiff's whole case depends upon a single document, as in the present case, and if as a result of the faults of the procedure, and of not applying the mind at all to the mandatory provisions of the law relevant on the question, or as a result of wrong interpretation or mis-interpretation of the provisions of law, the document is not admitted in evidence, and the Court proceeds with the suit, it will be virtually striking at its very foundation, denying the plaintiff a chance of presenting his case at all. In my opinion, this will amount to an erroneous decision resulting in the subordinate Court failing to exercise a jurisdiction vested in it by law; and if the error is gross & palpable and is likely to lead to injustice, it is an error such as S. 115 of the Code of Civil Procedure definitely intended to correct. I, therefore, overrule the preliminary objection and hold that this revision is competent.

(13) Now I take the point whether the agreement in question, reduced to writing, but not registered, can be admitted in evidence. The deed is drawn up in rather a crude and inartistic language. It gives possession of land to the creditor and authorises him to retain possession for a fixed period of twelve years only. He also binds himself to repay the mortgage-money, and where a mortgagor incurs a personal liability to repay, the mortgage cannot fall within the definition of a pure 'usufructuary mortgage' — *'Bishan Das v. Nand Ram'*, AIR 1936 Pesh. 48, the principal characteristic of this mortgage being an absence of a personal liability of the mortgagor to pay and the remedies of foreclosure or sale not being open to the mortgagee — *'Lachhman Singh v. Natha Singh'*, AIR 1940 Lah. 401 (FB).

(14) Either it is an 'anomalous mortgage, or it is a lease. In constructing a document as to whether it is a lease or a mortgage, according to the Privy Council in — *'Nidhasah v. Murlidhar'*, 25 All. 115, at p. 119, the following test may be applied:

"If it is not a security for the payment of any money or for the performance of any engagement, if no accounts are to be rendered or required, and if there is no provision of redemption, expressed or implied, it is simply a grant of land, for a fixed term free of rent, in consideration of a sum made up of past and present advances, though it may be described as a mortgage."



(15) In this case it is quite clear from the contents of the document that the transfer was made only to secure a debt and the parties intended to maintain the relation of a debtor and a creditor rather than that of landlord and a tenant. The existence of debt was specifically mentioned and the sentence "in case debt is not discharged then I shall pay interest at the rate of Rs. 1 annas 8 and shall pay the debt in one lump sum", implied that the accounts are to be maintained, and after taking the accounts it was to be seen how much debt, if any, remained. Moreover, the nature of the contract is not altered by the fact that the calculation is made beforehand of the period for which rent and profits will be sufficient to pay off both the principal and interest. It is true that there was no express provision for redemption but the creditor was to take possession of the field for 12 years and appropriate the income in liquidation of the debt, and it was clearly implied that after the expiry of the said period the right to the land was to cease. In — 'Tukaram v. Ramchand', 26 Bom 252 at p. 258 (FB), it was held that in such case the mortgagor was entitled to redeem. The Full Bench further observed:

"There is no apparent reason why such a contract should not come within the category of anomalous mortgages as defined in S. 98 of the T. P. Act, which lays down, that "the rights and liabilities of the parties shall be determined by their contract, as evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage".

After taking every thing into account I am of opinion, that the transaction in the present case was not a 'Zur-i-peshgi' lease, as held by the learned Munsiff, but was an anomalous mortgage—a combination of simple and usufructuary mortgage. The document created personal liability as divisible from a property obligation. The suit filed by the plaintiff was simply for the money debt and not for enforcement of lien, or charge, or, for possession of the property. The document, in fact, is not tendered in evidence for the purpose of proving a "transaction affecting property", nor does the plaintiff seek to establish the amount he is entitled to recover as compensation for relinquishing possession of that property. As there is an express covenant on the part of the mortgagor to repay the loan the document can be used as the basis of a claim for return of the money acknowledged to be due therein.

(16) Although the bond is not registered, in such a case, it can well be received in evidence in support of a claim to enforce the money obligation: vide — 'Sheo Pal v. Prag Dat', 3 All 229 (FB); — 'Gomaji v. Subbarayappa', 15 Mad 253; — 'P. V. M. Kunhu Moidu v. T. Madhava Menon', 32 Mad 410; — 'Basant Lal v. Jowahar Singh', AIR 1925 Lah. 356; — 'Baru Mal v. Daulat Ram', AIR 1932 Lah. 400 and — 'Khan-tamoni Dassi v. Biswa Nath', AIR 1933 Cal 786. In my opinion the document was clearly admissible in evidence for the purpose of proving a monetary transaction.

(17) I, therefore, allow the revision, set aside the order of the trial Court and send the case back to that Court so that it may decide this case after taking into consideration the document which it has rejected as inadmissible. Costs will abide the result.

B/M.K.S.

Petition allowed.

A. I. R. 1953 MADHYA BHARAT 12

(GWALIOR BENCH)

DIXIT J.

Pitambar Das and others, Applicants v. The State.

Criminal Revn. No. 192 of 1951, D/- 3-3-1952.

(a) Criminal P. C. (1898), Ss. 476 (B) and 476 — Offence under S. 193, Penal Code — Order under S. 476-B — No enquiry and preliminary order under S. 476 — Validity — (Penal Code (1860), S. 193).

Section 476-B does not contemplate that the appellate Court should, after hearing the parties, first pass a preliminary order stating that prima facie there was sufficient material for issuing notice to the parties concerned to show cause why they should not be prosecuted and then the Court should after again issuing a notice to the parties and hearing them, pass a final order disposing of the appeal. The appellate Court can after giving a notice of the appeal to the parties concerned proceed to hear the appeal and pass an appropriate order disposing of the appeal. (Para 2)

The power to make a preliminary inquiry under S. 476 is in the discretion of the Court and whether an inquiry is necessary or not depends on the facts and circumstances of each case. Where the persons proposed to be proceeded against under S. 193, Penal Code, do not produce any evidence to show that there is no material for instituting the complaint against them, the judge is entitled to consider the material on record before him and come to the conclusion that it is expedient in the interests of justice that those persons should be prosecuted for that offence. Where he records such finding after discussing the materials before him and directs the institution of the complaint under S. 193, Penal Code, before the magistrate having jurisdiction to entertain the same, it is an order which is in conformity with the provisions of Ss. 476 B and 476, even though he may inappropriately call it a "report". (Para 2)

Anno: Cr. P. C., S. 476B N. 4; S. 476 N. 8, 11; Penal Code, S. 193 N. 6.

(b) Criminal P. C. (1898), Ss. 439 and 476 B — Revisional jurisdiction — Order under S. 476 B for filing complaint under S. 193, Penal Code — Offence committed in civil proceedings — When order is attacked as being without jurisdiction question whether revision lies on Criminal or Civil side of High Court is academic. (Para 3)

Anno: Cr. P. C., S. 439, N. 1; S. 476 B N. 13; Penal Code, S. 193 N. 6.

Bhagwandas Gupta, for Applicants; Shiv Dayal, Dy. Govt. Advocate, for the State.

ORDER: This is a petition to revise an order passed by the Sessions Judge, Gwalior, in an appeal under S. 476 (B) of the Cr. P. Code, directing that a complaint for the prosecution of the applicants for giving false evidence be filed before the City Magistrate, Lashkar. It appears from the record that the proceedings under S. 476 of the Code arose out of a Civil suit disposed of by the City Civil Judge, Lashkar. After the disposal of the suit, one Rampyaribai who was a party to the suit applied to the City Civil Judge that the applicants who had appeared in that Civil suit as witnesses be prosecuted for giv-



ing false evidence. The learned Civil Judge refused to make a complaint against the applicants. Thereupon, Rampyaribai appealed to the Sessions Judge, Gwalior. A notice of the appeal was given to the applicants and on 26-2-51, the learned Sessions Judge after hearing the parties passed an order expressing the opinion that a prima facie case had been made out for the prosecution of the applicants and directing a further notice to be issued to them to show cause why proceedings in respect of an offence under S. 193 I.P.C. should not be instituted against them.

In response to this notice, the applicants stated on 22-3-51, that there was no material, whatsoever, for commencing against them proceedings under S. 193 I.P.C. On 7-5-51, the learned Counsel appearing for Rampyaribai and the applicant Pitambardas and others requested the Court to pass whatever order it thought fit on the material before it. Thereafter on 20-8-51, learned Sessions Judge in what was styled by him as a 'report', but which was in fact an order, after referring to the various statements made by the applicants in the Civil suit, recorded a finding that it was expedient in the interest of justice that an inquiry should be made against the applicants in respect of an offence under S. 193 I.P.C. On the same date, the learned Sessions Judge passed a separate order stating that the report was ready and that it be sent to the City Magistrate for disposal according to law. It is from this latter order that this revision petition has been filed.

(2) Learned Counsel for the applicants contends that the order passed by the learned Sessions Judge directing that a complaint for the prosecution of the applicants be filed, is illegal and without jurisdiction inasmuch as the learned Sessions Judge held no inquiry under S. 476 of the Code and did not record a finding, after such an inquiry, to the effect that it was expedient in the interest of justice to prosecute the applicants. There is no substance in this contention which seems to me to have been raised on account of an error in the procedure followed by the Sessions Judge in disposing of the appeal before us under S. 476(B) of the Code and on account of the wrong use of the word 'report.' Section 476(B) of the Code does not contemplate that the appellate Court should after hearing the parties first pass a preliminary order stating that prima facie there was sufficient material for issuing notice to the parties concerned to show cause why they should not be prosecuted and then the Court should after again issuing a notice to the parties and hearing them, pass a final order disposing of the appeal. The appellate Court can after giving a notice of the appeal to the parties concerned proceed to hear the appeal and pass an appropriate order disposing of the appeal. It was, therefore, unnecessary in this case, for the learned Sessions Judge to record an order of preliminary nature and to issue notices a second time to the applicants to show cause why they should not be prosecuted.

The argument of the learned Counsel for the applicants that the Sessions Judge was bound to hold an inquiry under S. 476, is not supported by the wording of the section itself. The power to make a preliminary inquiry is in the discretion of the Court and whether an inquiry is necessary or not depends on the facts and circumstances of each case. The object of the inquiry is only to give an opportunity to the person or persons likely to be prosecuted to explain their position in connection with the

charge alleged against them and to enable them to place before the Court the necessary evidence in support of their explanation. In the present case, it is clear from the order passed on 7-5-51 that the applicants did not desire to produce any evidence in support of their earlier statements that there was no material for instituting any complaint against them. The learned Sessions Judge was, therefore, quite justified in forming his own opinion on the material on the record and in coming to the conclusion that it was expedient in the interest of justice that the applicants should be prosecuted for the offence under S. 193 I.P.C. The learned Sessions Judge recorded this finding on 20-8-51 in what he described as a 'report' but which is really an order of the court discussing the material on record, recording a finding that it was expedient in the interest of justice that an inquiry should be made in respect of the offence under S. 193 I.P.C. and directing that a complaint for the prosecution of the applicants under S. 193 I.P.C. be filed before the City Magistrate, Lashkar. The use of the word "the report" by the Sessions Judge was, no doubt, inappropriate. That, while using the word 'report', the learned Sessions Judge really meant "an order of the Court disposing of the appeal" is clear from the substance of the so-called report and also from the order dated 30-5-51 of the Sessions Judge wherein he mentioned that "that order was not yet ready." The order passed by the learned Sessions Judge is, therefore, in conformity with the provisions of Ss. 476 and 476 (B) of the Code.

(3) Before I conclude, I must observe that when this petition was put up for hearing before another Judge of this Court, the learned Deputy Government Advocate took an objection as to the competency of this revision petition, under section 439 Cr. P.C. It seems to have been then argued that the proceedings out of which this revision petition arose were civil proceedings. In view of the fact, that the learned Counsel for the applicant proposed to attack the order of the lower Court as one being without jurisdiction, the question whether this revision petition should be entertained on civil or criminal side was merely of academic interest. Learned Counsel for the parties did not, therefore, press before me the point.

(4) The result is that this revision petition is dismissed.

B/M.K.S.

Petition dismissed.

**A. I. R. 1953 MADHYA BHARAT 13  
(GWALIOR BENCH)**

SHINDE J.

Kailashnath Gurtu, Applicant v. Harishchandra and another, Opponents.

Civil Revn. No. 207 of 1950, D/- 28-5-1951.

**Houses and Rents — Madhya Bharat Sthan Niyanttran Vidhan (Smt. 2006), Ss. 10 and 23 — Retrospective operation — (Civil P. C. (1908), S. 9).**

Any legislation, which takes away the existing jurisdiction of a forum, unless it has been made specifically applicable to pending actions, will not affect the jurisdiction of that forum to try pending actions properly entertained by it at the time of their institution. AIR 1949 Bom 182, Rel. on. (Para 5)



Therefore Ss. 10 and 23 of the Sthan Niyantiran Vidhan (Smt. 2006), giving exclusive jurisdiction to the Rent Controller to entertain and try suits for determination of fair rent, will not take away the jurisdiction of the Civil Court to try a properly entertained pending suit under S. 5 (4), Accommodation Control Ordinance (Smt. 2004) for fixation of fair rent, as those two sections do not contain anything to show that the legislature even impliedly intended to take away the jurisdiction of the Civil Courts in pending actions also. AIR 1946 All 269; AIR 1936 All 3 and AIR 1936 Pat 546, Disting. (Para 8)

Anno: Civil P. C., Pre., N. 3; S. 9 N. 50.

Bhagwandas Gupta, for Applicant; Babulal, for Opponents.

REFERENCES: Courtwar/Chronological/ Paras

('43) AIR 1943 FC 24: (ILR (1943)

Kar FC 21)

('36) AIR 1936 All 3: (58 All 495)

('46) AIR 1946 All 269: (ILR (1946) All 248)

('49) AIR 1949 Bom 182: (51 Bom LR 122)

('36) AIR 1936 Pat 546: (15 Pat 704)

(1850) 9 CB 551: (19 LJPC 297)

ORDER: The applicant Kailashnath filed a suit for the determination of fair rent in the court of the Civil Judge, Gwalior, under sub-section (4) of section 5 of the Accommodation Control Ordinance Samvat 2004. During the pendency of the suit Sthan Niyantiran Vidhan S. 2006 came into force on the 9th of February, 1950. The trial Court holding that as Sthan Niyantiran Vidhan has come into force it has no jurisdiction to try the suit, returned the plaint under Order VII rule 10. The District Judge held that the order of the trial Court viewed in the light of section 10 of the Sthan Niyantiran Vidhan is correct. The plaintiff being aggrieved by the decision of the District Judge has filed this revision.

(2) The present suit for the determination of fair rent was filed on 2-5-1949. Sthan Niyantiran Vidhan came into force on 9th February, 1950. So there is no doubt that at the time when the suit was instituted it was governed by the provisions of Accommodation Control Ordinance Samvat 2004. The question for consideration is whether the jurisdiction of the civil Judge to try a suit filed during the life time of the Accommodation Control Ordinance has been ousted by Sthan Niyantiran Vidhan Samvat 2006.

(3) It is a fundamental rule of the construction of statute that no statute except one dealing with the procedure is to be construed to have retrospective operation unless such a construction appears very clearly in the terms of the Act or raised by necessary and distinct implication. (Vide Maxwell on Interpretation of Statutes 9th Edn. P. 221). Enactments dealing with procedure are always retrospective in the sense that their provisions will apply to proceedings already commenced at the time of their enactments. The reason for this is that no person has a vested right in any course of procedure; but where some of the provisions of the enactment of procedure do affect vested rights whether substantive or remedial, rule against retrospective operation of statute will apply, unless there is an indication to the contrary in the Act. This principle is now so well established that it is hardly necessary to support it by any authorities. I shall, however, content myself with quoting only one authority, which is a recent case of the Bombay High Court. In — C. P. Bannerjee v. B. S. Irani AIR 1949 Bom, 182, the facts were briefly as follows. Plaintiff filed a suit on 12th September, 1947 to recover

a sum of Rs. 1000/-. Under section 21 of the Presidency Small Cause Courts Act, as it then stood, the plaintiff had the election to institute the suit in the High Court. In about May 1948 the Bombay Legislature enacted Act No. 44 of 1948 called the Presidency Small Causes Courts (Bombay Amendment) Act and by section 2 thereof the election which was given to the plaintiff to file a suit in the High Court was deleted. The Bombay legislature also simultaneously enacted Bombay Act No. 41 of 1948 called the Bombay High Court Letters Patent Amendment Act. By section 3 amendment was made in clause 12 of the Letters Patent of the High Court. The amendment read as follows:-

"Except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Bombay, or the Bombay City Civil Court".

(4) The question for consideration before the Bombay High Court was whether it had further jurisdiction to try and determine the cases even though the suit was rightly received and entertained at the date when the same was instituted. In the course of the judgment Bhagwati J. made some important observations on the law relating to the subject matter of jurisdiction. As these observations have a very great bearing on this case, I propose to quote his observations in extenso:

"Normally it would not have a retrospective operation. It has been laid down as a fundamental rule of the English law, which we have been following here, that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessary and distinct implication. There is no doubt that so far as the statutes are concerned, a distinction is broadly made between procedural statutes and statutes which affect the substantive rights of the parties. There is no vested right which a subject has in regard to procedure. But with regard to the jurisdiction of the Court in which he has a right to institute proceedings a subject can have a vested right. That this is so is amply borne out by authorities and I shall only content myself with quoting one of them, which is an authority of the Federal Court, a judgment of Varadachariar J. reported in 'Venugopala v. Krishnaswami AIR 1943 F. C. 24 and the passage at P. 27 Col. 1, thereof:

"It will be noticed that in that case the Judiciary Act was passed during the pendency of the action in the Court of first instance and their Lordship's decision recognised that, from the date of the initiation of the action, the suitor had a right of appeal to a superior tribunal according to the state of the law, as it stood at the time of the commencement of the proceeding. This necessarily involves the recognition of an equally valuable right that the proceedings should in due course be tried and disposed of by the tribunal before which it had been commenced. This principle that a statute should not be so interpreted as to take away an action which has been well commenced has been affirmed in various cases in differing circumstances. In 'Marsh v. Higgins', (1850) 9 C. B. 551 it was observed by Wilde C. J. that it must have been well known to both branches of the legislature that strong and distinct words would be necessary to defeat a vested right to continue an action which has been well commenced'.

"These observations of the Federal Court are enough to show that where an action has been rightly instituted in a court which had jurisdiction to entertain it, would require strong and







fore, he himself had a right of pre-emption superior to that of the plaintiff. It was also stated that the real sale price is Rs. 1820/- and not Rs. 1500/-. The trial Court decreed the suit on the ground that the plaintiff had a superior right of pre-emption. It held that the eaves of the Patars in the plaintiff's house extended over the pre-empted house, and water from these eaves is discharged over it; also that there is a common wall and there is a staircase in the plaintiff's house attached to this common wall; that there is a Khassi Mori (Spout) in this common wall; that rain water from the pre-empted house through this Khassi Mori flows in the drain of the plaintiff's house and then passes on to the Mori of the pre-empted house before flowing in the public gutters on the road. The Court further held that the apertures in the house of the defendant Dattatraya are newly built and no right of easement is proved. The plaintiff was, therefore, held to have a superior right of pre-emption and his suit was decreed on certain conditions.

(2) The defendant vendee appealed and the findings of the trial Judge were set aside by the first appellate Court which held that there was a mistake in the sketch map of the houses, that on inspection of the site, it was found that there is no staircase of the plaintiff attached to the common wall, that drains of the two houses are separate and that the plaintiff has no right of easement over the pre-empted property. The appeal was allowed and the suit was dismissed.

(3) The plaintiff filed an appeal to the Gwalior State High Court, and the learned Judge on the single Bench, who heard the appeal, was of opinion that the plaintiff had put in specific grounds in para. 4 of the plaint, one of which could give him a superior right of pre-emption. He could not afterwards be allowed to take up new grounds (viz. of easements) and the appeal was therefore dismissed. The plaintiff then approached the Judicial Committee of the Gwalior State which came to the conclusion that the grounds stated in para. 4 of the plaint should be taken to be illustrative only and not as exhaustive. The Judicial Committee set aside the judgment and decree of the Gwalior State High Court and remanded the case back for disposing the appeal according to law after hearing arguments on the evidence adduced by the parties in the case. It was in these circumstances, that this appeal was pending in the Gwalior State High Court when the merger took place. This appeal was then transferred to this Court.

(4) Mr. Motilal Gupta, learned counsel for the respondents, urged that this Court is not bound by the directions of the Gwalior State Judicial Committee and should ignore them. In our opinion Issue No. 1 "Has the plaintiff a superior right of pre-emption" is sufficiently wide and as evidence has been allowed and has been adduced in the case about the easements and no party can be taken by surprise now, we decided to hear the counsel on the merits.

(5) Our attention was invited to the fact that the judgments of all the three Courts are based upon the local inspection of the Judges. In — '*Raj Chandra v. Iswar Chandra*', AIR 1925 Cal 170 it was held that though O. 18 R. 18 of the Civil P. C. empowers the Court to go on local inspection of any property in respect of which it is called upon to decide a question in controversy, it is still the duty of the Court not to make the result of such inspection the

foundation of its judgment which must be based upon evidence adduced by the parties. It does not entitle the Judge to put his view obtained by means of such inspection in place of evidence. The Judge is to hold such inspection for the purpose of better following and understanding the evidence adduced before him or to test its accuracy.

(6) In a suit about damages for injuries on G. I. P. Railway where the Judges of the Bombay High Court visited the scene of the accident and based their judgment on their own observations, their Lordships of the Judicial Committee disapproved the mode of deciding the case on impressions and of casting to the winds the legal evidence in the case — '*Kessowji v. G. I. P. Rly.*', 31 Bom 381 at p. 392.

(7) In — '*Ahmad Sahib Shutari v. Magnesite Syndicate Ltd.*', 39 Mad 501 it was held by a Divisional Bench that the inspection which a Judge makes should be used by him only to test the accuracy of the evidence let in. He should not, without submitting himself to the test of cross-examination make his knowledge the sole evidence for determining the question raised before him. I respectfully concur with this view. The same view has been expressed in — '*Dawarka Prasad v. Makhu Lal*', AIR 1919 Pat 517. In — '*Abdul Baqi v. M. Fakhrul Islam*', AIR 1937 Pat 333, Wort J., further remarked that by understanding the evidence, is not meant 'contradicting a witness' and a witness may make a statement which from the local inspection may appear to be untrue but a Judge is not entitled to say that it is untrue from what he himself observes.

(8) The trial Court has, of course, discussed the evidence adduced by the parties in the case; but the learned District Judge has based his decision on the local inspection and on nothing else. In my opinion, this judgment cannot be sustained. I would, therefore, allow this appeal and reverse the decree of the District Judge and remit the case to him for disposal of the appeal according to law. Costs will abide the result.

(9) KAUL C. J.: I agree.  
B/D.H.

Appeal allowed.

#### A. I. R. 1953 MADHYA BHARAT 16

(GWALIOR BENCH)

CHATURVEDI J.

Manik Chand, Appellant v. Jiwanlal and others, Respondents.

Civil Misc. Appeal No. 32 of 1950, D/- 12-7-1952.

Civil P. C. (1908), Ss. 151 and 107, O. 41 R. 23 and O. 43 R. 1 (u) — Remand under inherent power — No appeal lies.

The power of remand under S. 107 is limited to the case described in O. 41, R. 23. But nothing in that section restricts in any manner the application of the principle of inherent power recognised by S. 151 of the Code. A Court can, therefore, order a remand in cases other than the case specified in O. 41 R. 23, if it be necessary for the ends of justice. But no appeal lies against such order of remand even if the judge has ordered refund of stamp on appeal. (Paras 3, 6 and 7).

Anno: C.P.C., S. 151 N. 2 Pt. 32; O. 41 R. 23 N. 10 Pts. 1 and 2; N. 22 Pt. 1.

R. R. Tiwari, for Appellant; Patankar, for Respondents.



## REFERENCES: Courtwar/Chronological/ Paras

- (27) AIR 1927 Bom 111: 100 Ind Cas 578 2  
 ('17) 44 Cal 929: (AIR 1917 Cal 44 FB) 3  
 ('25) AIR 1925 Cal 1157: (87 Ind Cas 575) 5  
 ('25) 52 Cal 783: 29 Cal WN 614: 5  
 AIR 1925 Cal 716 5  
 ('35) AIR 1935 Cal 134: (155 Ind Cas 506) 5  
 ('28) AIR 1928 Lah 116: (106 Ind Cas 842) 5  
 ('28) AIR 1928 Lah 341: (107 Ind Cas 284) 5  
 ('37) AIR 1937 Lah 454: (170 Ind Cas 422) 5  
 ('40) ILR (1940) Nag 538: AIR 1940 6  
 Nag 349: 1940 Nag LJ 350: 191 Ind Cas 566 6  
 ('45) AIR 1945 Oudh 133: (1944 6  
 Oudh WN 390) 6  
 ('48) AIR 1948 Oudh 220: (1948 6  
 Oudh WN 117) 6  
 ('27) 6 Pat 380: AIR 1927 Pat 296: 6  
 103 Ind Cas 722 6  
 ('35) AIR 1935 Pat 49: (154 Ind Cas 859) 6  
 ('42) AIR 1942 Pat 195: 197 Ind Cas 13 6  
 ('46) AIR 1946 Pat 272: 222 Ind Cas 210 6  
 ('51) AIR 1951 Raj 108 6

**JUDGMENT:** This second appeal by the defendant is directed against an order of remand passed by the first appellate court and arises out of a suit filed by the respondents plaintiffs on the basis of a 'Bahikhata' account which the appellant defendant did not admit to be genuine. There were six issues framed in this case by the trial court; and, on the ground that the plaintiff had not been able to prove his dues against the defendant, the suit was dismissed by the trial court. An appeal was filed to the District Judge, Miorena, and the learned District Judge came to the conclusion that certain issues were wrongly framed and wrongly decided, that application for interrogatories was wrongly rejected and it should now be allowed, and, that material evidence in the case had not at all been considered by the trial court. After reframing certain issues and after issuing necessary directions for the trial court for a proper approach to the case, the learned District Judge remanded the case back for retrial allowing an opportunity to the parties to adduce fresh evidence if necessary. Against this order of remand, the defendant has filed this second appeal.

(2) A preliminary objection has been taken on behalf of the respondents as to the competency of this appeal. It is urged on their behalf by Mr. Patankar that the order from which this appeal has been preferred is not one which comes within the purview of O. 41 Rule 23 of the Civil Procedure Code and that therefore no appeal lies to this court from that order. Strictly speaking, the objection taken on behalf of the respondents is well founded, for the order does not in point of fact conform to the provisions of O. 41 R. 23 which contemplates an order of remand being passed in a case in which the trial court disposed of a suit upon a preliminary point. Mr. Ramrup Tiwari, learned counsel for the appellant on the other hand, contends that the lower appellate court should have dealt with the appeal on merits and if it was of opinion that further evidence was necessary on any point, it should have acted under O. 41 R. 25.

He places reliance on — 'Kalu Dalpat v. Narain Dagadu', AIR 1927 Bom 111: 100 Ind Cas 578. Mr. Tewari also contends that the District Judge has ordered the stamp on appeal to be refunded. This under Section 13 of the Indian Court Fees Act could be done only in the case of remand under Order 41 R. 23. The learned counsel, therefore, argues that the remand in this case was intended to be one

under O. 41 R. 23 and the appeal is competent. He also urges that an order passed by the appellate court in the exercise of its inherent jurisdiction is an appealable order even though it may not come within the scope of O. 41 R. 23. A large number of cases have been cited by both the parties in support of their respective contentions.

(3) It is well settled now that the power of remand under Section 107, Civil Procedure Code is limited to the case described in O. 41 R. 23. But nothing in that section restricts in any manner the application of the principle of inherent power recognised by Section 151 of the Code. The powers of the appellate court as regards remand are thus not restricted to the case specified in O. 41 R. 23, but the court, by reason of its inherent jurisdiction, recognised and prescribed in the Code, may order a remand in cases other than the case specified in O. 41 R. 23, if it be necessary for the ends of justice. — 'Ghuznavi v. The Allahabad Bank Ltd.', 44 Cal 929 (FB).

(4) If the Code recognises the power of an appellate court to direct a remand in circumstances other than those specified in O. 41 R. 23, the question arises, whether an order passed by the appellate court in the exercise of its inherent jurisdiction is an appealable order?

(5) There are two sets of decisions in the reports. In one set, which is the earlier one, it is laid down that though an order passed by the Court of appeal below might not be in strict accord with the provisions of O. 41, R. 23 read with O. 32 R. 1 (u), if the order of the appellate court purported to be an order under O. 41 R. 23 an appeal would lie from such order. It was added that an order passed by the appellate court in the exercise of its inherent jurisdiction was an appealable order though it may not come within the scope of O. 41 R. 23. As an illustration of this set reference may be made to — 'Agent, Bengal Nagpur Rly. v. Beharilal Dutta', 52 Cal 783: 29 Cal WN 614: AIR 1925 Cal 716; — 'Umesh Narain v. Secy. of State', AIR 1925 Cal 1157; — 'Mohammad Ali v. Karam Ali', AIR 1935 Cal 134; — 'Mt. Sahebji v. Mohammad Sarwar Khan', AIR 1928 Lah 116; — 'Gopal Singh v. Mangal Singh', AIR 1928 Lah 341 and — 'Radha Lal v. Fateh Mohummed', AIR 1937 Lah 454.

(6) In the other series of cases it is laid down that there can be no appeal from an order of remand unless it falls under O. 41 R. 23, or unless it can be said to amount to a decree within the meaning of Section 2 (2). It was added that an order of remand which does not fall within the purview of O. 41 R. 23 cannot be deemed to be one under it simply because the judge purported to act in accordance with its provisions. The rights conferred are of substance and cannot be enlarged or whittled down by what judges do or purport to do. Where the remand order has not covered the whole of the subject matter of the suit, an order directing refund of the whole of the court fees paid on appeal is wrong, as this could be done only in the case of a remand under O. 41 R. 23. The mere order of the lower appellate court that stamp on appeal be refunded cannot be taken to be an indication as to the law under which the appellate court below intended to make, the order of remand.

Hence, it has been laid down that even if the judge has ordered refund of stamp on appeal, if the order of remand does not fall



under O. 41 R. 23 no appeal lies. As an illustration of the latter class reference may be made to — 'Chandrika Prasad Singh v. Mithu Rai', 6 Pat 380; AIR 1927 Pat 296: 103 Ind Cas 722; — 'Halima Khatun v. Abdul Majeed', AIR 1935 Pat 49; — 'Sheolal Balmakund v. Jugal Kishore', ILR (1940) Nag 538: AIR 1940 Nag 349: 1940 Nag LJ 350: 191 Ind Cas 566; — 'Pradyat Kumar Tagore v. Jyotish Chandra', AIR 1942 Pat 195: 197 Ind Cas 13; — 'Baldeo Singh v. Niras Singh', AIR 1946 Pat 272: 222 Ind Cas 210; — 'Jagdish Singh v. Kateshar Singh', AIR 1945 Oudh 133; — 'Ashfaq Hussain v. Moharram Ali', AIR 1948 Oudh 220 and — 'Jahangeer Khan v. State of Rajasthan', AIR 1951 Raj 108.

It will be seen that since 1940, the trend of the decisions has definitely been in favour of the latter view. — 'Sheolal Balmukund v. Jugal Kishore', ILR (1950) Nag 538, is the leading case on the subject and the latter cases upon which the respondent relies do little more than follow the 'ratio decidendi' of Stone C. J. and Vivian Bose J. (as he then was) in — 'Sheolal Balmukund's case'. I need hardly emphasize the elementary principle that no appeal can lie unless the right has been expressly conferred by statute and further that a court cannot override an express provision of law under colour of its inherent powers. In this view of the matter, I respectfully concur with the view expressed in — 'Sheolal's case' and also in other reported cases after the year 1940.

(7) In the case before me the suit was disposed of on merits by the trial court. It was not disposed of on a preliminary ground. The order of remand of the lower appellate court was under its inherent jurisdiction, and not under O. 41 R. 23. Hence I hold that it was not appealable.

(8) Once it is conceded that the lower appellate Court had inherent jurisdiction to remand the case, this appeal cannot be converted into a revision unless it is shown that some illegality or material irregularity has occurred in the exercise of inherent jurisdiction within the meaning of sub-section (c) of S. 115, Civil P. C. No such point has been taken in arguments before me, and I do not think that the present is a fit case in which I should be inclined to interfere in revision.

(9) I, therefore, dismiss the appeal with costs.

B/V.R.B.

Appeal dismissed.

**A. I. R. 1953 M. B. 18 (Vol. 40, C. N. 11)**

**(INDORE BENCH)**

**CHATURVEDI J.**

Punam Chand, Petitioner v. State and another, Opponents.

Criminal Ref. No. 22 of 1951, D/- 8-11-1951.

**Cantonments Act (1924), Ss. 103 and 81 to 83 — Applicability — Demand of information under S. 103 to ascertain liability to pay octroi — Legality.**

Since Ss. 81 to 83 of the Act are a special provision dealing with octroi duties, S. 103 which is a general provision dealing with general taxes must be read as excluding from its operation the cases which have been provided for in Ss. 81 to 83. Hence an Executive Officer of the Cantonment cannot under S. 103 require an inhabitant of the Cantonment to give information regarding goods imported into the Cantonment to ascertain liability to pay octroi. Failure to give such information cannot entail conviction under S. 103(2). Section 103 also cannot be regarded as one meant for demanding information which may enable the Executive Officer to detect an evasion of a tax. The only object of this section is to enable the Executive Officer to ascertain the liability of any particular inhabitant of the Cantonment to pay any tax. (Paras 8 & 9)

Govt. Advocate, for the State; Maharshi, for Opponent No. 2.

REFERENCE .....

/Para

('15) 16 Cri LJ 702: (AIR 1916 Mad 1108) 8

**ORDER:** This is a reference by the Second Additional Sessions Judge, Indore, recommending that the conviction of the petitioner under Section 103, Sub-section (2) of the Cantonments Act and the sentence to pay a fine of Rs. 20/- passed by the Sub-Divisional Magistrate, First Class, Mhow, in criminal case No. 53 of 50 of his file be set aside.

(2) The facts are that the petitioner is the proprietor of the Modern Radio House at Mhow. The Cantonment Executive Officer served on him a notice (Ex. P/1) dated the 19th November 1949, which is as follows:

"You are hereby required to furnish the following information to me within 10 days of receipt hereof namely:

(a) A statement of the entire Radio goods and other goods with quantity and description, imported by you into this Cantonment during the month of April 1949, giving the dates of import and value of the goods.

(b) Place or places from where imported and the names and addresses of the persons or firms from whom you purchased the goods with their corresponding invoices.

(c) Routes and conveyance (such as by rail, motor, cart, post, etc.) by which the goods were brought into this Cantonment and through which Naka or Octroi Post."

(3) The petitioner did not furnish any information and the Cantonment Board, Mhow, lodged a complaint against him in the Court of Sub-Divisional Magistrate, Mhow Cantonment. The petitioner was convicted as stated above.

(4) Section 103 of the Cantonments Act, 1924, runs as follows:

"The Executive Officer may, by written notice, call upon any inhabitant of the Cantonment to furnish such information as may be necessary for the purpose of ascertaining:

(a) Whether such inhabitant is liable to pay any tax imposed under this Act;

(b) At what amount he should be assessed; or

(c) The annual value of the building or land which he occupies and the name and address of the owner or lessee thereof.

(2) If any person, when called upon under sub-section (1) to furnish information, neglects to furnish it or furnishes information which is not true to the best of his knowledge or belief, he shall be punishable with fine which may extend to one hundred rupees."

(5) Mr. Sanghi, on behalf of the petitioner, contends that the object of Section 103 is to ascertain whether any inhabitant of the Canton-



ment is liable to pay any tax imposed under the Cantonments Act. Mr. Sanghi lays emphasis on the words "is liable to pay"; and, he argues that it is the present liability to pay any tax which is to be ascertained and not any past liability of the inhabitant who, in the past, might have imported some articles in the Cantonment area without paying octroi duty. He puts an important question in this way: Whether the Executive Officer can call upon any inhabitant in 1951 to furnish information what articles he had been importing since 1939? Mr. Sanghi then argues that Section 103 is a general provision dealing with general taxes and sections 81, 82 and 83 of the Cantonments Act deal with octroi duties and Mr. Sanghi contends that where there are special sections about octroi then it should be presumed that the general Section 103 does not apply to octroi.

(6) Mr. Maharshi, on behalf of the Cantonment Board, has drawn my attention to chapter 5 of the Cantonments Act which deals with taxes. Section 60 deals with general powers of taxation; Section 61 with framing of preliminary proposals; Section 62 with objections and disposals; Section 63 with imposition of tax. Then Section 64 defines what annual value is and Section 65 deals with incidence of taxation. Sections 66 to 74 deal with assessment list; Ss. 75 to 79 with remission and refund and Section 80 with charge on immovable property. Sections 81 to 83 deal with Octroi, Terminal tax, and Toll. Then there is a procedure about appeals in sections 84 to 88 and about payment and recovering of taxes in sections 89 to 96. Then there is a heading 'Special provisions relating to taxation' and sections 97 to 105 cover this subject.

(7) Mr. Maharshi contends that Section 103 is not a general provision but is a special provision relating to taxation. He urges, and in this, is supported by the Government Advocate that 'liable to pay any tax imposed under this Act' covers a very wide ground and the Executive Officer is empowered to ascertain liability of inhabitant in the Cantonment area to pay any tax imposed under the Act. According to him, the words 'any tax' are of very wide import and include octroi duty. He is, therefore, of the opinion that the Executive Officer was empowered under Section 103 to ascertain from the petitioner the entire Radio goods and other goods imported by him into the Cantonment area in April 1949, giving the dates of import and value of the goods. Mr. Maharshi, therefore, contends that inasmuch as the petitioner did not furnish information when demanded under Section 103 he has rightly been convicted.

(8) There is no doubt that the word 'tax' in its widest sense includes all money raised by taxation and it may include rates, octroi duties and other charges levied by the Cantonment Board. Neither 'tax' nor 'octroi' has, however, been defined in the Cantonments Act of 1924. 'Octroi' is the French name of local duty levied upon goods entering a town or district as distinguished from custom duties which are those levied at the front. In Chapter V of the Cantonments Act 'Octroi' has been included in the general subject "Taxation" and it can be taken to be a kind of tax imposed by the Act; but from the scheme of this Chapter it appears that the subject of "Octroi", terminal tax or tolls is a special one dealt with separately under Chapter V. The collection of octroi, terminal tax and toll can be leased by the Board for one

year under Section 83. If the contractor makes default in payment of the contract amount, he can be sued for money due under the contract — 'Mohamad Ibrahim v. Municipality of Anakapalli', 16 Cri LJ 702 (Mad). Apparently this is not applicable to other taxes. Section 81 then authorises inspection of goods by an Officer of the Board who can inspect, examine, or weigh goods, vehicles, or animals brought or received within the limits of the Cantonment area. The Officer authorised by the Board can demand any information, any bill, invoice or document which such person may possess relating to such goods, vehicles or animals. This section, in fact, enjoins upon the person bringing or receiving such goods within the limits of Cantonment area to disclose liability to pay octroi. Section 103 similarly enjoins upon an inhabitant of the Cantonment to disclose liability to pay any tax. It is suggested that Section 103 deals with duties and obligations of an inhabitant of a Cantonment; and the latter has double obligation to disclose liability to pay octroi; first, as receiver or bringer of goods under Sec. 81; and, then, as an inhabitant of the Cantonment area under Section 103. I do not think the Legislature intended to differentiate between the obligation in this respect of an inhabitant of the Cantonment area and an outsider; or intended to impose a double obligation on the inhabitant of the Cantonment area as suggested above. It has to be borne in mind that octroi is imposed on the article as soon as it is brought or received within the limits of a town. The bringer of the goods, or the receiver of the goods, after paying octroi, can sell the imported goods in the town and go outside the town taking the price with him and making a profit by the transaction. Once octroi duty is paid, the goods can be sold within the Cantonment area again and again, no further octroi can be levied. Any evasion of octroi, terminal tax, or toll, or any attempt at evasion is especially dealt with under section 82 and is made punishable with fine which may extend either to ten times the value of such octroi, terminal tax or toll, or to fifty rupees, whatever is greater, but which shall not be less than twice the value of such octroi, terminal tax or toll, as the case may be. In Sub-clauses (3) and (4) of Section 82, the duties and powers of Executive Officer of the Board in this respect are also dealt with. It will thus be seen that octroi as a form of indirect taxation or a form of non-recurring taxation has received special treatment at the hands of the legislature in the Cantonments Act of 1924. Having bestowed its attention to this particular subject and provided for it, the Legislature is reasonably presumed not to intend to alter this special provision by a subsequent general Section 103. The general Section 103 can then be read as silently excluding from its operation the cases which have been provided for by sections 81 to 83. *Generalia Specialibus Non-Derogant*.

(9) Section 103 also cannot be regarded as one meant for demanding information which may enable the Executive Officer to detect an evasion of a tax. The only object of this section is to enable the Executive Officer to ascertain the liability of any particular inhabitant of the Cantonment to pay any tax.

(10) In this view of the matter, I accept the reference, and would set aside the conviction and sentence passed by the Sub-Divisional Magistrate, First Class, Mhow, on the petitioner on 30-9-50 and would acquit him.

B/G.M.J.

Reference accepted.



**A. I. R. 1953 M. B. 20 (Vol. 40, C. N. 12)****(GWALIOR BENCH)****SHINDE C. J. AND DIXIT J.**

Ramprasad, Applicant v. War Profits Tax Officer, Gwalior, Opponent.

Civil Ref. No. 2 of 1951, D/- 12-5-1952.

**(a) Constitution of India, Art. 276 and Proviso to Art. 276 (2) — Applicability to tax under Gwalior War Profits Tax Ordinance — (Gwalior War Profits Tax Ordinance, 2001).**

Art. 276 is not applicable to the War Profits Tax under the Ordinance as it is purely a tax on income. The Proviso to Art. 276 (2) is also not applicable as the War Profits Tax was not in force in the financial year immediately preceding the commencement of the Constitution.

(Paras 2 and 17)

**(b) Constitution of India, Arts. 277 and 278 (1) (a) — Tax under Gwalior War Profits Tax Ordinance — Levy of — Agreement between President and Rajpramukh — Validity — (Gwalior War Profits Tax Ordinance (2001)).**

Per Shinde C. J.: Article 277 is not relevant in considering whether the War Profits Tax could be assessed and realised for the accounting period that ended on 30-6-46. But the Ordinance is still in force by virtue of Art. 278 (1) (a). The Madhya Bharat authorities for War Profits Tax can assess and realize the War Profits Tax after the 26th of January, 1950 by virtue of Art. 278 (1) (a), and the agreement entered into thereunder. The financial agreement entered into between the President and the Rajpramukh on 25-2-1950 is valid in law.

(Paras 3 and 6)

Per Dixit J.: The tax under the Gwalior War Profits Tax Ordinance is a tax which was being lawfully levied by the Madhya Bharat Government immediately before the commencement of the Constitution & as such in view of Art. 277, the Madhya Bharat Government is entitled to continue to levy and collect it after the commencement of the Constitution from the persons liable to pay the tax under the Ordinance. The tax is not a tax leviable in the sense in which the word "leviable" is used in Art. 278 (1) (a).

(Paras 19 and 21)

**(c) Gwalior War Profits Tax Ordinance (2001) — Liability of assessee — Restriction on — (Constitution of India, Art. 276).**

As Art. 276 of the Constitution is not applicable to the tax under the Ordinance, the liability of the assessee cannot be restricted to Rs. 250.

(Para 7)

**(d) Gwalior War Profits Tax Ordinance (2001), Cls. 9, 10 and 13 — Whether any transaction has reduced profits — Question of fact — Discretion of War Profits Tax Officer.**

Per Shinde C. J.: Clauses 9 and 10 are independent of each other. Even if the method of accounting has been accepted as regularly employed by the assessee, the War Profits Tax Officer has power under Cl. 10 to disallow deduction in respect of any transaction, if it appears to him that the transaction has artificially reduced the profits. Whether any transaction has artificially reduced the profits is a question of fact. It is left to the discretion of the War Profits Tax Officer to take a decision in this respect. Consequently this is not a question of law.

(Para 8)

Per Dixit J.: There is nothing in Cls. 9, 10 and 13 of the Ordinance to suggest that when a person is served with a notice to produce his accounts to support the return furnished by him of the profits of his business, the War Profits Tax Officer, unless he declares the account books of the person as fraudulent or erroneous, is bound to accept them for the purposes of assessment or that having accepted the account books he is bound to accept as correct every entry made therein. (Para 15)

**(e) Gwalior War Profits Tax Ordinance (2001), Cl. 10 — Correctness of entry in account book — Burden of proof.**

The burden of proving the correctness of a particular entry in an account book is on the assessee even though other entries of the same account book may have been accepted by the War Profits Tax Officer to be true.

(Paras 11 and 15)

**(f) Constitution of India, Arts. 265 and 277 — "Levy" and "imposition" — Distinction.**

Per Dixit J.: There is a distinction between "imposition" and "the levy, i.e., assessment and collection" of a tax. The imposition of a tax is by an Act of the competent Legislature and is purely a legislative act. The levy and the collection of a tax is a process subsequent to the imposition of the tax by the statute. A tax cannot be levied or collected before it is actually imposed by an Act of the competent Legislature. This is clear from Art. 265. Article 277 nowhere speaks of the imposition of a tax. The Article assumes the existence immediately, before the commencement of the Constitution of a valid law imposing a tax and permits the Government of the State to assess the persons liable to pay the tax and collect it from them, after the coming into force of the Constitution. It is the tax that was actually being levied immediately before the commencement of the Constitution that is saved by Art. 277, and it makes no difference whether the tax levied was in the case of a tax, one imposed on income or profits accruing in a period immediately before the commencement of the Constitution or a period anterior to it.

(Para 19)

Patankar, for Applicant; Advocate General, for the State.

SHINDE C. J.: This is a reference under cl. 46 (2) of the Gwalior War Profits Tax Ordinance Samvat 2001. The relevant facts of the case are as follows. The War Profits Tax Ordinance, S. 2001 was promulgated by His Highness the Maharaja Scindia imposing a tax on excess profits arising out of certain businesses in Gwalior State. The said Ordinance came into force on the 1st of July, 1944. The assessee Messrs Ramprasad Ramnarayan, who are wholesale dealers and Commission agents for cloth and yarn, were assessed for the chargeable accounting period 1-7-45 to 30-6-46 by the War Profits Tax Officer. Being aggrieved by the order, the assessee firm preferred an appeal to the Revenue Commissioner, who was the appellate authority for War Profits Tax. The appellate authority also upheld the order of the War Profits Tax Officer. Consequently at the instance of the assessee, the Commissioner for War Profits Tax has made this reference under clause 46 (2) of the Gwalior War Profits Tax Ordinance.



(2) Nine questions of law have been referred to us. We propose to deal with them seriatim. As questions Nos. 1, 2 and 3 are inter-allied I propose to deal with them together. The first question raised is whether the War Profits Tax Ordinance, Samvat 2001 is still subsisting. The second question is whether the Madhya Bharat authorities for War Profits Tax can assess and realize the War Profits Tax after 26th January, 1950. The third question is whether the financial agreement referred to by the appellate authority is valid in law. The counsel for the assessee contends that Entry 82 of the Union List given in the seventh schedule of the Constitution makes it quite clear that taxes on income other than agricultural income fall within the category of Union List. Consequently under Article 246 Parliament has exclusive power to make laws with respect to tax on income other than agricultural income. As War Profits Tax is a tax on income Madhya Bharat Government has no authority either to impose or to realize tax on income after the commencement of the Constitution.

It may be stated at the outset that the tax in question is assessed for the chargeable accounting period 1-7-45 to 30-6-46. The assessment order was passed on 6th May, 1950. The question that we have to consider is whether there is any restriction in the Constitution for the assessment and realization of a tax for the accounting period that ended on 30-6-46. Art. 246, no doubt, lays down that Parliament has exclusive power to make laws with respect to taxes on income other than agricultural income. The question here involved is not whether the Madhya Bharat State can make any laws in respect of tax on income other than agricultural income. Therefore, Article 246 is not of much assistance for the decision of the questions at issue. The counsel for the assessee contends that the tax in this case is not covered by Arts. 276, 277 or 278 and consequently Madhya Bharat Government cannot realize it.

It is no doubt true that the tax in question is not covered by Article 276. Article 276 refers to tax on professions, trades, callings and employments. The tax in question is purely a tax on income. It is imposed on the amount by which the profits during any chargeable period exceed the standard profits (Vide clause 4 of the Gwalior War Profits Tax Ordinance). It is thus clear that it is a tax on income. Proviso to sub-clause (2) of Article 276 is also not applicable to this case. Because the proviso only applies when in the financial year immediately preceding the commencement of the Constitution a tax is in force in any State. As the War Profits Tax was not in force in the financial year immediately preceding the commencement of the Constitution the proviso to sub-clause (2) of Article 276 is not applicable to this case. Article 276 therefore, is not applicable to the present case.

(3) Article 277 is also not relevant to this case. It runs as follows:

"Any taxes, duties, cesses or fees which, immediately before the commencement of this Constitution, were being lawfully levied by the Government of any State or by any municipality or other local authority or body for the purposes of this State, municipality, district or other local area may, notwithstanding that those taxes, duties, cesses or fees are mentioned in the Union List, continue to be levied and to be applied to the

same purposes until provision to the contrary is made by Parliament by law".

The wording of this Article clearly indicates that it refers to existing taxes. As already pointed out War Profits Tax was not being levied immediately before the commencement of the Constitution. It is admitted by the parties that after 1946 the tax has not been levied. This Article, therefore, has no application to the present case.

(4) Article 278, however, stands on a different footing. It runs as follows:

"1. Notwithstanding anything in this Constitution, the Government of India may, subject to the provisions of clause (2), enter into an agreement with the Government of a State specified in Part B of the First Schedule with respect to

(a) the levy and collection of any tax or duty leviable by the Government of India in such State and for the distribution of the proceeds thereof otherwise than in accordance with the provisions of this Chapter.....

2. An agreement entered into under cl. (1) shall continue in force for a period not exceeding ten years from the commencement of this Constitution;

Provided that the President may at any time after the expiration of five years from such commencement terminate or modify any such agreement if after consideration of the report of the Finance Commission he thinks it necessary to do so."

This Article clearly gives power to the Government of India to enter into an agreement with the Government of a Part B State with respect to levy and collection of any tax or duty leviable by the Government of India in such State irrespective of the fact that the tax is included in the Union List. In accordance with the provisions of this Article a Financial Agreement was entered into between the President of India and the Rajpramukh of Madhya Bharat on 25th February, 1950. Item 9 of this agreement is as follows:

"In respect of the taxes mentioned below, which pertain to items included in List I of the Seventh Schedule to the Constitution of India and are not in fact levied by the Government of India, the State will be allowed to continue to make assessments and to collect all the arrears outstanding, even after federal financial integration in respect of the liability of assessee up to the 31st March, 1950:—

Gwalior War Profits Tax.  
Indore Excess Profits Tax.  
Indore Industrial Profits Tax.  
Indore Stock Exchange & Forward Transactions Tax.  
Ratlam Royalty on Cloth Production."

This item of the agreement clearly indicates that the Madhya Bharat State has been allowed to continue to make assessment and collect all the arrears outstanding under Gwalior War Profits Tax in respect of the liability of assessee up to 31st March, 1950. The liability of the assessee is for the accounting period 1-7-45 to 30-6-46. According to this agreement therefore, the tax can be assessed and collected.

(5) The learned counsel contends that Article 278 (1) (a) is not applicable to the present tax;



because the tax in question was not leviable by the Government of India in Madhya Bharat State in 1946. This argument is fallacious. Art. 278 gives power to the Government of India to enter into an agreement with the Government of a Part B State in respect of tax leviable by the Government of India in the State under the Constitution. The underlying idea of this Article is not to withdraw suddenly a source of revenue available to a Part B State until the commencement of the Constitution. The subject matter of this Article, therefore, is a tax which was available to a Part B State until the commencement of the Constitution and which after the commencement of the Constitution became part of the Union List.

It is not, therefore, correct to say that Art. 278 (1) (a) refers to a tax which was leviable by the Government of India in a Part B State at the time of the levy. Before the commencement of the Constitution there was no Union and there was no Part B State. The Constitution, therefore, could not have referred to a tax leviable by the Union of India in a Part B State, at the time of levy. Besides to say that the tax should be leviable at the time of the levy is to import into the Article words which do not find place in the Article itself. All that the Article states is that a tax which after the commencement of the Constitution is included in the Union List may be allowed to be levied and collected by a Part B State provided there is an agreement between the Government of India and the Government of that State.

The contention of the assessee, therefore, cannot be sustained. The result is that the tax is covered by Article 278 (1) (a); and as there is an agreement between the Government of India and Madhya Bharat State and as the liability of the assessee is for the accounting period ending in 1946, assessment can be made and the tax can be collected. Questions Nos. 1, 2 and 3 are, therefore, answered as follows:

(6) The War Profits Tax Ordinance, Samvat 2001, is still in force by virtue of Article 278 (1) (a). The Madhya Bharat authorities for War Profits Tax can assess and realize the War Profits Tax after the 26th of January, 1950 by virtue of Article 278 (1) (a), and the agreement entered into thereunder. The financial agreement entered into between the President and the Rajpramukh on 25th February, 1950 is valid in law.

(7) The question No. 4 has already been dealt with in the discussion in respect of questions Nos. 1, 2 and 3. As already pointed out Article 276 has no application to the present tax. Consequently the liability of the assessee cannot be restricted to Rs. 250/-. Question No. 4, therefore, is answered in the affirmative.

(8) Question No. 5 is as follows:

'Can the War Profits Tax Officer and Appellate Authority assess the tax arbitrarily even when the authorities concerned have not declared account book of the assessee fraudulent or erroneous?'

This question has been raised on the strength of clauses 9 and 10 of the War Profits Tax Ordinance. Clause 9 is as follows:

'Profits and gains shall be computed, for the purposes of this Ordinance, in accordance with the method of accounting regularly employed by the assessee;

Provided that, if no method of accounting has been regularly employed or if the method is such that, in the opinion of the War Profits Tax Officer the profits cannot be properly deduced therefrom then the computation shall be made upon such basis and in such manner as the War Profits Tax Officer may determine'.

Clause 10 runs as follows:

'In computing profits for the purposes of this Ordinance, no deduction shall be made in respect of any transaction or operation of any nature, if and so far as it appears that the transaction or operation has artificially reduced or would artificially reduce the profits.'

Clause 9 only states that profits will be computed in accordance with the method of accounting regularly employed by the assessee. War Profits Tax Officer has apparently done so. The counsel for the assessee, however, contends that when the method of accounting has been accepted as regularly employed by the assessee, War Profits Tax Officer should not disbelieve the entry of Rs. 51,500/- shown as sum borrowed from the mother of Shrikrishna and the entry of Rs. 2264-6-3 shown as interest paid on the above sum. Cls. 9 and 10 are independent of each other. Even if the method of accounting has been accepted as regularly employed by the assessee, the War Profits Tax Officer has power under clause 10 to disallow deduction in respect of any transaction, if it appears to him that the transaction has artificially reduced the profits. Whether any transaction has artificially reduced the profits is a question of fact. It is left to the discretion of the War Profits Tax Officer to take a decision in this respect. Consequently this is not a question of law. Kanga in his *Law and Practice of Income Tax 1950 Edn.* at page 463 states as follows:

'The question whether cash credits or other entries in the accounts represent undisclosed or secreted profits is a question of fact.'

The result is that this question could not be referred under clause 46 (2) of the War Profits Tax Ordinance. The question has been so framed as to give it a colour of a question of law. But the arguments advanced disclose clearly that the assessee desires us to give an opinion as to whether the two items mentioned above have been rightly disallowed by the War Profits Tax Officer or not. As already stated even though the War Profits Tax Officer accepts the method of accounting as being regularly employed by the assessee, under cl. 10 he has full discretion to refuse a deduction in respect of any transaction which he thinks has artificially reduced the profits. There is no question of arbitrary decision involved in this case. As the question virtually is a question of fact we refuse to answer it.

(9) Question No. 6 is as follows:

'Do the principles of the Income Tax Law of the Hindu undivided family apply to War Profits Tax?'

Clause 2 Sub-Clause (13) of the Ordinance gives a definition of the word 'person'. That definition reads as follows:

'Person' includes any company or body of individual or any other association of persons whether incorporated or not and also includes a Hindu undivided family'.



There is, therefore, no doubt that the word 'person' includes also a Hindu undivided family. In view of this definition the counsel for the assessee did not press this point. The answer to this question, therefore, is in the affirmative.

(10) Questions Nos. 7, 8 and 9 are as follows:

"(7) What is the effect of the decision of a criminal court on a relevant issue on the judgment of War Profits Tax Authorities?"

(8) On whom lay the burden of proving the correctness or incorrectness of a particular entry when other entries of the same account books have been accepted to be true?

(9) Can War Profits Tax Authorities assess tax upon income which has not accrued within the taxable year?"

Questions Nos. 7 and 9 have not been pressed by the counsel for the assessee. There is no need, therefore, to give any opinion on these questions.

(11) With regard to question No. 8 it has been pointed out in the discussion of question No. 5 that under clause 10 the War Profits Tax Officer has a discretion in disallowing deduction in respect of any transaction if it appears to him that the transaction has artificially reduced the profits. This power is available to him even if he accepts the method of accounting as regularly employed by the assessee and accepts most of the entries as correct. Even if the War Profits Tax Officer accepts most of the entries as correct he is not deprived of his power to disallow deduction in respect of any transaction which he thinks has artificially reduced the profits.

Mr. Patankar, who appeared on behalf of the assessee, did not seriously urge this point. In view of clause 10 the War Profits Tax Officer has full discretion to disallow deduction in respect of any transaction which he thinks has artificially reduced the profits, although he may have accepted most of the entries in the account book to be correct. The result is, in our opinion, the onus of proof as regards the correctness of any entry is always on the assessee. Our answer to question No. 8 is that the burden of proving the correctness of a particular entry is on the assessee even though other entries of the same account book may have been accepted by the War Profits Tax Officer to be true.

(12) We, therefore, answer the reference accordingly.

(13) DIXIT J.: This is a reference under section 46 (2) of the Gwalior War Profits Tax Ordinance, Samvat 2001 by the War Profits Tax Commissioner for the opinion of this Court on certain questions. The relevant facts may be shortly stated as follows:

(14) On 20-1-47, a notice under section 13 (2) of the Ordinance was given to Messrs Ram Prasad Ram Narain, of Naya Bazar, Lashkar, by the War Profits Tax Officer, Gwalior State, requiring the firm to furnish within the prescribed period a return of the profits earned by the firm during the period from 1-7-45 to 30-6-46 for the purposes of determining the liability of the firm to War Profits Tax under the Ordinance. The assessment proceedings lasted from 20-1-47 to 6-5-50 on which date the

War Profits Tax Officer passed an order assessing the firm to excess profits tax and calling upon the firm to pay the amount of the tax before the date specified in the order. The Gwalior War Profits Tax Ordinance under which the assessment was made was promulgated by the Maharaja of Gwalior on 1-7-1944 and after the formation of Madhya Bharat, it continued in force in the territory comprising of the former Gwalior State by virtue of the Madhya Bharat Ordinance No. I (1) of 1948 & the Regulation of Government Act No. I (1) of 1948 which replaced the Ordinance No. I (1) of 1948.

The firm being dissatisfied with the assessment filed an appeal against the assessment order before the Revenue Commr., the duly constituted Appellate Authority. The appeal was rejected and thereafter the firm moved the War Profits Tax Commissioner under section 46 of Gwalior War Profits Tax Ordinance challenging the validity of the assessment on a number of grounds and requesting the Commissioner to state the case to this Court for opinion on the questions raised by him. The questions submitted by the War Profits Tax Commissioner for the opinion of this Court are these, namely,

"Q. 1. Is the War Profits Tax Ordinance Smt. 2001 still subsisting?"

Q. 2. Can the Madhya Bharat Authorities for War Profits Tax assess and realise the War Profits Tax after 26-1-1950, i.e. the commencement of the Indian Constitution?

Q. 3. Is the financial agreement referred to by the Appellate Authority valid in law?

Q. 4. In view of the Provisions of Indian Constitution, can the War Profits Tax Authorities assess the liability for more than Rs. 250/-?

Q. 5. Can the War Profits Tax Officer and Appellate Authority assess the tax arbitrarily even when the Authorities concerned have not declared account books of the assessee fraudulent or erroneous?

Q. 6. Do the principles of the Income Tax Law of the Hindu undivided family apply to War Profits Tax?

Q. 7. What is the effect of the decision of a Criminal Court on a relevant issue on the judgment of War Profit Tax Authorities?

Q. 8. On whom lay the burden of proving the correctness or incorrectness of a particular entry when other entries of the same account books have been accepted to be true.

Q. 9. Can War Profit Tax Authorities assess tax upon income which have not accrued within the taxable year."

(14a) At the hearing before us Mr. Patankar learned Counsel for the assessee firm abandoned questions Nos. 7 and 9 and did not press them before us. In relation to question No. 1, he also did not advance before us the contention raised by the assessee before the War Profits Tax Commissioner that the War Profits Tax Ordinance Samvat 2001 ceased to be operative after the expiry of Madhya Bharat Ordinance No. I (1) of 1948 and cannot be said to have been continued by virtue of the Regulation of Government Act Samvat 2005 (Act No. I



(1) of 1948). Instead, learned Counsel for the firm contended that the War Profits Tax Ordinance was not subsisting on the date of the assessment as it became inoperative on the commencement of the Constitution of India. Question No. 1 as argued before us is therefore really covered by question No. 2.

Question No. 3 raises the general question about the validity of the financial agreement dated 25-2-50 between the Government of India and the Madhya Bharat Government. But it appears to me that the general question whether this agreement which deals with many matters which are not relevant here, is valid, does not arise in the present case. The precise question which we have to consider is whether by virtue of clause IX of this agreement, the Madhya Bharat Government is competent under Article 278 (1) (a) to levy and collect the tax under the Gwalior War Profits Tax Ordinance Samvat 2001 from Messrs Ram Prasad, Ram Narain. Question No. 3 is really a part of question No. 2.

The question raised in question No. 4 as to the maximum amount of tax leviable is also connected with question No. 2 and can conveniently be dealt with while answering question No. 2. There are thus really four questions for consideration, namely the questions numbered as 5, 6 and 8 in the reference, and the important question whether after the coming into force of the Constitution of India, the Gwalior War Profit Tax Ordinance has become inoperative so as to preclude the Madhya Bharat Government from levying and collecting the tax under the Ordinance from the firm of Messrs. Ram Prasad Ram Narain.

(15) As regards questions Nos. 5, 6 and 8, I concur in the answers which My Lord the Chief Justice has given to those questions. I would only add that I do not find anything in sections 9, 10 and 13 of the War Profits Tax Ordinance to suggest that when a person is served with a notice to produce his accounts to support the return furnished by him of the profits of his business, the War Profit Tax Officer, unless he declares the account books of the person as fraudulent or erroneous, is bound to accept them for the purposes of assessment or that having accepted the account books he is bound to accept as correct every entry made therein. The burden of proving that a particular entry in the account books is correct and genuine is clearly on the prospective assessee.

In view of the fact that for the purposes of the War Profit Tax Ordinance, "a person" has been defined in section 2 (13) as including a Hindu undivided family, question No. 6 does not merit any consideration and learned Counsel for the firm did not press this question when his attention was drawn to the definition of the word "person" given in Section 2 (13).

(16) I also agree with my Lord, the Chief Justice that the assessment of the firm Messrs Ram Prasad Ram Narain to tax under the Ordinance for the chargeable period from 1-7-45 to 30-6-46 is valid. But my reasons for this conclusion are somewhat different. On the questions Nos. 1 to 4, the argument of the learned counsel for the firm is that as under Art. 246, Parliament alone has the power to legislate with respect to item 82 "Taxes on income other than agricultural income" and as under Article 366 (29) "Tax on income" includes a tax in the nature of excess profits tax, the Gwalior

War Profits Tax Ordinance, Samvat 2001, has after the commencement of the Constitution become inoperative; that it is not protected by Article 276; and that if it is protected by Article 276 then under clause 2 of Article 276, the total amount of tax payable by the firm cannot exceed two hundred and fifty rupees.

It is further contended that as under the Ordinance, no tax could be charged on profits accruing after 30-6-46, the tax under the Ordinance is not a tax which was levied immediately before the commencement of the Constitution and that, therefore, the Madhya Bharat Government cannot claim that they have a right under Article 277 to levy this tax after the coming into force of the Constitution.

As regards the financial agreement, it is said on behalf of the firm that under Article 278 (1) (a), an agreement with respect to the levy and collection of any tax or duty could be entered only if the tax or duty was one leviable by the Government of India; but inasmuch as prior to 26-1-1950 the Government of India could not impose income-tax in Madhya Bharat, the tax under the Gwalior War Profits Tax Ordinance, 'Samvat' 2001, is not a tax leviable by the Government of India and that, therefore, the Madhya Bharat Government cannot derive under clause IX of the agreement purported to have been entered under Article 278, any authority to levy and collect the tax.

(17) I find myself unable to accept the contention of Mr. Patankar learned Counsel for the assessee firm that the Gwalior War Profits Tax Ordinance ceased to be operative after the commencement of the Constitution. It is true that under Article 246, Parliament has the exclusive power to legislate with respect to taxes on income other than agricultural income. But here we are not concerned with a law of the Madhya Bharat State enacted after 26-1-1950 and imposing income-tax. The Gwalior War Profits Tax Ordinance, 'Samvat' 2001, was in force at the commencement of the Constitution in the territory of Madhya Bharat comprising of the former Gwalior State and the question of its invalidity on the ground of legislative competence under Art. 246 does not arise.

The real question for determination is whether after the commencement of the Constitution, the Ordinance has become inoperative under any provision of the Constitution. This necessitates a consideration of Articles 276, 277 and 278. I agree with the learned Counsel for the firm that Article 276 has no applicability in the present case. This Article draws a distinction between a tax on professions, trades, callings or employments and a tax on income accruing from or arising out of professions, trades, callings and employments. Clause 1 of Article 276 provides that if a law of the Legislature of a State imposes a tax on professions, trades, callings and employments it shall not be invalid on the ground that it relates to a tax on income which falls within the legislative authority of the Parliament.

Clause 2 prescribes the limit as to the maximum amount of such a tax payable by a person when it is imposed by the State. The proviso to clause 2 relates to the paying of such a tax in force in any state in the financial year immediately preceding the commencement of the Constitution. The last clause of Article 276 provides that the power of a Legislature of a



State to impose a tax on professions or employments in no way limits the power of Parliament to make laws with respect to taxes on income accruing from or arising out of professions, trades, callings and employments. The tax under the Gwalior War Profit Tax Ordinance is not a tax on a profession or a trade. It imposes a tax on the profits accruing from them. Article 276 is, therefore, not relevant here. The position is, to my mind, so obvious that I should serve no purpose by amplifying my reasons.

(18) In my view, it is Article 277 which enables the Madhya Bharat Government to levy the tax under the Gwalior War Profits Tax Ordinance after the coming into force of the Constitution and to recover it from the assessee. This article reads as follows:

"Any taxes, duties, cesses or fees which, immediately before the commencement of this Constitution, were being lawfully levied by the Government of any State or by any Municipality or other local authority or body for the purposes of this State, municipality, district or other local area may, notwithstanding that those taxes, duties, cesses or fees are mentioned in the Union List, continue to be levied and to be applied to the same purposes until provision to the contrary is made by Parliament by law."

(19) It is clear from this Article that if the tax under the Gwalior War Profits Tax Ordinance is a tax which was being lawfully levied by the Madhya Bharat Government immediately before the commencement of the Constitution, then, the Government is entitled to continue to levy it even after 26-1-50. It is not disputed that until at least the commencement of the Constitution the Gwalior War Profits Tax Ordinance was a valid law imposing a tax on profits. There is also no dispute that until 26-1-1950, a person to whom the Ordinance applied could be assessed to the tax under the Ordinance in respect of the profits which accrued during the prescribed chargeable period. What is contended by the Counsel for the firm is that inasmuch as the Ordinance did not impose any tax on profits accruing after 30-6-46, it cannot be said that the tax under the Ordinance is a tax which was levied immediately before the commencement of the Constitution.

I fail to see how the fact that the Ordinance did not impose any tax on profits accruing after 30-6-46 affects the operation of the Ordinance as regards the imposition, and the assessment and collection of the tax in respect of profits during the chargeable period before 30-6-46. The contention of the learned Counsel for the firm is based on the assumption that the expression "any tax levied immediately before the commencement of the Constitution" in relation to a tax in the nature of an income tax or excess profits tax, means a tax which was imposed on income or profits accruing in a chargeable period immediately before the commencement of the Constitution. I do not think that the language of Article 277 warrants any such construction of the expression "any tax levied immediately before the commencement of the Constitution."

It must be remembered that there is a distinction between "imposition" and "the levy, i.e., assessment and collection" of a tax. The imposition of a tax is by an Act of the competent Legislature and is purely a legislative act. The levy and the collection of a tax is a pro-

cess subsequent to the imposition of the tax by the statute. A tax cannot be levied or collected before it is actually imposed by an Act of the competent Legislature. This is clear from Art. 265. The levy, that is to say, the assessment of a tax, and the collection of the tax are executive processes regulated by provisions made in that behalf. Article 277 nowhere speaks of the imposition of a tax. It does not confer on any State the power to impose a tax after the coming into force of the Constitution, if the tax had not been already imposed by the law of the State immediately before the commencement of the Constitution.

The Article assumes the existence immediately before the commencement of the Constitution of a valid law imposing a tax and permits the Government of the State to assess the persons liable to pay the tax and collect it from them after the coming into force of the Constitution. It is the tax that was actually being levied immediately before the commencement of the Constitution that is saved by Article 277 and it makes no difference whether the tax levied was in the case of a tax, such as in the present case, one imposed on income or profits accruing in a period immediately before the commencement of the Constitution or a period anterior to it.

If the distinction between the imposition of a tax, and the levy and collection thereof is borne in mind in construing Article 277, then the contention of the learned Counsel for the assessee firm clearly fails. In my opinion, the tax under the Gwalior War Profits Tax Ordinance is a tax which was being lawfully levied by the Madhya Bharat Government immediately before the commencement of the Constitution and as such the Madhya Bharat Government is entitled to continue to levy and collect it after the commencement of the Constitution from the persons liable to pay the tax under the Ordinance.

(20) In the view I take of Article 277 it is really not necessary for me to consider whether by virtue of the Financial agreement dated 25-2-50, the Madhya Bharat Government validly derives under Article 278 (1) (a) the authority to levy and collect the tax under the Gwalior War Profits Tax Ordinance. But as some reliance has been placed on behalf of the State on this agreement to support the validity of the assessment on the firm Messrs. Ram Prasad Ram Narain, I think it proper to say a few words about the view though not a concluded one which I am at present, inclined to take of Article 278 (1) (a).

It seems to me that the object of Article 278 (1) (a) is to enable any State specified in Part B of the First Schedule of the Constitution to receive a larger share of the proceeds of certain taxes, than they would be entitled to under the earlier provisions of Chapter 1 of Part XII. With this object the Article permits the Government of India and the Government of any 'Part B' State to enter into an agreement with respect to the levy or collection of a tax imposed by an Act of the Parliament and thus leviable by the Government of India in that State. A tax is not leviable by the Government of India unless it is actually imposed by an Act of Parliament. The words "tax or duty leviable by the Government of India" in Article 278 (1) (a) do not mean a tax or duty which can be imposed by the Union Govern-



ment. It means a tax or duty having been imposed by an Act of the Parliament is leviable by the Union Government.

The agreement contemplated by this Article is with respect to the executive act of the levy and collection of any tax or duty and not with regard to the conferment on the State of the power to impose a tax or to save an existing law of the State imposing a tax. For if a State has or is given the power to impose a tax, then, it is unnecessary to provide that it shall have power to levy and collect the tax by an agreement entered into in that behalf with the Government of India, as the power to levy and collect a tax is necessarily implied in the power to impose a tax.

(21) The tax under the Gwalior War Profits Tax Ordinance is not a tax leviable in the sense I take of the word "leviable" as used in Article 278 (1) (a). I am, therefore, disposed to think that the clause IX of the Financial Agreement is not of much assistance to the State in supporting the assessment on the Firm Messrs. Ram Prasad Ram Narain under the Gwalior War Profits Tax Ordinance.

(22) For the foregoing reasons, I am of the opinion that the assessment of the firm to tax under the Gwalior War Profits Tax Ordinance is legal and valid and I answer the reference accordingly.

B/V.R.B.

Reference answered.

**A. I. R. 1953 M. B. 26 (Vol. 40, C.N. 13)**

**(INDORE BENCH)**

**MEHTA AND CHATURVEDI JJ.**

State of Madhya Bharat, Appellant v. Hiralalji and another, Respondents.

Criminal Appeal No. 22 of 1951, D/- 22-9-1951.

**(a) Companies Act (1913), S. 87 D (3) — Liability under — (Indore Companies Act, S. 87 D).**

Under sub-section (3) of S. 87 D, the only person who can be punished is the Director of the Company who is a party to the making of the loan or giving of the guarantee. Where the pro-note was executed by the managing director and not by the other director the latter cannot be held guilty.

(Para 10)

Anno: Companies Act, S. 87 D N. 1.

**(b) Interpretation of Statutes — Technical Legislation — Civil P. C. (1908), Pre.**

The first and most elementary rule of construction is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, and otherwise in their ordinary meaning.

(Para 11)

Anno: C. P. C., Pre. N. 7.

**(c) Companies Act (1913), S. 87 D — Guaranteeing of loan — Meaning of — (Indore Companies Act, S. 87 D) — (Contract Act (1872), S. 126).**

The word "guarantee" has acquired a technical meaning and the legislature was aware of it. The essence of guarantee is that a guarantor agrees to discharge his liability only in one event, i.e., when the principal debtor fails in his duty. In other words, a guarantee pre-supposes the existence of a principal debtor and if in any contract there never was at any time another

person who can be properly described as "the principal debtor" in respect of whose default a guarantee can be given, there cannot be said to have been any "guarantee" either in its technical meaning or in its ordinary meaning. So a promissory note executed jointly by a Company and its Managing Agents does not come within the purview of section 87 D.

(Para 11)

Anno: Companies Act, S. 87 D N. 1; Contract Act, S. 126 N. 2, 3.

**(d) Interpretation of Statutes — Penal Provision — (Civil P. C. (1908), Pre.) — (Companies Act (1913), S. 87 D).**

The provision contained in section 87 D of the Companies Act is a penal provision and such a provision is to be construed strictly.

(Para 13)

Anno: Civil P. C., Pre. N. 7; Companies Act, S. 87 D N. 1.

**(e) Criminal P. C. (1898), S. 342 — Examination of pleader of accused.**

Where the accused were exempted from attending the Court under an order of His Highness the Maharaja Holkar, and the Magistrate instead of examining them under section 342 recorded the statement of the counsel for the accused.

Held that this was not warranted by any provision of the Code of Criminal Procedure.

(Para 17)

Anno: Cr. P. C., S. 342 N. 17.

Government Advocate, for the State; S. M. Samvatsar, for Respondents.

**JUDGMENT:** The State has filed this appeal under section 417 of the Code of Criminal Procedure against the order dated 21st August 1950 passed by the Additional City Magistrate, Indore in criminal case No. 143 of 1950 acquitting the two respondents of an offence under section 87 (D) of the Indore Companies Act.

(2) Respondent No. 1 Seth Hiralalji is the Managing Director of the Kalyanmal Mills Ltd., Indore, incorporated under the Indore Companies Act (Act No. 6 of 1914) and respondent No. 2 is his son who is also a permanent Director of the above said Mills. Both the respondents are proprietors of the Firm Tilokchand Kalyanmal and Co., Indore, which seems to be a joint-family business firm. This firm works as Secretaries, Treasurers and Agents of the Kalyanmal Mills Ltd., Indore.

(3) On 17th November 1947, the Kalyanmal Mills Ltd., and Tilokchand Kalyanmal and Co., both executed a promissory note for a sum of Rs. 2 lacs at four and a half per cent interest in favour of the Bank of Indore Ltd. wherein they jointly and severally promised to pay the sum to the Indore Bank. This pro-note was renewed from time to time till 11th March 1948, and then the loan was repaid to the Indore Bank. Respondent No. 1 Seth Hiralalji executed and signed on behalf of the Kalyanmal Mills Ltd., as well as on behalf of the Tilokchand Kalyanmal and Co. It is admitted that the sum of Rs. 2 lacs went to the Mills who subsequently paid it back to the Indore Bank.

(4) Then on 11-9-1948, Tilokchand Kalyanmal and Co. and the Kalyanmal Mills Ltd., approached the Manager, the Bank of Indore Ltd., and took another loan of Rs. 1 lac at four and half per cent. interest. The pro-note in favour of the Bank was executed and signed by respondent No. 1 Seth Hiralalji on behalf



both of Tilokchand Kalyanmal and Co. and the Kalyanmal Mills Ltd. This is a joint and several promise to pay to the Bank of Indore Ltd., the sum of Rs. 1 lac. Ex. P/1 shows that there was a request by the Mills as well as by the Tilokchand Kalyanmal and Co. to the Bank of Indore to pay an amount thereof to "one of us", viz. Tilokchand Kalyanmal. The receipt Ex. P/2 was also executed by Tilokchand Kalyanmal and Co., on 11-9-1948, and there is no doubt that this sum of Rs. 1 lac was taken not by the Mills but by the Managing Agents, Tilokchand Kalyanmal and Co. It is this pro-note that is to be interpreted in this appeal.

(5) In the report of the Auditors, S. B. Billimoria and Co., Bombay, dated 8th June 1948, this liability of the Mills on behalf of the Managing Agents was objected to in the following words:

"The Company and the Secretaries, Treasurers and Agents have jointly passed a Promissory note to the Bank of Indore Ltd., for Rs. 1,00,000 which sum has been received by the Secretaries, Treasurers and Agents, and not by the Company, and there is no entry in respect thereof in the Company's Books. This appears to be in contravention of section 87-D of the Indore Companies Act."

(6) On the basis of the Auditor's report, Mr. Jagjiwandas Tulsiram Shah, a share-holder of the Mills, lodged a complaint on 21-1-50 against the two respondents under section 87-D of the Indore Companies Act which is identically the same as section 87-D of the Indian Companies Act. The complaint also alleged that the loan had been repaid to the Bank on 31-12-48. The complaint was dismissed and the accused acquitted as stated above, and the State has filed this appeal against the order of acquittal. The main point taken in the appeal is that by agreeing to execute a promissory note jointly and severally with the Managing Agents in favour of the Indore Bank, the Mills had taken a liability upon themselves which was in contravention of the spirit underlying sections 86-D and 87-D of the Companies Act.

(7) The Government Advocate contends that signing of the promissory note by Kalyanmal Mills for the loan that was going to the Managing Agents clearly meant that the Mills took the liability upon themselves and thus guaranteed the loan. The learned Government Advocate argues that it was nothing short of guaranteeing a loan made to the Managing Agents within the meaning of the expression used in section 87-D.

(8) Mr. Samvatsar, learned counsel for the respondents, argues that the first loan of Rs. 2 lacs was taken by the Mills and the pro-note was also jointly and severally executed by the Mills and the Managing Agents. The Managing Agents had taken liability to the extent of 2 lacs of Rupees which went to the Mills. When the Managing Agents had become liable for payment of Rs. 2 lacs which went to the Mills, the learned counsel contends, that there was nothing wrong, when in consideration of this liability, the Mills executed the pro-note for the money (Rs. 1 lac) which went to the Managing Agents. Mr. Samvatsar urges that this joint and several "pro-note" executed in this manner cannot come within the term "guaranteeing a loan". In his opinion the word "guarantee" in section 87-D should be literally construed; but in the opinion of the learned Government Advocate, it should be construed in a liberal

sense and its meaning should not be restricted to mean a contract of guarantee as defined under section 126, Contract Act.

(9) The portion of section 87-D, Indore Companies Act which is similar to the same section of Indian Companies Act, that is material for the purposes of this appeal, runs as follows:

87-D.

1. No Company shall make to a Managing Agent of the Company or to any partner of the Firm, if the Managing Agent is a firm... .., any loan out of the monies of the company or guarantee any loan made to the Managing Agent.

3. In the event of any contravention of sub-section (1) any Director of the Company who is a party to the making of the loan or giving of the guarantee shall be punishable with fine which may extend to Rs. 500, and if default is made in repayment of the loan or discharging the guarantee shall be liable jointly and severally for the amount unpaid."

(10) Mr. Samvatsar rightly contends that under sub-section (3) the only person who can be punished is the Director of the Company who is a party to the making of the loan or giving of the guarantee. And as the pro-note was executed by respondent No. 1 and not by respondent No. 2 the latter cannot be held guilty. In our opinion this contention is well-founded, and we order that this appeal should be dismissed, so far as respondent No. 2 Shri Narendra Kumar Singh is concerned. The question then remains whether the first respondent No. 1 can be held guilty under section 87-D.

(11) It has to be borne in mind that the Legislature has used the word "guarantee" in sub-sections (1) and (3) quoted above. The first and most elementary rule of construction is, that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning, if they have acquired one, and, otherwise in their ordinary meaning, (Maxwell page 3). The word "guarantee" has acquired a technical meaning and the legislature was aware of it. The essence of guarantee is that a guarantor agrees to discharge his liability only in one event i.e. when the principal debtor fails in his duty. "Let him have the loan, I will see you paid," or "if he does not pay I will" ... are phrases ordinarily used when a guarantee is given. In other words, a guarantee pre-supposes the existence of a principal debtor, and if in any contract there never was at any time another person who can properly be described as "the principal debtor" in respect of whose default a guarantee can be given, there cannot be said to have been any "guarantee" either in its technical meaning or in its ordinary meaning. So, in my opinion a promissory note executed jointly by a Company and its Managing Agents does not come within the purview of Sec. 87-D.

(12) It is true that because the money had gone to Tilokchand Kalyanmal and Co., the Mills could not have shaken off their individual & separate obligation for the debts incurred. Under the terms of the promissory note, the entire liability for the money borrowed from the Bank of Indore could have been borne by the Managing Agents alone, or by the Kalyanmal Mills alone. In case of default, the Bank could have sued either of the two and could have under section 43 of the Contract Act excluded the right of a joint promisor to be



sued along with the co-promisor. In this sense, it can be said, the Mills took a liability for the loan which had not been received by them. In other words, by executing the pro-note they facilitated a loan by the Indore Bank to their Managing Agents and adopted a device which ought to be stopped by the Legislature. But as the wording of section 87D is, I am clear in my mind that the action of the Mills in executing the pro-note does not come within the meaning of the expression "guaranteeing a loan".

(13) It has again to be noted that the provision contained in section 87D, is a penal provision and such a provision is to be construed strictly.

(14) Maxwell in 9th Edition (1946) at page 268 observes as follows:

"But the rule of a strict construction requires that the language shall be so construed that no cases shall be held to fall within it which do not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment. Where an enactment may entail penal consequences, no violence must be done to its language to bring people within it, but rather care must be taken that no one is brought within it who is not within its express language.

"To determine that a case is within the intention of a Statute, its language must authorise the Court to say so, but it is not admissible to carry the principle that a case which is within the mischief of a statute is within its provision so far as to punish a crime not specified in the statute, because it is of equal atrocity or of a kindred character with those which are enumerated. If the Legislature has not used words sufficiently comprehensive to include within its prohibition all the cases which fall within the mischief intended to be prevented, it is not competent to a Court to extend them."

(15) Then at page 289 Maxwell adds that

"the effect of the rule of strict construction might almost be summed up in the remark, that, where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the Legislature which has failed to explain itself."

(16) On the basis of these principles of interpretation, I find that the learned Additional City Magistrate's order seems to be correct and the principles do not allow a Court to extend the meaning of the word "guarantee" so as to include within it a joint pro-note executed by the Mills and the Managing Agents for facilitating a loan to the Managing Agents.

(17) The learned Government Advocate has also drawn our attention to an irregularity committed by the learned Additional City Magistrate in this case. As the respondents were exempted from attending the Court under an order of His Highness the Maharaja Holkar, the learned Magistrate, instead of examining them under section 342, recorded the statement of the counsel for the respondents. We are sure that this was not warranted by any provision of the Code of Criminal Procedure. We entirely disapprove of the procedure adopted by the Magistrate but we do not think the case

necessitates a retrial in as much the appeal against order of acquittal cannot succeed.

(18) We, therefore, dismiss it.

B/D.H.

Appeal dismissed.

**A. I. R. 1953 M. B. 28 (Vol. 40, C. N. 14)**

**(GWALIOR BENCH)**

**SHINDE C. J.**

Mst. Chandni Begam, Appellant v. Madhorao Falke, Respondent.

Second Appeal No. 97 of 2003, D/- 8-2-1952.

**(a) Evidence Act (1872) S. 90 — Presumption under — Discretion of trial Court to raise — Interference by appellate Court.**

The question whether a presumption under S. 90 should or should not be raised is primarily a question for the trial Court. The appellate Court will not interfere unless the discretion has been exercised arbitrarily, capriciously or perversely or without due consideration of relevant facts and circumstances of the case. AIR 1921 Oudh 36, AIR 1935 Oudh 289 and 1933 All. 443 Rel. on. (Paras 3 & 4)

Anno: Evidence Act S. 90 N. 10 Pt. 9.

**(b) Easements Act (1882) S. 52 — Presumption of license from facts and circumstances.**

Even though there is no direct proof of license it can be presumed from the relevant facts and circumstances of the case.

(Paras 5-7)

Anno: Easements Act S. 52 N. 1.

**(c) Limitation Act (1908) Arts. 142 and 144 — Permissive possession — Possession subsequently becoming adverse — Art. 144 applies.**

A person can be said to be dispossessed or to discontinue his possession only when another person enters on the property in the possession of the plaintiff and such entry is adverse to the plaintiff. Where the plaintiff is in possession and the defendant has entered on the property but his entry is under a right derived from the plaintiff or is permissive it cannot be said that the entry itself is in contravention of the plaintiff's title, though by reason of subsequent events his possession may become adverse to the plaintiff. Adverse possession means hostile possession, that is, possession which is expressly or impliedly in denial of the title of the true owner. Where possession which is permissive to begin with, becomes adverse to the plaintiff by some act of the defendant Article 144 would apply and not Article 142. AIR 1933 Cal. 102 and AIR 1919 All. 403(2) Rel. on. (Para 8)

Anno: Lim. Act, Arts. 142 and 144 N. 2 Pts. 3, 4 and N. 16 Pt. 1.

Bhagwanswaroop, Patankar and Amanatulla, for Appellant; Mungre and Sapre, for Respondent.

**REFERENCES: Courtwar/Chronological/ Paras**

('19) 41 All 669: (AIR 1919 All 403(2) ) 8

('33) AIR 1933 All 443: (145 Ind Cas 147) 3-4

('33) AIR 1933 Cal 102: (140 Ind Cas 799) 8

('21) 61 Ind Cas 959: (AIR 1921 Oudh 36) 3-4

('35) 154 Ind Cas 965: (AIR 1935 Oudh 289) 3-4

**JUDGMENT:** This is defendant's second appeal against the judgment and decree of the District Judge, Gwalior, who dismissing the appeal of the defendant confirmed the decree of the trial court. The facts of the case briefly



are that Sardar Madhorao Falke filed a suit against Premrao alias Hashmutulla and Mst. Basantibai in the Court of Sub-Judge, Lashkar. The plaint alleges that Hashmatulla defendant No. 1's mother Mst. Chatro was in the keeping of plaintiff's father Sardar Ramrao Falke. She had a son by Sardar Ramrao Falke who is defendant No. 1 Hashmatulla, that Ramrao Falke gave two houses Nos. 3/5 and 4/511 to Mst. Chatro for use, that after the death of Mst. Chatro defendant No. 1 continued to be in possession of these houses by permission, that on 1-4-32 defendant No. 1 executed a usufructuary mortgage of house No. 3/5 for Rs. 2500/- in favour of Basantibai defendant No. 2.

On these allegations the plaintiff prays for a declaration of title and for declaring the mortgage deed void as against the plaintiff and also for the possession of the house. The suit was decreed both by the trial court and the first appellate court. Hence Mst. Chandani Begam who is the daughter of Hashamatulla original defendant No. 1 has filed this appeal.

(2) The learned counsel for the appellant has raised two points before me. The first point is that issue No. 2 has been wrongly decided in favour of the plaintiff and the second is that the suit is time barred. Issue No. 2 is as follows:

“क्या मकान मुतदाविया म्युनिसीपल नंबर ३:५, मालियत मुद्दे है? और वालिद मुद्दे ने वाल्दा मुद्दाहलेह को आर यतन दिया है? और इसलिये मुद्दाहलेह नंबर १ उसके इतकाल का मजाज नहीं है.”

In order to support the claim of the plaintiff that the suit house belongs to the plaintiff, plaintiff has produced both documentary and oral evidence. Documentary evidence consists of the following documents: (1) Patta Parmat, dated 12-4-1897. (2) Teharir written by Lele dated 4-2-91. (3) Receipt by Bihari Thekedar. (4) Teharir by the defendant dated 4-11-14. (5) Copy of the order passed by the Home Member, Gwalior Government, dated 5-9-29. (6) Statement by Shankarrao Bhujang. (7) Statement by Dattraya Lonkar.

(On consideration of Patta Parmat his Lordship held that it related to the house in dispute and proceeded:)

(3-4) Teharir Municipality signed by Mr. Lele dated 4-2-91 states that Rs. 2123-2-0 have been duly received and that orders have been issued to the Overseer to hand over the three shops and the land in Patankar Bazar. It appears from the papers that actually the house was purchased in 1891. But the Patta was given in 1897. The counsel for the appellant contends that this Teharir has not been proved according to law. Under Section 90 of the Evidence Act a document 30 years old produced from proper custody and otherwise free from suspicions proves itself and no evidence of the handwriting, signature, sealing or delivery need in general be given. There is no doubt that the document purports to be 30 years old and that it is produced from proper custody. No circumstances have been pointed out to suspect its genuineness. There is no reason, therefore, why a presumption may not be drawn under Section 90 of the Evidence Act.

Besides the presumption is rebuttable. No evidence has been produced by the defendant. In — ‘Har Prasad v. Bikramajitsingh’, 61 Ind. Cas. 959 (Oudh) it has been held that the question whether a presumption under Section

90 should or should not be raised is primarily a question for the trial court. It has also been held in several cases that the appellate court will not interfere unless the discretion has been exercised arbitrarily, capriciously or perversely or without due consideration of relevant facts and circumstances of the case. Vide — ‘Special Manager, Court of Wards, Balrampur v. Tribeni Prasad’, 154 Ind Cas 965 (Oudh) and — ‘Gomti Mt. v. Meghraj Singh’, AIR 1933 All. 443. It has not been shown that the lower court has exercised its discretion without due consideration of the facts or circumstances of the case. I, therefore, see no reason to interfere with the discretion exercised by the lower court. The objection raised with regard to the proof of the Teharir dated 4-2-91, therefore, cannot be accepted.

(His Lordship after considering other evidence held that the house in dispute was the property of the plaintiff and proceeded:)

(5-7) Turning now to the second aspect of issue No. 2, that is, whether the plaintiff's father gave the house in dispute to the mother of the defendant No. 1 for use, it must be admitted that there is no direct proof of license. But license can be presumed from the relevant facts and circumstances of the case. (His Lordship after considering the evidence held that the house in dispute was given to Mst. Chatro for use only and proceeded:)

(8) The second point raised by the learned counsel for the appellant is that the suit is time barred. The first question to consider in this connection is whether article 142 applies to the case or article 144. From the facts already found it is clear that the defendant was in permissive possession of the property. Article 142 applies where the plaintiff being in possession is either dispossessed or discontinues his possession. A person can be said to be dispossessed or to discontinue his possession only when another person enters on the property in the possession of the plaintiff and such entry is adverse to the plaintiff.

Where the plaintiff is in possession and the defendant has entered on the property but his entry is under a right derived from the plaintiff or is permissive it cannot be said that the entry itself is in contravention of the plaintiff's title, though by reason of subsequent events his possession may become adverse to the plaintiff. Adverse possession means hostile possession, that is, possession which is expressly or impliedly in denial of the title of the true owner. Where possession which is permissive to begin with, becomes adverse to the plaintiff by some act of the defendant article 144 would apply and not article 142. In — ‘Zainuddin Hossain v. Muhammad Abdur Rahim’, AIR 1933 Cal. 102 their Lordships of the Calcutta High Court held as follows:

“In the present case there was no transfer of any interest in immovable property at all but only permission to reside in the premises, and so there was no dispossession, not any discontinuance of possession on the part of the plaintiff, notwithstanding the permission, such possession as the grantor of the leave or license could have, he had in the premises. It has also been argued that the defendants and their predecessors acquired by virtue of adverse possession for over twelve years a limited interest, namely, a right to reside which could not be defeated. One amongst several answers to this contention is that there was never any such right asserted adversely to the plaintiff at any time



before the solicitor's letter Ex. C. In our opinion the article applicable to the case is article 144 of the Act and time began to run only after the plaintiff's right to Khas possession was denied....."

The same view has been expressed in — 'Jai-chand v. Girwarsingh', 41 All. 669. In the present case from the facts found above, it is clear that the defendant was in permissive possession. His first act which makes his possession adverse to the plaintiff is the execution of the mortgage deed on 1-4-32. The case, therefore, clearly attracts article 144 of the Limitation Act and the period of limitation of twelve years began to run from 1-4-32 when the possession of the defendant became adverse to the plaintiff. The suit was filed on 12-8-36. The suit is, therefore, clearly within time.

(9) The learned counsel for the appellant has raised a further contention that Sardar Ramrao Falke died in 1914. Hence license terminated on his death and the defendant's possession after his death became adverse to the plaintiff. It is true that Sardar Ramrao died in 1914. But from the facts as they appear on record, it is evident that the plaintiff impliedly gave permission to the defendant to use the house as before. Hashmatulla states in his deposition that Ajgarli, who was in the service of the plaintiff, used to realise the rent of the house in dispute and utilize it to meet his expenses. The fact that an officer of the Sansthan was allowed to realize the rent and spend it over the defendant testifies that the plaintiff had given implied permission to the defendant to use the house. The order of the Home Member dated 5-9-29 also supports the same conclusion. Rental of the house was treated as an allowance from the Sansthan to the defendant. From the same order it also appears that the plaintiff's Sansthan defrayed the expenses of the marriage of defendant's daughter.

Taking all these facts into consideration there is no doubt in my mind that the plaintiff gave implied permission to the defendant to use the house as before. In these circumstances the defendant's possession after the death of Sardar Ramrao Falke does not become adverse to the plaintiff. As already stated defendant's possession became adverse on 1-4-32, the day on which he executed the mortgage deed. The result is that the contention of the appellant that the suit is time barred fails.

(10) For the reasons given above the appeal fails and is dismissed with costs.

B/V.R.B.

Appeal dismissed.

**A. I. R. 1953 M. B. 30 (Vol. 40, C. N. 15)**

**(GWALIOR BENCH)**

**SHINDE AND DIXIT JJ.**

The State, Appellant v. Brij Lal Dhodi, Respondent.

Criminal Appeal No. 47 of 1950, D/- 14-12-1951.

(a) **Madhya Bharat Essential Supplies (Temporary Powers) Act (3 of 1948), S. 11 — Mens rea — Necessity — Madhya Bharat Cotton Textile Control Order (1948) Ss. 13 and 15.**

To make a person liable for an offence under the Act, he must have a mens rea. The effect of Section 11 is not to exclude mens rea but to draw a presumption of mens rea and to cast on the accused the

burden of proving that he did not have the necessary mens rea. It is one thing to say that in an offence under a statute mens rea is excluded. It is quite different to say that a statute makes a presumption of mens rea and casts on the accused the burden of showing the absence of a criminal mind. (Burden held discharged by accused) AIR 1951 SC 484 Foll. AIR 1950 Madh-B 89 disting. (Para 4)

**(b) Criminal P.C. (1898) S. 423 — Finding of fact — Interference.**

A different view by the Appellate Court of the evidence may be possible but in appeals against acquittals the Appellate Court must be slow to disturb a finding of fact arrived at by a Judge who had the advantage of seeing witnesses. AIR 1934 PC 227(2) Foll. (Para 5)

Anno: Cr. P. C., S. 423 N. 14.

Shiv Dayal Deputy Govt. Advocate, for the State; J. M. Anand, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras  
(34) AIR 1934 PC 227(2); (36 Cri LJ 786) 5  
(47) AIR 1947 PC 135; (26 Pat 460 PC) 4  
(51) AIR 1951 SC 484; (1952 Cri LJ 69) 4  
(50) AIR 1950 Madh-B 89 3-4  
(50) Cri Appeal No 34 of 1950 (Madh-B) 5

**DIXIT, J.:** This is an appeal by the State from an order of the Additional City Magistrate, Lashkar acquitting the respondent Brij Lal Dhodi of the charge of having committed an offence under Section 8 of the Madhya Bharat Essential Supplies (Temporary Powers) Act Samvat 2005 (Act No. 3 of 1948) by contravening the provisions of sections 15 and 13 of the Madhya Bharat Cotton Textile Control Order 1948 made under section 4 of the Act No. 3 of 1948. It was alleged by the prosecution that on 18-7-50, the respondent Brij Lal Dhodi sold 82 yards of cloth to Messrs Sharma brothers at a price in excess of the maximum price fixed by the Textile Commissioner under section 13 of the Cotton Textile Control Order. The ex-mill price of this cloth was Rs. 130-7-9. The respondent was entitled to charge for the cloth sold in addition to the above price an amount of Rs. 1-0-6 in respect of sale-tax and a further amount of Rs. 8-3-6 in respect of the customs duty.

Under notification No. 44 of 1949 dated the 6-12-49 (published in the Gazette of 17-12-49) the respondent was also entitled to make a surcharge of 14 per cent. on the ex-mill price of the cloth, namely Rs. 130-7-9. It was alleged by the prosecution that the respondent Brij Lal Dhodi illegally realised from Messrs Sharma Brothers 14 per cent. surcharge on Rs. 139-11-9 being the total of the ex-mill price, sales tax and the customs duty, whereas he could have charged the 14 per cent surcharge only on the amount of ex-mill price, namely, 130-7-9. The prosecution stated that the respondent thus made an overcharge of Rs. 1-9-10. The respondent did not dispute these facts. In his defence, he stated that at the time he sold the cloth to Messrs Sharma Brothers and prepared a cash memo in respect of the transaction, there were several customers in his shop and that through some mistake he calculated the 14 per cent. surcharge on Rs. 139-11-9 instead of on Rs. 130-7-9. The learned City Magistrate accepted this plea and held that the accused committed a bona fide mistake in calculating the 14 per cent. surcharge.

(2) In this appeal, Mr. Shiv Dayal Deputy Govt. Advocate, firstly contends that section 15 of the Cotton Textile Control Order 1948 and section 11 of the Madhya Bharat Essential Supplies (Temporary Powers) Act, 1948 by necessary implication



rule out mens rea as a constituent part of the offence of a contravention of the Textile Control Order, 1948 and that, therefore, the Additional City Magistrate was not justified in taking into consideration the plea of the accused that he had committed a mistake in charging the 14 per cent. surcharge on Rs. 139-11-9. Mr. Shiv Dayal secondly argues that even if it is held that there can be no conviction under section 8 of the Essential Supplies (Temporary Powers) Act, 1948 in the absence of mens rea, the evidence on the record amply shows the criminal mind of the accused in calculating the 14 per cent. surcharge in the manner he did.

(3) In my opinion, both these contentions advanced by the learned Government Advocate must be rejected. In support of his contention, that mens rea is not a constituent part of a crime under the Act No. 3 of 1948 and the Cotton Textile Control Order 1948, Mr. Shiv Dayal places reliance on a decision of a Division Bench of this Court in — 'State v. Genda Lal', AIR 1950 Madh. B. 89. In that case the question was whether all the partners of a firm could be said to have contravened the provisions of clause 12-A of Indore Cotton Cloth and Yarn Control Order when on a search of the partnership shop time-barred cloth was found therein. One of the contentions advanced on behalf of the accused persons in that case was that the partners of the firm were not liable as they did not know that time-barred cloth was kept in the shop and that they had no guilty knowledge. The Division Bench did not accept the contention holding that clause 11 of the Indore Essential Supplies Order under which the Indore Cotton Cloth And Yarn Control Order was made clearly recognised the principle of vicarious responsibility in offences arising out of the breach of the provisions of that order and that therefore, mens rea as an essential constituent of the crime was excluded.

Clause 11 of the Indore Essential Supplies Order was to this effect:—

"Offences of corporations. If the person contravening an order made or deemed to be made under section 3 is a company or other body corporate every director, manager, secretary or other officer or agent thereof shall, unless he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention, be deemed to be guilty of such contravention."

(4) In the case of — 'State v. Genda Lal', AIR 1950 Madh-B 89 the Division Bench referred to the observations of their Lordships of the Privy Council in — 'Sri Niwas Mal v. Emperor', AIR 1947 P. C. 135 to the effect that,

"unless a statute, either clearly or by necessary implication, rules out mens rea as a constituent part of a crime, the defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind" and then observed that the Privy Council case clearly recognised that the law either expressly or by necessary implication rules out mens rea as a constituent element of the crime. The decision of the Division Bench is not an authority for the proposition that as a general rule mens rea is not necessary to constitute a crime. That decision only lays down that clause 11 of the Indore Essential Supplies Order, 1946 rules out mens rea as an essential constituent in offences of contravention of the Indore Cotton Cloth and Yarn Control Order.

On the basis of the Division Bench decision, it could, at the most, be argued that in offences

under a statute where a provision exists similar to clause 11 of Indore Essential Supplies Order, 1946 mens rea is excluded. But the authority of the Division Bench decision even in respect of this limited proposition is now considerably weakened by a recent decision of the Supreme Court reported in — 'Joy Lal Agrawal v. The State', AIR 1951 S. C. 484. In this case their Lordships of the Supreme Court considered the element of mens rea in respect of a prosecution under the Essential Supplies (Temporary Powers) Act 1946, Section 9 of which is analogous to clause 11 of Indore Essential Supplies Order of 1946, and held that on the evidence in that case, an inference of mens rea could be drawn against the accused person. If by the wording of S. 9, the element of mens rea in an offence under the Essential Supplies (Temporary Powers) Act, 1946 had been excluded, it would have been unnecessary for the Supreme Court and the Calcutta High Court whose judgment was under appeal before the Supreme Court to consider the question of mens rea on the evidence adduced in that case.

I am therefore, inclined to think that in view of this decision of the Supreme Court, the question whether mens rea is an essential constituent of an offence under the Essential Supplies Act of 1946 or the Madhya Bharat Essential Supplies Act, 1948 (which is nothing but a reproduction of the Central Act 1946) is no longer res integra and it must be held that to make a person liable for an offence under the Act, he must have a mens rea. In this view, the effect of section 9 of the Essential Supplies (Temporary Powers) Act 1946 (Act No. XXV of 1946) or of section 11 of the Madhya Bharat Essential Supplies (Temporary Powers) Act, 1948 is not to exclude mens rea but to draw a presumption of mens rea and to cast on the accused the burden of proving that he did not have the necessary mens rea. It is one thing to say that in an offence under a statute mens rea is excluded. It is quite different to say that a statute makes a presumption of mens rea and casts on the accused the burden of showing the absence of a criminal mind. The contention, therefore, of the learned Deputy Government Advocate that in the present case the question of mens rea does not arise for consideration, cannot be accepted.

(5) On the question whether the respondent has succeeded in showing that when he charged the 14 per cent. surcharge on Rs. 139-11-9, he had not the necessary guilty mind, I see no reason to disagree with the finding arrived at by the learned Additional City Magistrate. The accused gave a cash memo to the purchaser Messrs Sharma Brothers immediately after the sale of the cloth. In the cash memo, it was entered that the cloth was being sold for "official purpose". In the cash memo no attempt was made to hide the amount on which the 14 per cent. surcharge was calculated. When the matter of this overcharge was discovered by the Sub Inspector of Enforcement Branch, the accused was questioned by the Sub Inspector Mr. Chaturvedi and at that time also the respondent stated that the overcharge was a mistake. According to the evidence given by this Sub-Inspector, he found the same amount of surcharge which was shown in the cash memo entered in the respondent's account books and that there were no erasures of any kind in his account-books and further in the other cash memos issued by the respondent there was no overcharge of the type in the present case.

Mr. Chaturvedi also admitted in his deposition the possibility of the 14 per cent. surcharge on Rs. 139-11-9 being a mistake. In



these circumstances, it cannot be said that the conclusion drawn by the learned Magistrate that the overcharge was due to a bona fide mistake is unwarranted on the evidence on the record. A different view of the evidence may be possible but, as has been pointed out by the Privy Council in — 'Sheo Swarup v. Emperor', 1934 P. C. 227 (2) and by this Court in — 'State v. Hira Lal', Cri. Appeal No. 34 of 1950 (Madh. B.) that in appeals against acquittals the appellate Court must be slow to disturb a finding of fact arrived at by a Judge who had the advantage of seeing witnesses.

(6) For the above reasons, I do not think we would be justified in interfering with the acquittal of the respondent. The learned Additional City Magistrate has carefully considered all the facts and circumstances of this case and came to a conclusion which cannot be said to be wrong either in law or on facts.

(7) In my opinion, this appeal must, therefore, be dismissed.

(8) SHINDE J: I agree.

E D.H.

Appeal dismissed.

**A. I. R. 1953 M. B. 32 (Vol. 40, C. N. 16)**

**(INDORE BENCH)**

**CHATURVEDI J.**

Nathu Kalu, Applicant v. Anandilal Bhikaji, Opponent.

Small Cause Revn. No. 77 of 1950, D/- 8-11-1951.

**(a) Contract Act (1872), S. 16 — Document executed by illiterate and ignorant person — Unconscionable terms — Presumption — Onus of proof — (Evidence Act (1872), Ss. 101 to 103 and 114).**

In cases of documents executed by ignorant and illiterate person it is difficult to draw the usual presumption arising under S. 114, Evidence Act. AIR 1939 Nag. 78, Ref. (Para 12)

A duty is cast on the Courts to keep in mind the strict rule of law in respect of onus where the executant happens to be ignorant and illiterate. Mere illiteracy, without ignorance, will, of course, not be enough. A rustic from a village, both ignorant and illiterate, is in a position of special disadvantage and is likely to be dominated by the will of a shrewd literate man carrying on his business in the town. (Para 19)

Where the defendant, who is both ignorant and illiterate puts his thumb impression on a document, every term of which is to his disadvantage, and the transaction as a whole is unconscionable, and in a suit on the document the defendant admits only some of the conditions but not the harsher ones embodied in the document, it is the duty of the plaintiff to prove the execution of the document by establishing that the thumb impression of the defendant was given on the document after learning the contents which had been explained to him. (Para 15)

Anno: Contract Act, S. 16 N. 6, 11, 14 and 17; Evi. Act Ss. 101 to 103 N. 33; S. 114 N. 35.

**(b) Civil P.C. (1908), O. 6 R. 4 — Trade usage — Particulars to be alleged and proved.**

A usage of trade must be specifically alleged and proved. A Court is not entitled to base its decision on conjectures

and surmises, so far as usage of trade is concerned. (Para 20)

Anno: C.P.C., O. 6 R. 4 N. 6.

**(c) Provincial Small Cause Courts Act (1887) S. 25 — 'According to law' — High Court when would interfere in revision.**

Where in decreeing a suit the trial Court has misdirected itself by casting the burden of proof wrongly, by not drawing correct inferences from the documents, on which the suit was based, by basing its findings not on evidence but on conjectures or assumptions for which there is nothing in fact to support, and by overlooking the important principles of law of Evidence, and this has contributed to gross miscarriage of justice the High Court would interfere with the decision in revision. (Para 20)

Anno: Pro. Sm. Cause Courts Act, S. 25 N. 5, 6, 12.

Datta, for Applicant; Gandhe, for Opponent.

REFERENCES: Courtwar/Chronological/ Paras

('37) AIR 1937 PC 274: (170 Ind Cas 423 PC) 12

('22) 68 Ind Cas 809: AIR 1922 All 401 (2) 15, 18

('34) AIR 1934 Lah 542: (152 Ind Cas 240) 17

('39) AIR 1939 Nag 78: (ILR (1939) Nag 160) 12

('16) 35 Ind Cas 56: (AIR 1916 Pat 206) 14

('30) AIR 1930 Pat 598: (129 Ind Cas 144) 17

('31) AIR 1931 Pat 219: (134 Ind Cas 635) 18

('11) 11 Ind Cas 916: (4 Bur LT 202) 16

('27) AIR 1927 Rang 319: 5 Rang 527 13, 18

ORDER: This is a revision petition by the defendant against a decree passed by the Small Cause Court, Indore.

(2) After hearing the learned counsel for both the parties I have come to the conclusion that the decree made by the Court of Small Cause in this case is not according to law and must be set aside.

(3) The defendant petitioner executed on 4-9-1946 a promissory note (Ex. P-2) for Rs. 300/- with interest at the rate of 1½ Rs. per cent per month in favour of the plaintiff who has a shop of milk in Indore. On the same date he executed an agreement (Ex. P-1) in favour of the plaintiff by which he promised to give milk to the plaintiff, daily, without fail, at 4.30 A.M. in the morning and at 5 P.M. in the evening at the rate of 3½ seers per rupee and further stipulated to give 17 Chhataks per seer. The milk to be given to the plaintiff was agreed to be pure and without water and of such a quality that one seer of milk should provide 20 tolas of Mawa. If the milk was not of this quality and would not provide the requisite weight of Mawa, it was further stipulated that the plaintiff would be entitled to deduct 2 annas per tola. The defendant agreed that from Bhadwa Badi 1 of Samvat 2003 to Shrawan Sudi Poonam of Samvat 2004 he would not sell his milk to anybody else and that if he failed to do so or if he failed to give milk to the plaintiff even once, the plaintiff would be entitled to deduct, at the rate of 2½ annas per seer, a sum, from the price of milk, to be paid to him for the milk given to the plaintiff during the past month. Then in para 3 of the agreement there is a reference to Rs. 300/- borrowed by the defendant and the para runs as follows: "Apse jo peshagi rupaye teen so liye hain un pete Bhois nag ek ka dudh deunga, aur rupaye pete khandi 30 mahwar jama karta



jaunga. Agar khandi jama nahi karau wa mah das ke under jo bhi apne rupaye liye ada nahi karun to apko bakaya rupaye ka byaj jis tarikh se rupaye liye waha se apko rupaye deu. Wada tak rupaye ka byaj deunga."

(4) The defendant is illiterate and has affixed his thumb impression on the agreement as well as on the pro-note. The plaintiff, in his plaint, alleged that the defendant only paid Rs. 164/- and did not pay the whole amount of Rs. 300/- within a period of ten months as stipulated in the agreement and therefore he filed a suit for Rs. 185/- (i.e., Rs. 300/- principal plus Rs. 49 interest minus Rs. 165/- is equal to 185). The Court decreed the suit for Rs. 169/- only, rate of interest having been reduced to 1/- Re. only.

(5) The defendant resisted the suit on the ground that he had been regularly supplying milk to the plaintiff and the agreement was to supply milk worth Rs. 30/- per month & thus pay back Rs. 300/- within 10 months. He never promised to pay Rs. 30 in cash per month. In my opinion, the execution of pro-note and the agreement on the same day and the contents of the agreement, as stated above, definitely support the contention of the defendant.

(6) Mrs. Gandhe, on behalf of the non-applicant, contended that there were two transactions, one for milk; and another for Rs. 300/-; and that the agreement (Ex. P-1) should be read as referring to both. I do not think this contention can succeed. It is clear from para No. 3 of the agreement that the defendant wanted to pay Rs. 300/- by supplying milk worth Rs. 30/- per month. The words are clear.

"Ap se jo peshgi rupaye teen so (300 Rs.) liye hain un pete bhai nag ek ka dudh deunga aur rupaye pete kandi 30 Ru. mahawar jama karta jaunga."

(7) It is clear that Rs. 300/- were advanced by the plaintiff to the defendant only for the supply of milk regularly; otherwise the terms of the agreement would not have been so strict. Every term of the agreement is definitely in favour of the plaintiff and against the defendant, and prima facie, the whole bargain appears to be an unconscionable one. The defendant would never have agreed to the terms if he had not taken Rs. 300/- in advance for the supply of milk.

(8) Next thing that supports the defendant's contention is the Khata of the plaintiff. The defendant is never shown to have paid Rs. 30/- in cash in any month. On the other hand, milk had been supplied to the plaintiff for Rs. 30/- as 4 pies 6 in September; for Rs. 31-4-6 in October; for Rs. 37-1-0 in November for Rs. 39-4-6 in December; and Rs. 29-2-3 in January; for Rs. 23-14-9 in February & for Rs. 22/9/- in March. The average comes to about Rs. 30/- per month. I do not understand how the Court has overlooked the contents of the agreement and the figures in the Khata which speak for themselves.

(9) The Court has also, in its judgment, stated that in Ex. P-4 the account of milk supplied by the defendant is recorded and that every item bears the thumb impression of the defendant. The judgment seems to have been written in some hurry. The three items mentioned in the Khata (1) Rs. 21-10-3 for June 1947; (2) Rs. 26-8-0 for July 1947; (3) Rs. 48-2-3 for June and

July do not bear the thumb impression in the original document, though in the copy it is mentioned underneath the item, "Ni. a. Khud Nathulal". The plaintiff has admitted this.

(10) Then the Khata was written by the brother of the plaintiff Ramchandra, who is alive and is in Indore. He has not been produced in this case and I do not understand how the Khata can be taken to have been proved.

(11) It will be apparent from the Khata that in one lump sum Rs. 76-5-6 have been deducted from the price of milk, presumably because the milk supplied was not of the quality, one seer of which would have supplied 20 tolas of Mawa and the plaintiff resorted to his right of deducting 2 annas per tola from the price of milk. But on what particular dates the milk was not of requisite quality & for what dates the deductions have been made has not been mentioned in the Khata. The Khata only mentions that the deductions have been made for the milk of past two months. The plaintiff in his testimony also, cannot mention the specific dates. The Khata is in the hand-writing of Ramchandra who could have said that everything was explained to the illiterate defendant when his thumb impression was taken, but in the absence of Ramchandra's testimony the items cannot be taken to have been legally proved.

(12) In cases of documents executed by ignorant and illiterate person it is difficult to draw the usual presumption arising under section 114, Evidence Act, — 'Udebhan v. Vithoba', AIR 1939 Nag. 78. In — 'Omanhene Kwamin Bassayin v. Omanhene Bendentu II', AIR 1937 P. C. 274, in an appeal from West Africa, their Lordships of the Privy Council held that where a person not knowing English has affixed his mark to a document written in English language, the onus to prove that the document was properly explained and interpreted to the person affixing his mark so as to make him understand its true importance is on the party relying on the document — ('Omanhene Kwamin Bassayin v. Omanhene Ben Dentu').

(13) In — 'Hoe Moh v. I. M. Seedat', AIR 1927 Rang. 319: 5 Rang. 527, the defendant to an action based on a promissory note for Rs. 3000/- had admitted his signature on the paper but stated that he had signed a blank note with only the figure of Rs. 300/- written on the top of the paper. Division Bench of the Rangoon High Court dealing with the question of onus of proof observed:

"The admission by the defendant did not establish the plaintiff's claim and if there had been nothing on the pleadings besides the plaint and the defendant's denial, the suit must have failed. It is quite true that the fact that the defendant's signature is on the pro-note is of great evidentiary value and in many cases of this nature it might be sufficient corroboration of evidence given by the plaintiff himself to establish the plaintiff's case. That would depend on the circumstances of the particular case. But the defendant did not and never has admitted the material propositions of fact, which would give the plaintiff a right to sue, and the burden of proving the loan, in our opinion, rested upon the plaintiff."

(14) In — 'Ebadut Ali v. Mohammad Fareed', 35 Ind. Cas. 56 (Pat.) it was pointed out that execution consists in signing a document read out and understood and does not consist of



mere signing the name upon a blank sheet of paper. To be executed, a document must be in existence. Where there is no document in existence there cannot be execution. So where an executant clearly says that he signed a blank paper, the statement is a denial and not an admission of execution.

(15) In an Allahabad case, — 'Pirbhu Dayal v. Tula Ram', 62 Ind. Cas. 809: AIR 1922 All 401 (2), a Division Bench of the Allahabad High Court held that an admission by a defendant regarding the putting of a signature or a thumb mark on a document while he mentions that the paper when he signed it was blank is not such an admission of the execution of the document as to thrust the burden of proving his case upon him and it is for the plaintiff in such a case to prove primarily the due execution of the document relied upon by him.

(16) In — 'Maung Bya v. Maung Po', 11 Ind. Cas. 916 (Rang.) an illiterate person had put her mark and thumb impression on a document for Rs. 3000/- but had denied execution of such a document; though she admitted executing a document which the plaintiff told her was only for Rs. 400/-. It was held that the burden of proof in such a case lies upon the plaintiff to prove consideration and genuineness of the transaction.

(17) Two rulings, one of Lahore — 'Ramji Lal v. Debi Sahai', AIR 1934 Lah 542, & another of Patna — 'Sahdeo v. Pulesar', AIR 1930 Pat 598, had held a contrary view to the effect that the burden is on the defendant to explain how the document having defendant's thumb impression came into existence and the Lahore High Court held that in such a case the onus about non-payment lies upon the defendant. In view of the decision of the Privy Council in 1937, these two rulings cannot be held to be good law.

(18) In — 'Ramlakhan Singh v. Gog Singh', AIR 1931 Pat 219, a Division Bench followed with approval the two rulings of — 'Hoe Moh v. I. M. Seedat', AIR 1927 Rang 319 and — 'Pirbhu Dayal v. Tula Ram', AIR 1922 All 401 (2) and held that where plaintiff proves identity of defendant's thumb impression on the pro-note but defendant pleads that it was taken on a blank paper, Courts are not bound to raise presumption of due execution in plaintiff's favour. It was further held that where the law places the onus on the plaintiff to prove that the document is duly executed, the onus cannot be discharged by merely proving the identity of a thumb impression, but it must be further proved that the thumb impression was given on the document after it had been written out and completed. If the evidence adduced by the plaintiff is unreliable or if there is no evidence then no onus is necessarily thrown on the defendant merely by reason of the fact that the defendant asserts that the thumb impression is his.

(19) From all that has been stated above, it follows that duty is cast on the Courts to keep in mind the strict rule of law in respect of onus, where the executant happens to be ignorant and illiterate. Mere illiteracy, without ignorance, will, of course, not be enough. A shrewd man of the world with business instincts and acumen may be illiterate, but he will not affix his mark to a document without taking special precautions to ensure that he has a true and accurate knowledge of the contents of that document. A rustic from a village, both ig-

norant and illiterate, stands on a different footing. He is in a position of special disadvantage and is likely to be dominated by the will of a shrewd literate man carrying on his business in the town, and will in all probability put his thumb impression on a document prepared by the latter, relying on him so far as the contents of the document are concerned. In such a case, it must be further proved that the thumb impression was given on the document by the defendant after learning the contents which had been explained to him.

In the case before me the defendant is both ignorant and illiterate; otherwise he would never have put his thumb impression on a document, every term of which placed him at a very great disadvantage. When the defendant admitted only some of the conditions but not the harsher ones embodied in the document, it was the duty of the plaintiff to have proved execution of the document. In the written statement, the defendant petitioner clearly mentioned that he had not stipulated for supplying 17 Chhataks milk for a seer. The learned Small Causes Court Judge while decreeing the suit, strangely enough, observed as to this point as follows:

"17 chatak dudh lekar 16 chatak jama karna awaji pi 1 me yaha karar nyaya poorna hain. Wadi ka kathan hain ki dudh napte samaya fes: foam: ka ek chatak kata jata hain, yaha kisi prakhar anyaya poorna widit nahi hota."

(20) I have carefully gone through the statement of the plaintiff non-applicant in this case, but I have not been able nor Mrs. Gandhe has been able, to trace the particular passage in the testimony of the plaintiff to this effect. In fact, there is nothing on the record which may incline me to the view that anything of the sort was deposed by any witness in the Court below. Even in the agreement (Ex. P-1) this usage of trade has not even been referred to. A usage of trade must be specifically alleged and proved. A court is not entitled to base its decision on conjectures and surmises so far as usage of trade is concerned. The plaintiff has not been able even to state the name of the scribe of the agreement Ex. P-1 and the execution of the document remains unproved. I have already stated above that the Khata Ex. P-3 and Ex. P-4 cannot be held to have been proved in the absence of Ramchandra's statement. Whatever money has been shown to have been deposited either as cash or as price of milk supplied, would amount to more than Rs. 300/-. If allowance is made in the amounts by adjusting one chhatak per seer of milk and if the sum of Rs. 76-5-6 which had been wrongly deducted on the basis of bad quality of milk is added to the amount alleged to have been paid by the defendant, it will be seen that the plaintiff non-applicant had already received from the defendant a sum much more than Rs. 300/- plus interest, whatever the rate of interest might have been.

In my opinion, the trial court has in this case misdirected itself by casting the burden of proof wrongly, by not drawing correct inferences from the documents on which the suit was based by basing its findings not on evidence but on conjectures or assumptions for which there is nothing in fact to support and by overlooking the important principles of law of Evidence; and this has contributed to gross miscarriage of justice in this case. I would, therefore, allow this revision petition, set aside



the decree and judgment of the Small Cause Court and dismiss the plaintiff's suit. The defendant petitioner will be entitled to his costs both here as well as in the Court below.

B/K.S.

Revision allowed.

**A.I.R. 1953 M.B. 35 (Vol. 40, C. N. 17)**  
**(INDORE BENCH)**

**KAUL C. J. AND MEHTA J.**

State v. Raj Kumar Singh, Opponent.

Criminal Misc. Case No. 159 of 1950, D/- 2-4-1951.

**Constitution of India, Art. 134(1)(c) — Leave to appeal to Supreme Court — Certificate of fitness — Principles — Question of interpretation of temporary Act — Quashing of proceedings against accused in view of interpretation — Case held not fit for appeal to Supreme Court.**

Per Mehta J.: To justify a grant of leave to appeal under Art. 134(1)(c) there must at least be a substantial question of law or a disregard of the forms of legal process or some violation of the principles of natural justice, or otherwise substantial or grave injustice must have been done, or it should be a matter of great public importance. The mere fact that the petitioner raised a point which may be a point of law does not justify his claim for a certificate under Art. 134(1)(c). AIR 1941 PC 132; AIR 1951 Mad. 213 and AIR 1950 Orissa 235 Ref.

(Para 10)

Where the question of law is not well settled or where there is some doubt as to the principles of law involved or there is a conflict of judicial decisions, it may be that a substantial question of law can be said to arise which may require the final adjudication by the highest Court. (Para 12)

The construction of a legislative provision which is no longer in force and under which no further questions on the same point can arise, cannot be said to be of great public importance so as to justify the grant of such leave. (Para 14)

Per Kaul C. J.: It would not be proper for any Judge to attempt to define in what cases or classes of cases a certificate of fitness should be granted and thus, to restrict the wide generality of the language advisably used by the framers of the Constitution. A Judge might indicate in a negative form a class of cases in which the certificate contemplated by Art. 134(c) should not be granted. (Para 22)

Substantial and grave injustice to the party asking for leave to appeal has almost invariably been held to be the test which must be fulfilled before such leave would be granted in a criminal case.

(Para 20)

It should not be granted if the question for consideration is only the interpretation of any section of a temporary Act which is not likely to affect a large number of cases and in respect of which it cannot be said that if the view taken by the High Court is erroneous it would result in grave and substantial injustice. (Para 22)

Where all that the High Court had done was to interpret the words "shall continue to remain in force until repealed or amended", as used in S. 3 of Madhya Bharat Ordinance No. 1 of 1948 and held that the use

of these words could not have the effect of making a temporary Law or Order which was to remain in force for a special period, perpetual and in support of this view relied upon AIR 1941 FC 16 and in this view quashed the proceeding initiated against the accused for breach of notification under Indore Essential Supplies (Temporary Powers) Order, 1946 which had expired before the alleged breach was committed and the State filed an application for leave to appeal under Art. 134(1)(c) against the judgment of the High Court:

Held (1) that the case was not fit one for appeal under Art. 134(1)(c) as there was no substantial question of law or a question of public importance involved in the case. The mere fact that the view of Law taken by the High Court resulted in the acquittal of a person who had committed a breach of a rule made under a temporary Order or in a proceeding initiated against him being quashed does not necessarily constitute grave and substantial injustice, justifying the grant of a certificate. (Para 24)

P. R. Sharma, Govt. Advocate, for the State; N. P. Engineer, D. C. Bharucha, S. M. Samvatsar, V. R. Nevaskar and B. P. Gupta, for Opponent.

**REFERENCES:** Courtwar/Chronological/ Paras

('41) AIR 1941 PC 132: (43 Cri LJ 1)	10
('41) AIR 1941 FC 16: (ILR (1941) Kar FC 72)	4, 11, 13, 24
('50) AIR 1950 SC 169: (51 Cri LJ 1270)	8, 18
('09) 33 Bom 221: (9 Cri LJ 226)	21
('50) AIR 1950 Bom 380: (52 Cri LJ 620)	10
('51) AIR 1951 Mad 213: (ILR (1951) Mad 607)	10
('50) AIR 1950 Orissa 235: (ILR (1950) Cut 305)	10
(1887) 12 AC 459: (56 LT 615)	19
(1867) 16 LT 752: (4 Moore PC (NS) 460)	19

**MEHTA J.:**— This is an application by the State through the Director of Food, Madhya Bharat for leave to file an appeal under Art. 134 (c) of the Constitution, against the judgment dated the 14th October, 1950 passed by a Division Bench of this Court in Criminal Reference No. 111 of 1950. The brief facts are that Seth Rajkumarsinghji was being prosecuted in the Magistrate's Court for a breach of Notification No. 27 dated 12th June, 1948, passed under Indore Essential Supplies (Temporary Powers) Act of 1946, by which serving of food stuff to 151 or more than 150 persons at any religious, social function, or at any party without the permission of the Food Minister was prohibited. The Indore Essential Supplies (Temporary Powers) Order of 1946 came into force on 1st October, 1946 when the Holkar State was in existence and applied to the then Holkar State territories. It was extended from time to time and it was to remain in force till 30th September, 1948. It was contended before us that this Notification No. 27 dated 12th June, 1948 as well as its parent order viz. Indore Essential Supplies (Temporary Powers) Order, expired on 30th September, 1948. On the date viz. 14th February, 1949 on which Seth Rajkumarsingh was alleged to have committed the offence, there was no law in force in Indore restricting the distribution of food stuffs to a particular number of persons. This contention prevailed and the Criminal proceeding against Seth Rajkumarsingh was quashed by this court on a reference made by the Sessions Judge, Indore.

The contention of the Government Advocate was that the Madhya Bharat Ordinance No. 1 of



1948, and Madhya Bharat Ordinance No. 12 of 1948 continued in force, and kept alive the Indore Essential Supplies (Temporary Powers) Order even after 30th September, 1948. He placed reliance on S. 3 of Ordinance No. 1 of 1948 which runs as follows:

"When the administration of any Covenanting State has been taken over by the Raj Pramukh, or when any State has been merged in the State of Madhya Bharat, all laws, Ordinances, Acts etc., etc., having the force of law in the said State, shall continue to remain in force until repealed or amended under the provisions of the next succeeding section....."

(2) The main question for consideration before us was as to the meaning of "shall continue in force until repealed or amended" used in S. 3 of Ordinance No. 1 of 1948 promulgated by Raj Pramukh of Madhya Bharat.

(3) We held that the effect of S. 3 of the Ordinance was not to make perpetual a temporary order which expired with efflux of time. The Indore Essential Supplies (Temporary Powers) Act of 1946 automatically ceased to be in force from 30th September, 1948 which was the duration fixed in the Act itself.

(4) We construed Section 292 of the Government of India Act and Art. 372 of the Constitution where similar words are used to ascertain the meaning of the words "shall continue in force until repealed or amended". We also followed the decision of the Federal Court in *United Provinces v. Attiqua Begum*, AIR 1941 F. C. 16 (reference P. 24).

(5) We held, on the aforesaid considerations that the purpose for which S. 3 of the Ordinance No. 1 of 1948, Madhya Bharat, was passed was to negate the possibility of the existing laws, Ordinances, Acts etc., prevailing in various integrating States, being held to be no longer in force by repeal of the authority or the law which authorised its enactment. It was never intended by S. 3 of the Ordinance No. 1 of 1948 to give perpetual life to temporary orders whose duration was limited by the temporary order itself. After the efflux of time viz. 30th September, 1948 the Indore Essential Supplies (Temporary Powers) Act and Notification No. 27 dated 12-6-1948 automatically ceased to have any existence.

(6) The ground on which the Government Advocate supports the application for leave to the Supreme Court being granted is that the interpretation put by this Court on the words "shall continue to remain in force until repealed or amended", is open to question and is opposed to the plain and natural meaning. It was also contended that the decision given by this Court in Criminal Reference No. 111 of 1950 involves substantial questions of law and the effect of the decision given by this Court will be to render invalid all acts done under and prosecutions launched in respect of contraventions of the orders and notifications relating to essential commodities which were continued in force by the Indian Essential Supplies Order 1946. It is contended that the issues of laws decided in the case are of great public importance.

(7) It will be necessary to consider the scope of appeal under Art. 134 of the Constitution and the considerations which should weigh with the courts in granting leave to appeal to the Supreme Court against a final order and sentence in a Criminal proceeding.

(8) In — *Pritamsingh v. State*, AIR 1950 S. C. 169 their Lordships of the Supreme Court have laid down that generally speaking, Supreme Court will not grant special leave to appeal in criminal

cases unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against. It was further held that though the Supreme Court is not bound to follow the decisions of the Privy Council too rigidly since the reasons, Constitutional and administrative, which sometimes weighed with the Privy Council, need not weigh with the Supreme Court, yet some of those principles are useful as furnishing in many cases a sound basis for invoking the discretion of the Court in granting special leave.

(9) It is, therefore, clear that the scope of an appeal under Art. 134 of the Constitution to the Supreme Court against a final order or sentence in Criminal proceedings has not all been widened.

(10) In — *King W. H. v. Emperor*, AIR 1950 Bom 380 a Division Bench of Bombay High Court held that except in cases falling under sub-clause (a) and (b) of the Art. 134 (1) in all other criminal matters the Constitution of India intends that the High Court in the respective States in the territory of India should normally and ordinarily be the final Courts of appeal. This fact must, therefore, be borne in mind in deciding the question as to whether a certificate of fitness should be given in a case. There must at least be a substantial question of law or considerations must exist like those mentioned by Viscount Simon in — *Mahomed Nawaz v. Emperor*, AIR 1941 P. C. 132 e. g. a disregard of the forms of legal process or some violation of the principles of natural justice, or otherwise substantial or grave injustice had been done, or it should be a matter of great public importance. The mere fact that the petitioner raised a point which may be a point of law does not justify his claim for a certificate under Art. 134 (a) (c). Vide also — *Radhakrishnayya v. Sarasamma*, AIR 1951 Mad 213 and — *Arjuna Misra v. Indian Union*, AIR 1950 Orissa 235.

(11) The Government Advocate argued that in the decision given by us a substantial question of law is involved but I do not see what substantial question of law is involved. We merely construed the very common phrase in legislative enactments "shall continue to remain in force until repealed or amended" and in doing so compared the language used in S. 292 of the Government of India Act 1935 and Art. 372 of the Constitution. We also followed the decision in *Attiqua Begum's case*, AIR 1941 F. C. 16 (reference P. 24.)

(12) Where the question of law is not well settled or where there is some doubt as to the principles of law involved or there is a conflict of judicial decisions, it may be that a substantial question of law can be said to arise which may require the final adjudication by the highest court.

(13) Here, there is no substantial question of law involved. There is no conflict of decisions on the point involved, and we merely followed the decision of the Federal Court in *Attiqua Begum's case* (AIR 1941 F. C. 16), which we were bound to follow. If we give permission to file appeal to the Supreme Court it would mean that the decision of Federal Court is doubtful. In my opinion there is no substantial question of law involved in this case, and merely raising a question of law is not enough.

(14) There is no matter of public importance involved in this case. The decision given by us affects only acts done and prosecutions launched in respect of acts done between 30th of September, 1948 and 18th January, 1950. The Madhya Bharat Feeding at Parties Restriction Order came into force on 19th January, 1950. The learned Govern-



ment Advocate has not given particulars in his application for leave as to the number of prosecutions which are likely to be affected by our decision. But even if some prosecutions launched under the Indore Essential Supplies (Temporary Powers) Order are likely to be affected by our decision, the construction of a legislative provision which is no longer in force and under which no further questions on the same point can arise, cannot be said to be of great public importance so as to justify the grant of leave to appeal to the Supreme Court in a criminal matter in which by decision of this court an accused person has been discharged.

(15) For the reasons aforesaid, I would reject the application for grant of certificate and hold that this is not a fit case for appeal to the Supreme Court.

(16) KAUL C. J.: I have had the advantage of reading the order dictated by my learned brother Mehta J. and agree with him that the certificate applied for by the State should not be granted. I should, however, like to state very briefly my reasons for the view taken in my own words.

(17) Before the new Constitution came into force, the decisions of High Courts in the country in criminal matters were final. Appeals in criminal matters which had been determined by a High Court, could be entertained by the Judicial Committee by special leave which was granted in exercise of royal prerogative. A right of appeal was however allowed in a very limited class of cases under the Letters Patent of the High Court of Calcutta, Madras and Bombay (Clause 41). A change has been introduced by the new Constitution. Obviously no question of any prerogative can now arise. A discretionary power to grant special leave to appeal has, however, been conferred upon the Supreme Court by Art. 136 of the Constitution. The Supreme Court is also a court of criminal appeal for certain classes of cases specified in Art. 134 (1) Sub-clauses (a) and (b). Sub-clause (c) of that Article further provides for an appeal from any judgment, final order or sentence in a criminal proceeding given by a High Court, if the High Court certifies that the case is a fit one for appeal to the Supreme Court. No provision is found either in Art 134 or in any other Article of the Constitution to guide the High Courts in determining the cases or classes of cases in which a certificate of fitness as contemplated by Art 134 (1) (c) should be granted. The matter must therefore, be determined on general principles, and on such inferences as it may be possible to draw from any provision in our Statute Law.

(18) An indication of the way in which the discretionary power given to the Supreme Court under Article 136 shall be exercised in criminal cases, is to be found in the decision of that court in 'Pritamsingh's case', AIR 1950 S. C. 169. It was observed that in granting special leave in criminal cases, though the Supreme Court was not bound to follow the decisions of the Privy Council too rigidly, it was not inclined to depart from the principles laid down by the Judicial Committee which should normally govern the exercise of discretion of the court in grant of special leave to appeal in such cases.

(19) These principles stated briefly and in very general terms are that there must be something which in the particular case deprives the accused of the substance of a fair trial and the protection of law, which in general tends to divert the due and orderly administration of Law into a new course which may be drawn into an evil precedent in future,—'Reg v. Bertrand', (1867) 16 L. T. 752 or if by a disregard of a form of legal process or

by some failure of principles of natural justice or otherwise substantial and grave injustice has been done — 'Re Dillet', (1887) 12 A. C. 459.

(20) It would appear that substantial and grave injustice to the party asking for leave to appeal has almost invariably been held to be the test which must be fulfilled before such leave would be granted in a criminal case.

(21) Under S. 5 of the Code of Criminal Procedure, all offences under the Indian Penal Code or any other Law can be inquired into, tried or otherwise dealt with only according to the provisions of that Code. S. 404 provides that no appeal shall lie from any judgment or order of a criminal court except as provided by the Code of Criminal Procedure or by any other Law for the time being in force. Under S. 430 judgments and orders passed by an appellate court upon appeal are final except in cases provided for in S. 417 and Chapter XXXII of the Code. It is legitimate inference to draw from the provisions above referred to and the general scheme of the Code that the decisions by the High Court given in exercise of its appellate or revisional jurisdiction or as a court of reference are, but for any Law that may provide otherwise, to be final. All the Laws in force in the territory of India before the commencement of the new Constitution have, by Art. 372, been continued to be in force, subject to the provisions of the Constitution. That Arts. 134 and 136 of the Constitution affect the finality of the determinations of the High Courts in criminal matters is clear. The question for consideration is how far it was intended that this finality should be affected in matters other than those specified in Art. 134 (1) (a) and (b). It is significant that the language of Sub Clause (c) of Art. 134 (1) has a very close resemblance to that used in clause 41 of the Letters Patent of the Calcutta, Bombay and Madras High Courts. It was held by a bench of Bombay High Court in — 'Re Bal Gangadhar Tilak', 33 Bom 221 that before granting a certificate for leave to appeal to the Privy Council, the High Court must be satisfied that there is a reasonable ground for thinking that grave and substantial injustice may have been done by reason of some departure from the principles of natural justice.

(22) The High Court, when considering an application for the grant of a certificate under Art. 134 (1) (c), does not sit in judgment upon its own decision. It has, however, been authorised to grant a certificate of fitness to appeal to the Supreme Court in any case that it might consider appropriate. I am clear that it would not be proper for any Judge to attempt to define in what cases or classes of cases a certificate of fitness should be granted and thus to restrict the wide generality of the language advisably used by the framers of the Constitution. I believe, however, that I would not lay myself open to this charge, if I might indicate in a negative form a class of cases in which the certificate contemplated by Art. 134 (c) should not be granted. In my opinion, it should not be granted, if the question for consideration is only the interpretation of any section of a temporary Act which is not likely to affect a large number of cases, and in respect of which it cannot be said that if the view taken by the High Court is erroneous, it would result in grave and substantial injustice.

(23) I am further of opinion that when the State applies for grant of a certificate of fitness in a case where the High Court has either acquitted the accused or quashed the proceedings initiated against him, it must make out a strong case showing that the view taken by the High Court is erroneous.



(24) It was contended by the learned Government Advocate in support of this application that a substantial question of law was involved in the decision given by us and therefore a certificate of fitness should be granted. In the first place I am not satisfied that any substantial question of Law or a question of general importance is involved in the present case. All that we have done is to interpret the words "shall continue to remain in force until repealed or amended", as used in Section 3 of Madhya Bharat Ordinance No. 1 of 1948 and held that the use of these words could not have the effect of making a temporary Law or Order which was to remain in force for a specified period, perpetual. In support of our view, we relied on the decision of the Federal Court in *Atiqur Begum's case* AIR 1911 F.C. 16 reference p.24. Secondly, I am of opinion that even if our decision involved a substantial question of Law, we would not be justified in granting a certificate of fitness unless we were further satisfied that it resulted in grave and substantial injustice. The mere fact that the view of Law taken by us resulted in the acquittal of a person who had committed a breach of a rule made under a temporary order or in a proceeding initiated against him being quashed does not necessarily constitute grave and substantial injustice, justifying the grant of a certificate of fitness to appeal to the Supreme Court under Art. 134(1)(c) of the Constitution. To do so would be to affect the finality of the decisions of the High Court both on questions of fact and Law as envisaged by the Code of Criminal Procedure, beyond what was contemplated by Article 134 of the Constitution.

(25) For the reasons given above the application is rejected.

A/G.M.J.

Application rejected.

**A. R. I. 1953 M. B. 38 (Vol. 40, C. N. 18)**

**(INDORE BENCH)**

**CHATURVEDI J.**

Dalpatri Jhanjhari. Applicant v. West End Watch Co., Bombay, Opponent.

Small Cause Revn. No. 21 of 1950, D/- 27-3-1952.

(a) Civil P. C. (1908), Ss. 19 and 20 — Plaintiff writing letter from Ujjain to defendant in Bombay that he is sending his watch for repairs by parcel — Defendant receiving parcel but finding it empty — Plaintiff's suit in Ujjain for recovery of price and damages — Cause of action held did not arise in Ujjain — Suit held one in tort — Held there was no offer — Ujjain Court held had no jurisdiction — (Contract Act (1872), Ss. 4, 10, 137 and 218) — (Tort-conversion).

Plaintiff, a resident in Ujjain, sent his wrist-watch to the defendant for repairs at Bombay and addressed a letter to the defendant, the material portion of which was "I have sent the above watch to you by registered parcel post separately for repairs which will reach you. On receiving the same kindly send an estimate of repairs and on approval I will write to you to carry on work for its repairs". The defendant opened the parcel and found nothing in it. The plaintiff filed a suit in Ujjain Small Causes Court for the recovery of the price of the wrist watch and damages:

Held that (1) the letter of the plaintiff was not an offer. There was no contract for repairs of the watch or for the return of the same at Ujjain. (Para 1)

(2) Even if the letter was an offer it must be held to be one made at Bombay where it was received. (Para 4)

(3) The mere fact that the plaintiff posted a letter at Ujjain and sent the parcel from there would be no part of cause of action, because there could be no proposal till it came to the knowledge of the person to whom the proposal was made. (Para 5)

(4) Even if it be assumed that the watch was received by the defendant at Bombay and repairs were carried out without formal acceptance of the offer the cause of action will arise in Bombay. (Para 6)

(5) The wrist-watch was entrusted to the care of the defendant at Bombay and could have been obtained from the defendant there. (Para 7)

(6) If a person wrongfully converted goods and received the amount, the owner of the goods may either sue in tort or may waive the tort, and recover the proceeds in an action for money had and received, which is based on an implied contract of agency, the defendant being fictitiously assumed to have rightfully received the money as the plaintiff's agent, and to have failed to pay it over to his principal. But, the plaintiff did not so elect, and there being no contractual relation disclosed in the plaint his suit would be taken to be in tort and the jurisdiction will be determined by S. 19, Civil P. C. Case law referred. (Paras 8, 9)

(7) The Court at Ujjain, therefore, had no jurisdiction to try the suit. (Para 12)

Anno: Civil P. C., S. 19 N. 1, 2; S. 20 N. 17, 18; Contract Act, S. 4 N. 1; S. 10 N. 4; S. 187 N. 1; S. 218 N. 1.

(b) Civil P. C. (1908), Ss. 19 and 20 — S. 20 is subject to limitation of S. 19. (Para 11)

Anno: Civil P. C., S. 19 N. 1; S. 20 N. 2.

Vyas, for Applicant; Vohra, for Opponent.

REFERENCES: Courtwar/Chronological/ Paras

('47) ILR (1947) All 44: (AIR 1947 All 337)	4
('24) 25 Bom LR 604: 87 Ind Cas 226: AIR 1924 Bom 205	8
('40) ILR (1940) Mad 195: (AIR 1940 Mad 49)	4
('43) AIR 1943 Mad 471: (ILR (1944) Mad 95)	4
('46) 25 Pat 292: (AIR 1947 Pat 134)	4
('48) 27 Pat 723: (AIR 1949 Pat 270)	4
('36) AIR 1936 Sind 229: (30 Sind LR 182)	8
(1925) 1 KB 52: (94 LKKB 26)	8

ORDER: The only point in this case is whether the Ujjain Court had jurisdiction to hear the suit out of which this revision has arisen. The defendant non-applicant (West End Watch Company) carries on business at Bombay. The plaintiff applicant sent his wrist-watch there for repairs and a letter to the defendant, the material portion of which is in the following words:

"I had purchased a matchless wrist watch from an Indore dealer, while I was at Mhow. I have sent the above watch to you by registered parcel post separately for repairs, which will reach you. On receiving the same kindly send an estimate of repairs and on approval I will write to you to carry on the work for its repairs."

(2) The defendant's correspondence shows that they had opened the parcel but found nothing in it. After correspondence with the



Presidency Post Master the defendant informed the plaintiff who was of the opinion that the Company is responsible for the loss sustained by him. He, therefore, brought this suit for recovery of Rs. 57/- as the price of the wrist watch and Rs. 58/- as damages (i.e. for the recovery of 115/- rupees in all). In para 7 of the plaint he mentioned that the plaintiff resides at Ujjain, that he sent the wrist watch from Ujjain and that the defendant ought to have returned it to him at Ujjain, therefore, the Ujjain Court had jurisdiction.

(3) The learned Small Causes Court, Ujjain, held that Ujjain Court had no jurisdiction. Aggrieved with this order, the plaintiff has filed this revision.

(4) The judgment of the Small Causes Court, I regret to observe, is rather unsatisfactory. He has not referred to any provision of the Civil Procedure Code, which in his opinion governed the case or to the question whether there was any agreement between the parties. The unsystematic approach to the whole question by the Court below has given rise to different kinds of argument at the Bar which will have to be referred to briefly. It is well settled law now, that the question of jurisdiction is to be determined with reference to the allegations in the plaint and not with reference to pleas. The basis of the suit, according to the plaint, does not appear to have been any agreement between the parties that the watch will be returned to Ujjain after repairs. The letter of the plaintiff referred to above was, firstly, not an offer. There was neither offer nor acceptance and there was no contract between the parties for repairs of the watch or for the return of watch to Ujjain. Secondly, even if the plaintiff's letter referred to above be regarded as an offer, (which it was not) then an offer must be deemed to have been made at the place where it was received and not at the place from which it was sent. — 'Ahmad Bux v. Fazal Karim', ILR (1940) Mad. 195; — 'Ratanlal v. Harcharanlal', ILR (1947) All. 44; — 'Manilal v. Venkatachalapathi Iyer', AIR 1943 Mad. 471; — 'Arthur Butlar Co. Ltd. v. Dist. Board of Gaya', 25 Pat. 292 and — 'Dhanraj Mills Ltd. Libitity Co. v. Narsingh Prasad', 27 Pat. 723. Section 4 of the Indian Contract Act is clear on this point.

(5) Mr. Vyas contends that the letter was sent from Ujjain and the cause of action in part arose at Ujjain within the meaning of Section 20(c) C.P. Code. In my opinion the mere fact that the plaintiff posted a letter at Ujjain and sent the parcel from Ujjain would be no part of cause of action because there could be no proposal till it came to the knowledge of the person to whom the proposal was made. If a person travelling in a car or a train gets down at one place to post a letter and despatches the parcel from a Post Office in the way; can it be said that the place where the letter and parcel were posted had anything to do with any part of the cause of action? The Post Office is only the agent of the sender of the letter and the parcel and not the agent of the addressee. The offer thus, takes place where it is communicated to the other party.

(6) Thirdly, even if, it be assumed that the watch was received by the defendant at Bombay and repairs were carried out the cause of action will arise in Bombay. Where an order for work is sent by post and without formal acceptance the work is carried out in the district where the order is received the whole cause of action arises in the latter district, (Halsbury, Second Edition, Vol. 8, page 191).

(7) Fourthly, the wrist watch was entrusted to the care of the defendant at Bombay and could have been obtained from the defendant there. There is no allegation in the plaint that either expressly, or by implication the defendants had agreed either to repair the watch, or to send it to Ujjain.

(8) Fifthly, if a person wrongfully converts goods and receives the amount, the owner of the goods may either sue in tort or may waive the tort, and recover the proceeds in an action for money had and received, — 'Thorappa Devanappa v. Ummedmalji', 25 Bom. L.R. 604; 87 Ind. Cas. 226; AIR 1924 Bom. 205. This latter action is based on an implied contract of agency, the defendant being fictitiously assumed to have rightfully received the money as the plaintiff's agent, and to have failed to pay it over to his principal, — 'Brockle Bank Ltd. v. R.', (1925) 1 K.B. 52. But, where the plaintiff does not so elect, his suit will be taken to be in tort and the jurisdiction will be determined by Section 19 of the Code of Civil Procedure, — 'Mulsing Dawlatram Firm v. Fatechand Anrai', AIR 1933 Sind 229.

(9) In fact, the allegations in the plaint in this case do not state a cause of action in contract but the gravamen of the complaint is definitely a tort. Where there is no contractual relation, either express or implied, alleged in the plaint, an action of tort has to be assumed. In this connection I may usefully refer to Corpus Juris, Vol. I page 1020 where illustration 2 (under foot note 18) runs as follows.

"Where property has been converted, but the pleadings do not show that it has been converted into money, a suit to recover the value of property is an action ex delicto and not ex contractu."

(10) On page 1019, it is mentioned:

"Actions in tort include an action to recover damages for a conversion ..... and generally, wherever it appears that the object of the action is to recover damages for a tortious act on the part of the defendant, or that, although either form of action might be maintained, the gist of the action is a wrong or breach of duty imposed by law, as distinguished from a mere breach of contract."

(11) Now, so far as the suit is one in tort and the provisions of Section 19 C.P. Code apply, in my opinion, the conclusion arrived at by the learned Small Causes Court is right. Section 20 C.P. Code is subject to the limitation of Section 19. The opening words of Section 20 are: "Subject to the limitation aforesaid", and, section 19 reads as follows:

"Where a suit is for compensation for wrong done to the person or to moveable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides or carries on business or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the said courts."

(12) The allegations in the plaint are that the wrong to the wrist watch was done at Bombay and the defendant also carries on business there and in the circumstances of this case, I am clear in my mind that the Ujjain Court had no jurisdiction.

(13) I, therefore, dismiss the revision with costs.

B/R.G.D.

Revision dismissed.



A. I. R. 1953 M. B. 40 (Vol. 40, C.N. 19)

(INDORE BENCH)

CHATURVEDI J.

Vishwanath Vasudeo and another, Applicants v. Sakal Alya Panch and another, Opponents.

Civil Revn. No. 96 of 1950, D/- 24-3-1952.

(a) Court-fees Act (1870) S. 12 — Revision when lies at defendant's instance — Civil P.C. (1908) S. 115.

If a matter affects Court-fee alone, which is one purely between the Government and the plaintiff, no revision petition might lie at the instance of the defendant, but when it involves a question of jurisdiction of the lower Court also, the defendant is clearly interested in the matter, as his right of appeal would be affected; and only in that case a revision would lie. AIR 1949 Mad. 415 Rel. on.; AIR 1947 All. 404; AIR 1941 Cal. 518 and AIR 1941 Cal. 509, dissent from; Case law discussed. (Para 8)

Anno: C. F. Act, S. 12 N. 13 C.P.C., S. 115 N. 27b.

(b) Court-fees Act (1870) S. 8(v)(e) and Sch. II Art. 17(6) — Property of temple — Suit for possession for purpose of managing it — Court-fee payable.

The property of a temple belongs primarily to the deity and falls within the category of *res extra commercium*. Even as a house, it has no market value within the terms of S. 7 Clause (v)(e) and a suit for recovery of possession of it for the purpose of managing it and conducting its worship falls under Article 17(6) of Schedule 2. It makes no difference as to the marketability of the temple whether it is public or private. AIR 1924 Mad. 19 (FB) and AIR 1938 Nag. 481, applied. (Para 9)

Anno: C. F. Act, S. 7(v) N. 25 Pt. 1; Sch. II Art. 17(6) N. 2 Pt. 3.

Dubey, for Applicants; Karanjkar, for Opponents.

REFERENCES: Courtwar/Chronological/ Paras

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|---|------|
| ('18) 43 Bom 507: 46 Ind App 24:                        |      |
| AIR 1918 PC 188   | 3, 5 |
| ('35) 57 All 17: AIR 1934 All 620(FB)                   | 7    |
| ('37) ILR (1937) All 17: AIR 1936 All 686 (FB)          | 7    |
| ('47) AIR 1947 All 340: (ILR (1947) All 433)            | 7    |
| ('47) AIR 1947 All 404: (ILR (1947) All 640)            | 7    |
| ('41) AIR 1941 Cal 509: (197 Ind Cas 128)               | 7    |
| ('41) AIR 1941 Cal 518: 73 Cal LJ 240: 196 Ind Cas 762  | 7    |
| ('51) Civil Revn. No. 75 of 1951 (Madh-B, Gwalior)      | 7    |
| ('23) 46 Mad 782: AIR 1924 Mad 19 (FB)                  | 9    |
| ('49) AIR 1949 Mad 415: (1948-2 Mad LJ 523)             | 8    |
| ('38) ILR (1938) Nag 106: AIR 1938 Nag 122 (FB)         | 4    |
| ('38) AIR 1938 Nag 481: 178 Ind Cas 97                  | 9    |
| ('46) AIR 1946 Nag 160: (222 Ind Cas 194)               | 5    |
| ('49) AIR 1949 Nag 211: (ILR (1949) Nag 66)             | 5    |
| ('37) 16 Pat 766: AIR 1938 Pat 22: 172 Ind Cas 840 (FB) | 6    |

ORDER: A suit was instituted by the plaintiffs, on behalf of Sakal Alya Panch Khargone, against the defendant applicants, for the possession of a temple. The allegation is that the temple of Ramjee belongs to the Panchas,

and after the death of Mahant Shri Kuberdas, the Panchas appointed defendant No. 1 as the Pujari. Defendant No. 2 is the brother of defendant No. 1. The plaintiff stated that the duty of defendant No. 1 was to arrange the Puja, to manage the temple and to take the offerings. Due to mismanagement of the temple, the Panchas desired to appoint a new Pujari; but defendants No. 1 and 2 did not leave the temple and hence the suit is instituted. The plaintiffs valued the relief of possession at Rs. 100/- and 5 rupees was the valuation put for purposes of injunction and they paid Court fee of Rs. 8/14/0. The trial Court held that the subject matter of the suit is not capable of money valuation and, therefore, the Court fee ought to be levied under Schedule II Art. 17 (VI) of the Court fees Act and the plaintiffs were ordered to pay Rs. 15/-.

(2) Against this order the defendant has come up to this Court and wants me to revise it. The first question that arises is: Whether such a revision is entertainable?

(3) Their Lordships of the Privy Council in — *Rachappa Subrao v. Shidappa Venkat Rao*, 43 Bom. 507: 46 Ind App 24: AIR 1918 P.C. 188 had observed:

"The Court-fees Act was passed not to arm a litigant with a weapon of technicality against his opponent, but to secure revenue for the benefit of the State. This is evident from the character of the Act, and is brought out by Section 12, which makes the decision of the first Court as to value final as between the parties, and enables a Court of appeal to correct any error as to this, only where the first Court decided to the detriment of the revenue."

(4) Their Lordships refused to allow a defendant to utilise the provisions of the Act to obstruct his opponent, and refused to entertain his objection raised for the first time in appeal, that the Court had no jurisdiction to proceed upon an insufficiently stamped plaint. An inference was rightly drawn from this by the Full Bench of the Nagpur High Court in — *Balaji Dhumnaji v. Mukta Bai*, ILR (1938) Nag. 106: AIR 1938 Nag. 122 (FB) that a question about the sufficiency or otherwise of Court-fee is only a side-issue. It is not inter parties and does not invalidate a decision simply because the plaint or the Memorandum of appeal was under-stamped.

(5) After discussing the case-law on the point the Full Bench of the Nagpur High Court came to the conclusion that if the effect of the order of the Court demanding additional Court fee is a refusal to proceed to trial at all, it must be regarded as an irregularity which affects either jurisdiction or procedure within the meaning of clause (c) of Section 115 C.P. Code; and inasmuch as it is only merely incidental and interlocutory but finally and effectively shuts the plaintiff out from all hope of redress in the suit itself, the error must be regarded as material.

The Full Bench, therefore, held that an order demanding additional court-fees is always revisable, but at the same time this opinion was also expressed that an order accepting the Court-fees paid is not revisable because, then there is no refusal to proceed with the trial (or the appeal) and because their Lordships of the Judicial Committee had observed in — *Rachappa Subrao v. Shidappa Venkat Rao*, 43 Bom. 507 (PC) at p. 518 "Jurisdiction is not then affected nor is the other side damnified."



A different view was taken in — 'Hiralalsa v. Rambhau', AIR 1946 Nag 160 by a Judge sitting on a Single Bench but this was not followed in later decisions vide — 'Manoharsingh v. Parmeshari', AIR 1949 Nag. 211 which adhered to the Full Bench ruling.

(6) A similar view was taken by a Full Bench of the Patna High Court in — 'Ramkhelavan Sahu v. Surendra Sahi', 16 Pat. 766: AIR 1938 Pat. 22: 172 Ind. Cas. 840 (FB), where it was held that in deciding the question of Court-fees, the Court decides an issue between the plaintiff and the Crown and the defendant is not a party to the dispute; that the defendant has a remedy should the decision on merits be against him, in bringing the matter of the Court-fee to the notice of the appellate Court under section 12 Court-fees Act; and lastly that as between the plaintiff and the defendant the trial Court has not refused to exercise its jurisdiction to decide the case on the merits.

(7) The Calcutta High Court in — 'Rabindra Nath v. Girendra Mohan', AIR 1941 Cal. 518: 73 Cal. LJ 240: 196 Ind. Cas. 762, expressed dissent from the above view and observed that the question, whether the suit falls within a particular category under S. 7 or whether it comes under one or the other schedule of the Court-fees Act cannot be regarded as merely one between the plaintiff and the Crown, for it may affect the jurisdiction of the Court to entertain the suit and that is a matter in which the defendant is certainly interested. It was therefore held that the decision on a question as to proper classification of a suit, that is, whether an ad valorem fee or fixed fee is payable on the plaint, is open to revision under Section 115 C. P. Code.

With due respect to the learned Judges who decided this case as well as — 'Kanaklata Dasi v. Ramgopal', AIR 1941 Cal. 509, I have not been able to understand the basis which led them to differentiate between a question of valuation and a question relating to classification. In my opinion, the reasoning in the two rulings is obscure as a question of valuation involves generally, though not necessarily, a question relating to classification. In — 'S. Mazahir Hussein v. Anjuman Islamia', AIR 1947 All. 404 a Division Bench of the Allahabad High Court came to the conclusion that a defendant has no locus standi under Section 6A (U.P. Court-fees Act) to challenge the order, calling upon the plaintiff to make good the deficiency in Court fee by objecting that the amount of Court-fee ordered to be paid is not sufficient.

Though I agree with the conclusion, I respectfully disagree with the reasoning that an order demanding additional Court-fee does not amount to a "case decided" within the meaning of Section 115 C.P. Code. This decision is based upon two old Full Bench rulings reported in — 'Gupta & Co. v. Kriparam Bros.' 57 All. 17: AIR 1934 All 620 (FB) and in — 'Mt. Surajpali v. Arya Pritinidhi Sabha', ILR (1937) All. 17: AIR 1936 All. 686 (FB). The changes in the Court-fees Act subsequent to these Full Bench rulings, have entirely been overlooked. In my decision, in a case at Gwalior — 'Chinkubai v. Jaisingh', Civil Revn. No. 75 of 1951, I have dissented from the observations of this Division Bench, and I have agreed to the modern view and to the view taken by Waliullah J. in — 'Hafiz Mahomed v. Chief Inspector of Stamps, U.P.', AIR 1947 All. 340.

(8) So far as the defendant's application in revision is concerned, in my opinion, the position has very succinctly been summed up by Panchapakesa Aiyer J. in — 'Subrahmanyam v. Lakshmi Narayanamma', AIR 1949 Mad. 415 where it has been held that if a matter affects Court-fee alone, which is one purely between the Government and the plaintiff, no revision petition might lie at the instance of the defendant, but when it involves a question of jurisdiction of the lower Court also, the defendant is clearly interested in the matter, as his right of appeal would be affected; and only in that case a revision would lie. With respect I concur in this view.

(9) In the present case, as no question of jurisdiction of the Court below is involved, the revision petition cannot be held to be competent and it must fail. I might however add that even if the revision was competent, I do not think, I would have differed from the view taken by the lower Court, as the property of a temple belongs primarily to the deity and falls within the category of *res extra commercium*. Even as a house, it has no market value within the terms of S. 7 Clause (V) (e) and a suit for recovery of possession of it for the purpose of managing it and conducting its worship falls under Article 17(6) of Schedule 2. It makes no difference as to the marketability of the temple whether it is public or private. The principles enunciated in — 'Rajagopala Naidu v. Rama Subramania Aiyar', 46 Mad. 782: AIR 1924 Mad. 19 (FB) and in — 'Motilal Shioji Ram v. Shambhoolal Ganpatlal', AIR 1938 Nag. 481: 178 Ind. Cas. 97 fully apply to the facts of the case.

(10) For reasons stated above, I dismiss the revision with costs.

B/V.R.B.

Revision dismissed.

A. I. R. 1953 M. B. 41 (Vol. 40, C. N. 20)

(GWALIOR BENCH)

DIXIT J.

The State v. Kesari Mal, Opponent.

Criminal Ref. No. 6 of 1952, D/- 6-3-1952.

**Criminal P. C. (1898), Ss. 438 and 497 (5) — Anticipatory bail — Grant of — Power of Sessions Judge to cancel — Reference to High Court — Competency — Essential Supplies (Temporary Powers) Act (1946).**

Where the Sessions Judge thinks that the order of bail passed by the Sub Divisional Magistrate in anticipation of arrest for an offence under the Essential Supplies (Temporary Powers) Act is illegal or improper, the Sessions Judge himself has the power under Section 497 (5), Criminal P. C. to cancel the bail and it is wholly unnecessary for him to make a reference to High Court for cancellation of the bail. The provisions in the Essential Supplies (Temporary Powers) Act with regard to bail do not in any way affect the discretion vested in the Sessions Judge under S. 497 (5) in the matter of cancellation of bail. (Para 2)

Anno: Cr. P. C., S. 438 N. 3 Pt. 2; S. 497 N. 7. Shiv Dayal, Dy. Govt. Advocate, for the State.

**ORDER:** This is a reference by the learned Sessions Judge of Gwalior recommending that an order passed by the Sub-Divisional Magistrate Antari granting anticipatory bail to Kesarimal who apprehends arrest for an offence under the Essential Supplies (Temporary Powers) Act, 1946, be set aside.



(2) This reference must be rejected on the ground that, if the learned Sessions Judge thinks that the order of bail passed by the Sub-Divisional Magistrate was illegal or improper, the Sessions Judge himself has the power under S. 497 (5) of the Criminal P. C. to cancel the bail. The provisions in the Essential Supplies Temporary Powers Act with regard to bail do not in any way affect the discretion vested in the Sessions Judge under S. 497 (5) in the matter of cancellation of bail. That being so, it seems to me that it was wholly unnecessary for the Sessions Judge to make this reference to this court for passing an order with regard to the cancellation of bail. The Sessions Judge is at liberty to cancel the bail, if he is so inclined.

(3) The reference is accordingly rejected.  
B/K.S. Reference rejected.

A. I. R. 1953 M. B. 42 (Vol. 40, C. N. 21)

(Gwalior Bench)

CHATURVEDI J.

Nand Kishore owner of the Firm Ram Prasad Ram Kuwar, Applicant v. Firm Maheswari Mills, Morena, Opponent.

Civil Revn. No. 43 of 1952, D/- 14-8-1952.

(a) Partnership Act (1932) S. 69(2) — Registration of firm subsequent to institution of suit.

The registration of a firm is a condition precedent to its right to institute a suit and a Court cannot proceed with a trial of a suit when the condition precedent has not been fulfilled. Subsequent registration cannot cure the initial defect and validate the institution of a suit. AIR 1942 Mad. 252, Foll. AIR 1942 Lah. 289 (FB), AIR 1939 Nag. 301, 41 Cal. WN 534, and AIR 1937 Mad. 767 Not foll. (Para 5)

Anno: Partnership Act S. 69 N. 1 Pt. 3.

(b) Partnership Act (1932) S. 74(a) and (b) — "Right" — Meaning of.

'Right' in S. 74 means 'substantive rights' and not merely 'right to sue'. It should not be confined to 'cause of action.' (Para 8)

Anno: Partnership Act S. 74 N. 1.

(c) Interpretation of Statutes — Retrospective operation — Test to determine whether statute is retrospective.

The real test when deciding whether a particular provision of law is to be given retrospective effect or not, is not whether the law is a law of procedure or substantive law, but whether the law in question affects or impairs existing rights including rights of action which are substantive rights. Where existing rights would be adversely affected, Courts decline to give retrospective effect unless compelled thereto by the words of the Statute. (Para 10)

Anno: C. P. C., Preamble N. 3 Pt. 3.

(d) Partnership Act (1932) Ss. 69(2) and 74(b) — Retrospective operation of S. 69(2) — Rights saved by S. 74.

S. 69(2) cannot be held to have retrospective operation. Therefore, S. 74 saves those rights which were acquired or had accrued prior to the coming into force of S. 69 and saves all legal proceedings or

remedies in respect of such rights. Case law discussed. AIR 1934 Cal. 754 and AIR 1937 Pat. 16 Not foll. (Paras 16 & 17)

Anno: Partnership Act, S. 69 N. 1; S. 74 N. 1. Motilal Gupta, for Applicant; Shiv Dayal, for Opponent.

REFERENCES: Courtwar/Chronological/		Paras
('27)	54 Ind App 338: AIR 1927 PC 176	5
('30)	58 All 495: (AIR 1936 All 3)	2, 14, 15
('41)	AIR 1941 All 178: (ILR (1941) All 311: 1941 All LJ 107	15
('51)	ILR (1951) Bom 101: AIR 1951 Bom 6: 52 Bom LR 862	5
('39)	AIR 1939 Bom 61: (ILR (1939) Bom 104)	14
('35)	62 Cal 213: AIR 1934 Cal 754: 39 Cal WN 67	13, 14
('37)	41 Cal WN 534	2
('36)	17 Lah 275: (AIR 1935 Lah 893)	2
('42)	AIR 1942 Lah 289: ILR (1942) Lah 517 FB	1, 2
('36)	AIR 1936 Mad 991: (165 Ind Cas 939)	2
('37)	AIR 1937 Mad 767: 1937-2 Mad LJ 273	2
('38)	AIR 1938 Mad 185: (175 Ind Cas 811)	2
('38)	AIR 1938 Mad 688: (179 Ind Cas 16: 1938-2 Mad LJ 44)	2, 10
('42)	ILR (1942) Mad 355: AIR 1942 Mad 252	5
('39)	AIR 1939 Nag 301: 186 Ind Cas 670	2
('40)	ILR (1940) Nag 170: AIR 1940 Nag 137	16
('51)	ILR (1951) Nag 81: AIR 1951 Nag 159: 1950 Nag LJ 554	5
('36)	15 Pat 810: AIR 1937 Pat 16	13
('39)	18 Pat 114: (AIR 1939 Pat 239)	2
('38)	AIR 1938 Rang 273: (176 Ind Cas 379 FB)	14
('39)	ILR (1939) Kar 765: AIR 1939 Sind 206	16
('43)	AIR 1943 Sind 26: ILR (1942) Kar 442	16

ORDER: This is a revision filed by the defendant in a suit instituted in the Court of Civil Judge, First Class, Morena, against him by the plaintiff Mills. It appears that the plaintiff's firm was not registered when the suit was instituted but was registered after the presentation of the plaint in Morena Court. The defendant applicant resisted the suit on the ground that the suit was not maintainable; but the plea of the plaintiff was that this subsequent registration of the partnership was enough to enable the plaintiff to maintain the suit, notwithstanding the provisions of S. 69(2), Partnership Act. The Court upheld the plaintiff's plea observing that S. 69(2) had no application in this case and relying on — 'Nazir Ahmed v. People's Bank of North India Ltd.', AIR 1942 Lah 289 (FB) held that subsequent registration validated proceedings. The defendant has come to this court and desires me to revise this order.

(2) There is no doubt that in Full Bench case of — 'Nazir Ahmed v. People's Bank of North India Ltd.', ILR (1942) Lah 517: AIR 1942 Lah 289 (FB) and also in three other cases viz.; — 'Jakiuddin v. Vithoba', AIR 1939 Nag 301: 186 Ind. Cas. 670; — 'Radha Charan v. Matilal', 41 Cal W N 534 and — 'Varadarajulu Naidu v. Rajamanika Mudaliar', AIR 1937 Mad 767: 1937-2 Mad L J 273 the view that prevailed was in favour of the plaintiff non-applicant. It was held that subsequent registration cured the defect and the suit was maintainable. On the other hand, in — 'Subramania Mudaliar v. East Asiatic Co. Ltd.', AIR 1936 Mad 991, in



— 'Ibrahim Saheb and Brother v. Gurulinga Aiyer', AIR 1938 Mad 185; in — 'Girdharilal Son & Co. v. Kappini Gowder', AIR 1938 Mad 688 it was held that subsequent registration did not remedy the defect. The views of the Patna High Court — 'Laluram Sagarmal Firm v. Jamuna Prasad', 18 Pat 114, the Allahabad High Court — 'Danmal Parshotam Das v. Babu Ram Chhote Lal', 58 All 495 and the Lahore High Court — 'Krishen Lal Ram Lal v. Abdul Ghafur Khan', 17 Lah 275 were also to this effect.

(3) The terms of S. 69 (2), Partnership Act may be reproduced here for reference and they are:

"No suit to enforce the right arising from a contract shall be instituted in any court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners of the firm."

(4) A plain reading of the terms above, without anything more, shows clearly that unless the firm is registered, the institution of the suit on its behalf to enforce a right arising from a contract will be barred.

(5) The entire case law was reviewed in — 'Ponnuchami Goundar v. Muthusami Goundar', ILR (1942) Mad 355; AIR 1942 Mad 252 and the learned Judges of the Madras High Court came to the conclusion that the registration of a firm is a condition precedent to its right to institute a suit and a Court cannot proceed with a trial of a suit when the condition precedent has not been fulfilled. They further added that the great weight of authority was also in favour of the opinion that subsequent registration would not put the suit on a proper basis and that the Court's duty was to dismiss it. The learned Judges also relied on — 'Bhag Chand Dagadusa v. Secy. of State', 54 Ind. App. 338; AIR 1927 P. C. 176, where S. 80, Civil Procedure Code has been considered by the Judicial Committee and the provisions thereof had been held to be explicit and mandatory.

The learned Judges observed that S. 69, Partnership Act had very much in common with S. 80, Civil Procedure Code and on the basis of the Privy Council decision came to the conclusion that subsequent registration could not cure the initial defect and validate the institution of a suit. This view has since then been followed by various High Courts. The Bombay High Court in — 'Prithvi Singh v. Hasan Alli', ILR (1951) Bom 101; AIR 1951 Bom 6: 52 Bom L R 862 and the Nagpur High Court in — 'Abdul Karim v. Ram Das Narayan Das', ILR (1951) Nag 81; AIR 1951 Nag 159; 1950 Nag L J 554 have adopted this view. In my opinion these latter cases have laid down the correct position in law and I respectfully concur with them.

(6) It is then contended that even if S. 69 (2), Partnership Act applies the right of the plaintiff to sue in the present case is saved by S. 73 of the Madhya Bharat Partnership Act 'Samvat' 2006 (Act No. 67 of 'Samvat' 2006) which in terms is identically the same as S. 74 of the Indian Partnership Act and the portion material to this case runs as follows:

"Nothing in this Act shall affect or be deemed to affect

(a) any right, title, interest, obligation, or liability already acquired, accrued or in-

curred before the commencement of this Act, or

(b) any legal proceeding or remedy in respect of any such right, title, interest, obligation or liability, or

(c) anything done or suffered before the commencement of this Act; or

(e) any rule of law not inconsistent with this Act."

(7) In this connection, it will be useful to refer to the following facts:

(3) The Madhya Bharat Partnership Act came into force on 7-11-49, and according to clause (3) of S. 1 of the Act, S. 69 came into force on 17-12-49 (vide Madhya Bharat Government Gazette dated 17-12-1949 Part 2, page 189). According to the plaint, the defendant purchased goods from the plaintiffs on 26-11-1949 and asked the plaintiffs to send goods to Surendra Nagar within two days. The plaintiffs despatched the goods on 28-11-49 according to the advice and informed the defendant accordingly. There are certain other things alleged in the plaint e.g., that the defendant subsequently desired that the goods should be sent to Ahmedabad and not to Surendra Nagar, that the goods reached Surendra Nagar and could not be detained at Ahmedabad.

The defendant then did not take delivery and on 16-12-49 informed the plaintiffs, who sold the goods at a loss on 18-12-1949. The plaint mentions that the goods which were sold to the defendant were worth Rs. 16,771-2-0 that the plaintiffs spent Rs. 243-6-9 in sending people to Ujjain and Ahmedabad and that the goods sold by them at Surendra Nagar fetched only Rs. 10,569-9-9 and they had to suffer a loss of Rs. 6,444-12-3. Adding interest and notice charges the plaintiff instituted a suit for Rs. 6500/- against the defendant on 28-1-1950. According to the plaint, therefore, the contract was concluded on 28-11-49, when according to the order of the defendant, goods were despatched to Surendra Nagar and the invoice and the Hundi about the value of goods were also sent to the United Commercial Bank Ltd, at Ahmedabad.

The defendant asked the said Bank to present the Hundi after four or five days and then after that period refused to accept it. The plaintiff also received a wire from the defendant on 11-12-49 informing the plaintiff that the defendant would not take delivery of the goods. It will be apparent that the plaintiff's right to recover the value of goods from the defendant had accrued on 28-11-49 when the contract had concluded or on 11-12-49 when the defendant had refused to take delivery of goods. In my opinion 'Right' in S. 74 of the Indian Partnership Act means 'substantive rights' and not merely 'right to sue'. It should not be confined to 'cause of action'. In any case, the rights of the plaintiff had accrued after the enactment of the Madhya Bharat Partnership Act, but before S. 69 could come into force.

(9) The questions that arise for determination are: Can S. 69 (2) take away those rights of the plaintiff which had accrued to him before the said section came into force? Does not S. 73 of the Madhya Bharat Partnership Act (S. 74 of the Indian Partnership Act) save those rights?

(10) It may be noted here that the Indian Partnership Act, except S. 69, had come into force in India on 1st October 1932 and S. 69 came into force a year later i.e., on 1st October



1933. The main question that was canvassed in — *Girdhari Lal Son and Co. v. K. Gowder*, AIR 1933 Mad 688: 119 Ind Cas. 16: 1938-2 Mad L.J. 11 was, whether S. 69 (2) relates to mere matter of procedure and can be given retrospective effect? Venkataramana Rao, J. was of opinion that S. 69 (2) belongs to the law of procedure and an enactment altering the procedure is always held to be retrospective even where the alteration tends to the disadvantage of one of the parties. It was further observed by the learned Judge that the language of S. 69 (2) is very general and will apply to all suits arising from contracts whether entered into before the passing of the Act or not. His Lordship also added that the postponement of the operation of the section may fairly be taken as an indication of the intention of the Legislature to give retrospective action to the section and that S. 74 (b) does not go to save this retrospective operation.

Pandurang Rao J. differed from this view and held that S. 69 (2) cannot be said to relate to mere matter of procedure, for, it requires something to be done, viz., registration 'de hors' the court. Section 69 (2) cannot be given retrospective effect particularly in view of S. 74 (b). His Lordship further observed: (and I respectfully agree with it), that the real test when deciding whether a particular provision of law is to be given retrospective effect or not, is not whether the law is a law of procedure or substantive law, but whether the law in question affects or impairs existing rights including rights of action which are substantive rights. Where existing rights would be adversely affected, Courts decline to give retrospective effect unless compelled thereto by the words of the Statute.

(11) The matter was then referred to Varadachariar J. who agreed with Justice Pandurang Rao and held that S. 74 (b) saves the 'remedy' in respect of any right acquired or accrued prior to 1st October 1932 from the bar of S. 69 (2). On the question whether S. 69 (2) relates to law of procedure, his Lordship on pages 704-5 observed as follows:

"In this connection it is necessary to consider the purpose and effect of the provision in S. 69. If it had such unintegral connexion with the subject-matter of the proposed suit as in some way to make the step required by it a step in the litigation, I should have been inclined to accept the argument that it related to a matter of procedure. But it is obvious that that was not its purpose. In a case for instance of a 'Patta' being delivered or a notice being given or a bill being tendered by a solicitor, it is clear that the condition intimately bears upon the subject-matter of the suit to follow. The object however of S. 69 was to make sure that the general policy of the Legislature that all partnerships should be registered will be carried out.

It is true that occasionally questions may arise in a suit as to who are the partners of a particular firm; but that cannot justify my ignoring the real purpose of the provision in S. 69. As pointed out by Sir Dinshaw Mulla, the object of this provision was to bring pressure to bear on partners to have the firm and themselves registered. This policy has been attempted to be enforced in various ways in different systems. In the English Legislation, S. 7 of Registration of Business Names

Act of 1916 imposes a penalty upon partners making default in the matter of registration. Such a provision certainly cannot be described as a processual provision."

(12) I may pause here to mention that other High Courts did not share this view on the other grounds and there has been a conflict of opinion on this point.

(13) A contrary view was held by the Calcutta High Court in — *Surendra Nath v. Monohar*, 62 Cal 213: AIR 1934 Cal 754: 39 Cal W N 67, wherein it was observed that S. 74 would go to indicate that the intention of the Legislature was to bring S. 69 into operation against the firms, if they do not register themselves, or if they do not take proceedings respecting antecedent matters within a year from the date of the commencement of the Act. Section 74 (b), therefore, said the learned Judges, did not save litigation started after 1st October 1933. This ruling was followed by the Patna High Court in — *Shazad Khan v. Darbar Babu Kuchhi*, 15 Pat 310: AIR 1937 Pat 16, wherein it was held that S. 74 (b) of the Act saves only pending suits. Mr. Motilal Gupta places reliance on these rulings.

(14) In — *Dhanmal Parshotam Das v. Babu Ram Chhote Lal*, 58 All 495: AIR 1936 All 3, Justice Bennet followed — *Surendra Nath v. Monohar*, 62 Cal 213 but Sulaiman C. J. differed from him. The Full Bench of the Rangoon High Court in — *Soonoiram Ramniranjan Das v. Junjilal*, AIR 1932 Rang 273 (FB) supported the views of Sulaiman C. J. In — *Revappa Nandappa v. Babu Siddappa*, AIR 1939 Bom 61, Beaumont C. J. delivering the judgment of the Division Bench, and, commenting on the Calcutta case, observed as follows:

"In '62 Cal 213', which the learned Judge in lower Court followed, a Division Bench of the Calcutta High Court held that S. 74 did not take out of the operation of S. 69, a suit to enforce a right accrued before S. 69 came into operation. The Court took the view that inasmuch as the Legislature had postponed the operation of S. 69 for a year they must have intended the section to have retrospective effect when it came into operation. I agree that one may feel a doubt as to whether the Legislature really intended S. 74 to operate to save a suit which was barred by S. 69. It certainly looks as if the Legislature had intended to give unregistered firm one year in which to effect registration and one would have expected that if they did not avail themselves of the opportunity given to them they would have to suffer the consequences.

But, in my opinion, where the words of a section in a Statute are plain the court must give effect to them, and is not justified in depriving the words of their only proper meaning in order to give effect to some intention which the court imputes to the Legislature from other provisions of the Act. Such a course can only be justified where a literal construction of the section is inconsistent with the meaning of the Statute as a whole, and in my opinion no such case exists here."

(15) In — *Ram Gopal Srinivas v. Net Ram*, AIR 1941 All 178: ILR (1941) All 311: 1941 All L.J. 107 a Division Bench of the Allahabad High Court followed Sulaiman's views and disapproved those of Bennet J. expressed in — *Danmal Parshotam Das v. Babu Ram Chhote*



Lal', 58 All 495: AIR 1936 All 3. The Division Bench held that S. 74 (b) relates to those legal proceedings or remedies which were open to a party in respect of any right, title, interest, obligation or liability which had already been acquired, accrued or incurred before the commencement of the Act and that section does not limit the exemption from the operation of S. 69 only to pending proceedings. I may say that I am in respectful concurrence with these views.

(16) If, then, S. 69 (2) cannot be held to have retrospective operation, it ought to be held that S. 73 saves not only the rights but also the suits to enforce those rights. It not only saves the rights which accrued before the commencement of the Partnership Act but also those rights which accrued before the date when S. 69 came into force. In — 'Lokram Das Chatomal Firm v. Tharumal', ILR (1939) Kar 765: AIR 1939 Sind 206 a suit by an unregistered firm for rent due upto October 1933 was held to have been saved by section 74. A similar view was adopted by the Nagpur High Court in — 'Hiralal Gulab Chand Shop v. Amar chand Kisanlal Shop', ILR (1940) Nag 170: AIR 1940 Nag 137 wherein it was held that where part of the suit related to a cause of action which arose after the Partnership Act came into force but before S. 69 came into operation the whole suit is taken out of operation of S. 69 by S. 74 of the Partnership Act. In — 'Gurdinomal Chandumal v. Usto Muhammad Hayat', AIR 1943 Sind 26: ILR (1942) Kar 442 also it was laid down that S. 74 of the Indian Partnership Act saves those rights which accrued before 1st October 1933 i.e., before the date when S. 69 came into force.

(17) Keeping in mind the great weight of authority and agreeing with the principle enunciated in these rulings, I hold that S. 73 of the Madhya Bharat Partnership Act saves those rights which were acquired or had accrued prior to the coming into force of S. 69 and that S. 73 saves all legal proceedings or remedies in respect of such rights. In this view of the matter the suit in the Court below was maintainable and I dismiss the revision with costs. A/V.R.B. Revision dismissed.

**A.I.R. 1953 M. B. 45 (Vol. 40, C. N. 22)**  
(GWALIOR BENCH)

**DIXIT AND CHATURVEDI JJ.**

Laxmi Kumar, Applicant v. Jamunadas and others, Non-Applicants.

Civil Misc. Appln. No. 43 of 1951, D/- 18-7-1952.

**Constitution of India, Art. 133 (1) — "Final order" and "decree" — Meaning of — (Civil P. C. (1908) Ss. 2 (2), 109).**

After the sale of the mortgaged property, the decree-holder applied to the executing Court for the sale of a house and a shop situated in Sarafa Lashkar alleging that the decree in his favour contained a direction that if the proceeds of the sale of the mortgaged property were insufficient to satisfy the decree, the deficient amount shall be realisable from the house and shop in Sarafa Lashkar and that the decree had remained unsatisfied even after the sale of the mortgaged property. When a proclamation of the sale of the property situated

in Sarafa Lashkar was issued, the applicant came forward and objected to the sale claiming that he was a bona fide purchaser of the property in Sarafa Lashkar from the judgment-debtor; that the decree did not create a charge on the property and consequently it was not liable to be sold in execution of the decree. The court executing the decree rejected the applicant's contention that no charge was created by the decree against the property situated in Sarafa Lashkar. The applicant then came up in appeal to the High Court. The appeal was rejected by the High Court. The High Court held that the decree created a charge on the property situated in Sarafa and directed the executing court to decide the other objections of the applicant, namely, that the charge was not enforceable against him as he was a bona fide transferee for value without notice of the charge and the objection that as the sale proceeds of the mortgaged property were sufficient to satisfy the decree, the contingency contemplated in the decree for enforcing the charge had not arisen.

Held that the order which was passed by the High Court was on the face of it, not a final order. The order did not put an end to all the points in dispute between the parties about the sale of the property. The order was not also a decree and consequently the leave to appeal could not be given. Case law rel. on. (Paras 2, 3)

Anno: C. P. C. S. 2 (2) N. 7. S. 109 N. 3, "Shiv Dayal, for Applicant.

**REFERENCES:** Courtwar/Chronological/ Paras

('20) 47 Ind App 124: AIR 1920 PC 86	2
('33) 60 Ind App 76: AIR 1933 PC 58	2
('47) 1947 FCR 180: AIR 1949 FC 1:	
49 Cri LJ 625	2
('50) AIR 1950 FC 77: (1949 FCR 842)	2
('51) AIR 1951 Assam 73: (55 Cal WN 219)	2
('51) AIR 1951 Cal 300: (86 Cal LJ 324)	2
('51) AIR 1951 Mad 1051: (1951-2 Mad LJ 479)	2

**DIXIT J.:** This is an application for leave to appeal to the Supreme Court from an order of a Division Bench of this Court dated 9-7-51, passed in an appeal arising out of execution proceedings of a mortgage-decree. After the sale of the mortgaged property, the decree-holder applied to the executing Court for the sale of a house and a shop situated in Sarafa Lashkar alleging that the decree in his favour contained a direction that if the proceeds of the sale of the mortgaged property were insufficient to satisfy the decree, the deficient amount shall be realisable from the house and shop in Sarafa Lashkar and that the decree has remained unsatisfied even after the sale of the mortgaged property. When a proclamation of the sale of the property situated in Sarafa Lashkar was issued, the applicant came forward and objected to the sale claiming that he was a bona fide purchaser of the property in Sarafa Lashkar from the judgment-debtor; that the decree did not create a charge on the property and consequently it was not liable to be sold in execution of the decree.

The Court executing the decree rejected the applicant's contention that no charge was created by the decree against the property situated in Sarafa Lashkar. The applicant then came up in appeal to this Court. The appeal



was rejected by this Court. We held that the decree created a charge on the property situated in Sarafa and directed the executing court to decide the other objections of the applicant, namely, that the charge was not enforceable against him as he was a bona fide transferee for value without notice of the charge and the objection that as the sale proceeds of the mortgaged property were sufficient to satisfy the decree, the contingency contemplated in the decree for enforcing the charge had not arisen.

(2) We have heard Mr. Shiv Dayal in support of this application and in our opinion, it must be rejected. The applicant seeks leave to appeal under Article 133 of the Constitution of India. Sub-clause 1 of this Article states that an appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India, if the High Court gives the certificate of the nature indicated in that sub-clause. The order which was passed by this Court on 9-7-51 is on the face of it, not a final order. While holding that the decree created a charge, this Court directed the executing Court to determine the other objections of the applicant as regards the enforceability of the charge and thus decide the question whether the property situated in Sarafa Lashkar could or could not be sold in execution of the decree. Our order did not put an end to all the points in dispute between the parties about the sale of the property. It was, therefore, not a final order. The question as to what is a "final order" for the purposes of section 109 C. P. C. and section 205 of the Government of India Act, 1935, has been considered in a number of cases. In — 'Mohammad Amin Brothers Ltd. v. Dominion of India', AIR 1950 F C 77, the Federal Court observed:

"The expression 'final order' in section 205, Government of India Act, has been used in contradistinction to what is known as 'interlocutory order' and the essential test to distinguish the one from the other has been discussed and formulated in several cases decided by the Judicial Committee. All the relevant authorities bearing on the question have been reviewed by this Court in their recent pronouncement in — 'S. Kuppuswami Rao v. The King', 1947 F.C.R. 180; A I R 1949 FC 1: 49 Cri L J 625 and the law on the point, so far as the Court is concerned, seems to be well settled. In full agreement with the decision of the Judicial Committee in — 'Firm Ram Chandra Manjimal v. Firm Govardhan Das Vishidas', 47 Ind App 124: AIR 1920 PC 86 and — 'Abdul Rahman v. D. K. Cassim and Sons', 60 Ind App 76: AIR 1933 PC 58, & the authorities of the English Courts upon which the pronouncements were based, it has been held by this court that the test for determining the finality of an order is whether the judgment or order finally disposed of the rights of the parties. To quote the language of Sir George Lownes in — 'Abdul Rahman v. D. K. Cassim and Sons', 60 Ind App 76: AIR 1933 PC 58 the finality must be a finality in relation to the suit. If after the order, the suit is still a live suit in which the rights of the parties have still to be determined, no appeal lies against it. The fact that the order decides an important and even a vital issue is, by itself, not material. If the decision on an issue puts an end to the suit, the order will undoubtedly be a final one, but if the suit is still left

alive and has got to be tried in the ordinary way, no finality could attach to the order."

These observations apply with equal force in the construction of the expression 'final order' as used in Article 133. Very recently, the High Courts of Calcutta, Madras and Assam considered the meaning of the words 'final order' for the purposes of Article 133 and following the Federal Court decision reported in — 'AIR 1950 FC 77' held that the finality of the order under Article 133 must be in relation to the suit, that is, it must put an end to the suit altogether. An order of remand cannot be described as a final order and, therefore no appeal lies from it to the Supreme Court under Article 133. The Calcutta case — 'Chandra Singh v. Midnapore Zamindari Co. Ltd.', AIR 1951 Cal 300, related to an order of remand in suit; but in — 'Sindhuram v. Krishna', A I R 1951 Assam 73, the Court held that an order deciding that an application for delivery of possession in execution of a decree for possession was not time-barred and remanding the case to the Court below for disposal of the application according to law was not a 'final order' within the meaning of Article 133. The decision reported in — 'Ramaswami Chettiar v. Official Receiver Ramanathapuram at Madurai', AIR 1951 Mad 1051 also lays down that if the High Court finds that the petition for execution of the decree was in time and remands the case to the subordinate Judge to take steps in furtherance of execution, then such an order is not a 'final order' from which leave to appeal can be granted under Article 133. It is unnecessary to dwell further on the question as the learned counsel for the applicant conceded before us that the order dated 9-7-51 of this Court was not a final order.

(3) The principal ground on which he sought leave to appeal was that the order passed by the Division Bench must be regarded as a "decree". In our opinion, there is no force in this contention. The expression "decree" as defined in section 2 (2) C. P. C. means the formal expression of an adjudication which so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. It is clear from this definition that an order can be a 'decree' only if it conclusively determines the rights of the parties and not when it merely determines an incidental question. An interlocutory order in the course of execution proceedings which decides, for instance a point of law arising incidentally is not a decree within the meaning of section 2 (2) C. P. Code. The dispute between the parties in the present case was whether the property situated in Sarafa Lashkar could be sold in execution of the decree. The lower Court held that the decree created a charge. All that this Court held was that the executing Court was right in holding that the decree created a charge. But after the order dated 9-7-51 the questions whether the charge is enforceable and the property situated in Sarafa Lashkar can be sold are still to be determined. We, no doubt, decided an important and vital issue. But the question which was determined did not conclusively decide the rights of the parties with regard to the matter in controversy between them, namely, whether the property could be sold to realise the balance of the amount due on the decree. These rights can be said to be conclusively determined only when after hearing all the objections of the applicant



the lower Court decides one way or the other about the decree-holder's petition to realise the balance of the amount due on the decree by the sale of the property situated in Sarafa Lashkar. The rights have not been conclusively determined so far. For these reasons, we have no hesitation in holding that the order dated 9-7-51 of this court is not a decree and consequently the leave to appeal cannot be given.

(4) The application is, therefore, rejected.

(5) CHATURVEDI J.: I agree.

A/D.H.

Application rejected.

**A. I. R. 1953 M. B. 47 (Vol. 40, C. N. 23)**

**(INDORE BENCH)**

**CHATURVEDI J.**

Rajaram Parashram, Applicant v. Madhav Murar and others, Opponents.

Civil Revn. No. 296 of 1951, D/- 1-4-1952.

**Stamp Act (1899) S. 2(15) — Partition suit — Compromise decree — Decree drawn on plain paper — Reopening of case — (Civil P.C. (1908) O. 20 R. 18 and O. 23 R. 3).**

Where a Court has drawn up a partition decree without the proper stamp, it should be deemed that there is definitely a decree but not a decree that can be acted upon until proper stamp is supplied, but the decree can be validated by the addition of the proper stamp and therefore it cannot be said that there is no decree at all in the sense that that decree is merely a piece of waste paper which cannot be validated by the addition of the stamp unless the presiding officer re-signs the decree after it is stamped. Therefore in a partition suit once a compromise decree is passed though it may be drawn up on plain paper, the litigation terminates and the case cannot be reopened. AIR 1938 Mad. 307 Dissent from, AIR 1942 Lah. 260 (FB) and 7 Ind Cas 94 (Cal.) Rel. upon.

(Paras 6 & 8)

Anno: Stamp Act S. 2(15) N. 15 Pts 13 to 16.

S. R. Joshi, for Applicant; S. D. Sanghi, for Opponents.

**REFERENCES:** Courtwar/Chronological/ Paras

- |  |         |
|--|---------|
| (29) 56 Ind App 379: 7 Rang 624:               |         |
| AIR 1929 P. C. 279 (PC)                        | 6       |
| (05) 32 Cal 483                                | 2, 6    |
| (10) 37 Cal 399: (5 Ind Cas 532)               | 7       |
| (10) 14 Cal WN 1101: 7 Ind Cas 94              | 7       |
| (34) 38 Cal WN 1118: AIR 1935 Cal 125          | 8       |
| (42) ILR (1942) Lah 307: AIR 1942 Lah 260 (FB) | 6       |
| (12) 35 Mad 26: (12 Ind Cas 775)               | 4       |
| (38) AIR 1938 Mad 307: (183 Ind Cas 33)        | 4, 7, 8 |
| (33) AIR 1933 Oudh 562: (9 Luck 270 SB)        | 4       |

**ORDER:** This revision arises out of a partition suit which was filed by Madhava opponent No. 1 against his brother Parasram and his sons. Parasram is dead and his four sons are opponents Nos. 2 to 5. His fifth son Rajaram is the petitioner. Rajaram was a minor at the time of institution of the suit. A preliminary decree was passed by the Civil Judge 2nd Class Kasrawad. A Commissioner was appointed for the actual division of the property, but subsequently a compromise was arrived at between the parties and on the basis of this compromise a final decree was drawn up by the Court on plain papers and signed on 31-1-1952. In the executing Court certain objections were taken

to this decree as it was not on stamp and the decree-holder took the decree back and made an application to the trial Court for drawing up of the decree on the stamp papers which were furnished.

The petitioner made an application to the Court that this procedure was wrong, that he had attained majority on the date of compromise but his consent was not taken in the matter; and he also alleged that his elder brother Jagannath had at that date no right to represent him before the Court and to seek leave for compromise which had been granted by the Court on the understanding that the petitioner was a minor. The petitioner maintained that the final decree in a partition suit comes within the definition of an "instrument of partition" in Section 2(15) of the Stamp Act and unless a properly stamped decree was drawn up, the suit for partition must still be considered pending. The Court below overruled the objections and ordered that the decree be drawn on stamp papers. Against this order the petitioner has come to this Court in revision.

(2) Learned counsel for the petitioner places reliance on — 'Jotindra Mohan v. Bejoy Chand', 32 Cal 483, where the Division Bench of the Calcutta High Court at page 491 observed:

"A decree to be operative must, under the Indian Stamp Act, be engrossed on paper as required by that Act, and, until the Judge signs the decree so engrossed it cannot be said that the suit had terminated."

(3) Their Lordships then added:

"Ordinarily the judgment contains the decision as to the rights of the parties and directs what the relief granted is. The decree, which follows, is merely the formal expression of an adjudication arrived at in the judgment. After the judgment is pronounced the parties are not required to do any act to enable the Court to frame and sign the decree and as provided in Section 205, C. P. Code, the decree has retrospective effect and bears the same date as the judgment. But where, as in a suit for partition, the parties are required by law to do a certain act, and the Court cannot frame its decree until such act is performed, the adjudication contained in the judgment does not decide the suit."

(4) In — 'Satyanandam v. Paramkusum Nammayya', AIR 1938 Mad 307, the principle was further elaborated by laying down that a final decree for partition has no existence as a decree until it is engrossed on proper non-judicial stamp paper. It was added that the decree and the proceedings taken thereunder cannot become validated with retrospective effect on the production of the proper non-judicial stamp. In — 'Muzaffar Husain v. Sharafat Husain', AIR 1933 Oudh 562 (S.B.), a Special Bench of the Oudh Chief Court following — 'Thiruvengadathan Aiyar v. Mangayya', 35 Mad 26 held that a decree passed on the basis of the compromise filed by the parties in a partition suit which has the effect of allotting specific portions of property to the parties is an "instrument of partition" within the meaning of Section 2(15) and must be stamped as required under Schedule 1, Article 45 of the Indian Stamp Act.

(5) On the basis of these rulings Mr. Joshi strenuously argues that the omission to write



the decree on the stamped paper could not be condoned, and accordingly the final decree ought to have been taken to be non-existing on the date the application was made by the petitioner, and, that, under these circumstances, it was incumbent on the trial Court to have instituted an inquiry into the allegations of the petitioners and to have determined the question whether the petitioner was minor or major on the date when a compromise was arrived at by the parties in the case.

(6) The principle laid down in — *Jotindra Mohan v. Bejoy Chand*, 32 Cal 483, in my opinion, should be confined to the facts of that case. In that case a preliminary decree was drawn up and the order was passed confirming the report made by the Commissioner but a final decree was not drawn up. On the other hand, the Court had refused to draw up a final decree and all that their Lordships of the Calcutta High Court decided was that until a properly stamped decree was drawn up, the suit for partition must still be considered pending; and if a suit remains pending an order directing a party to be added can be made in such a case before it has actually terminated.

It will be seen that on facts that case can be distinguished from the present case where a final decree had been drawn up though on plain papers. Their Lordships of the Calcutta High Court had not expressed any opinion on the point: where in a case a final decree is already drawn up on plain paper can it still be considered to be a pending litigation? This question had been raised in — *Gopi Mal v. Vidya Wanti*, ILR (1942) Lah 307; AIR 1942 Lahore 260 (FB) and the Full Bench of the Punjab High Court after discussing the case-law on the point and on the basis of the principle enunciated by the Privy Council in — *Ma Pwa May v. Chettiar Firm*, 56 Ind. App. 379; 7 Rang 624; AIR 1929 P. C. 279 came to the conclusion that where a Court has drawn up a partition decree without the proper stamp there is no lack of inherent jurisdiction, though there might be an irregularity or illegality in the exercise of jurisdiction and therefore it cannot be said that there is no decree in existence at all.

The Full Bench therefore held that in such case it should be deemed that there is definitely a decree but not a decree that can be acted upon until proper stamp is supplied, but the decree can be validated by the addition of the proper stamp and therefore it cannot be said that there is no decree at all in the sense that that decree is merely a piece of waste paper which cannot be validated by the addition of the stamp unless the presiding officer re-signs the decree after it is stamped. With the greatest respect I concur in this view; as after all drawing up of a final decree on plain papers is only an error of procedure which can afterwards be rectified.

(7) The attention of their Lordships of the Madras High Court in — *Satyanandam v. Paramkusum Nammayya*, AIR 1938 Mad 307 does not seem to have been directed to this aspect of the question or to the three rulings of the Calcutta High Court. In — *Rafiuddin v. Latif Ahmed*, 14 Cal W N 1101; 7 Ind. Cas. 94 a final decree for partition had been drawn up on a Court-fee stamp instead of a non-judicial stamp and it was not until the decree had been appealed from and was sought to be

executed that the mistake was discovered. The Division Bench held that on the plaintiff's depositing a non-judicial stamp paper in the appellate Court and on the proper entries being made thereupon, the decree would be validated with retrospective effect from the date when it was drawn up. In giving their direction as to how the defect should be remedied the learned Judges said:

"We therefore direct the plaintiff petitioner to file a non-judicial stamp of the value of Rs. 100/- this will be defaced, and the cause title and names of the parties in the Court below will be written on it; it will then be attached to the decree as already drawn up. This, in our opinion, will be sufficient to validate the decree with retrospective effect from the date when it was drawn up on the principle explained by this Court in — *Chhayunnessa Bibi v. Basirar Rahman*, 37 Cal 399."

(8) The same principle was relied upon in — *Jogesh Chandra v. Mohini Mohan*, 38 Cal W N 1118; AIR 1935 Cal 125. Either on principle or on the weight of authority I cannot see my way to follow — *Satyanandam v. Paramkusum Nammayya*, AIR 1938 Mad 307 and with the greatest respect I dissent from the proposition enunciated in it. In my opinion once a compromise decree is passed though it may be drawn up on plain paper, the litigation terminates and the case cannot be re-opened. In this view of the matter the decision of the Court below does not warrant any interference. The petitioner can resort to remedies provided by law for assailing the decree in case he is disposed to do so. The revision fails and is dismissed with costs.

A/V.R.B.

Revision dismissed.

**A. I. R. 1953 M. B. 48 (Vol. 40, C. N. 24)**

**(GWALIOR BENCH)**

**DIXIT J.**

Roshan Singh, Applicant v. Chiranjilal, Non-Applicant.

Civil Revn. No. 218 of 1951, D/- 31-3-1952.

**Civil P.C. (1908) O. 16, R. 1 — It is not obligatory on party to accompany process-server.**

There is no provision in the C. P. Code casting an obligation on the parties to accompany the process-server for having the summonses served on their witnesses. It is the duty of the process-server to serve the summonses and if he fails to do so, parties cannot be punished for his negligence, by saddling them with adjournment costs of the opposite parties and directing them to bring their witnesses with them on the next day of hearing.

(Para 2)

Anno: C.P.C. O. 16 R. 1 N. 2.

Jagannath Prasad Gupta, for Applicant;  
Ram Krishna Dixit, for Non-Applicant.

**REFERENCE** ..... /Para  
(51) Civil Revn. No. 148 of 1951 (Madh-B) 2

**ORDER:** This is a revision petition from an order of the Civil Judge Second Class, Ambah abating the applicant's right to the issue of summonses to his witnesses on the ground that the applicant had failed to accompany the process-server for the service of the summonses on the witnesses and directing the applicant to produce his witnesses in the Court on the next day of hearing and to pay Rs 4/- as adjournment costs to the non-applicant.



(2) The order of the trial Court is clearly illegal and in utter disregard of Order 16, Rule 1. I have had occasion to point out in — 'Panalwan Singh v. Mahadevi', Civil Revn. No. 148 of 1951, that there is no provision in the C. P. Code casting an obligation on the parties to accompany the process-server for having the summonses served on their witnesses. It is the duty of the process-server to serve the summonses and if he fails to do so, parties cannot be punished for his negligence. In the present case the summonses had been issued to the applicant's witnesses and the process-server returned them unserved with the remark that the applicant did not accompany him for effecting the service. In these circumstances, the trial Court was not justified in giving any adjournment costs to the non-applicant and directing the applicant to bring his witnesses with him on the next date of hearing.

(3) For the above reasons I accept this revision petition and set aside the order of the lower Court with the direction that the applicant's witnesses be summoned and the case be disposed of in accordance with law.

(4) I must observe that the revision petition No. 148 of 1951 was also from an order of the Civil Judge Second Class, Ambah and it appears to me that the learned Civil Judge has disregarded altogether the decision of this Court in that revision petition and passed the illegal order which is now under revision. The learned Civil Judge is warned that in future such flagrant disregard of the decision of this Court will not be lightly overlooked by this Court.

(5) In the circumstances of the case, there will be no order as to costs of this petition.  
B/R.G.D. Revision allowed.

**A. I. R. 1953 M. B. 49 (Vol. 40, C. N. 25)**  
**(INDORE BENCH)**

DIXIT J.

Nathudas Narsinghdas and others, Applicants v. State.

Criminal Revn. No. 127 of 1951, D/- 18-2-1952.

**Criminal P.C. (1898) Ss. 342 and 439 — Nature of examination contemplated by section — Non-compliance of — Effect.**

Under S. 342 Criminal P.C., a Magistrate is not competent to question the accused regarding any fact which does not appear in the prosecution evidence against him, and if he does, both the question and the answer to it must be disregarded.

(Para 3)

The accused were prosecuted for abducting one J on the night of 2-1-1951 with intent that she may be compelled to marry one G. The charge framed against them also mentioned 2-1-1951 as the date of the occurrence. The Magistrate while examining the accused under S. 342, Criminal P.C. put to each of the accused the following question: 'Whether he along with his companions forcibly removed J on 6-1-1951 from the house of K with intent to take her to L for compelling her to marry G.'

Each of the accused gave very general answers denying any knowledge and also denying that they removed J or were taking her to L. There was nothing in these answers to suggest that they were well aware of the fact that the Magistrate was really questioning them as regards the circumstances of the incident of 2nd

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January 1951 appearing in evidence against them and that their denial was about these circumstances:

Held that the question put to each of the accused did not relate to the alleged offence of 2-1-1951 and therefore it must be presumed that the accused were not examined at all as regards the circumstances connected with the offence of 2-1-1951. The accused were, therefore, prejudiced in their defence by the failure of the Magistrate to give them an opportunity to explain the circumstances appearing against them in the evidence with the result that the trial was vitiated: AIR 1951 SC 441 Applied.

(Para 3)

Held further that as the investigation of the case was perfunctory and as the prosecution evidence was lacking in details no useful purpose would be served by ordering a retrial.

(Para 4)

Anno: Cr. P.C. S. 342 N. 14, 35; S. 439 N. 25a. D. C. Bharucha, for Applicants; Govt. Advocate, for the State.

**REFERENCE .....**

(51) AIR 1951 SC 441: (52 Cri LJ 1491 SC) 3

**ORDER:** The five applicants before me Nathudas, Harisingh Nirbhayasing, Nathudas s/o Tuisidas and Gopaldas have been convicted by the Additional District Magistrate of Mand-saur for an offence under Section 366, I. P. C. and sentenced to four years' rigorous imprisonment each. Their appeal against their convictions and sentences was dismissed by the Sessions Judge, Mand-saur. The accused persons have now preferred the petition to revise the decisions of the Courts below.

(2) Before me the conviction of the applicants is challenged on the ground that the examination of the accused persons under Section 342 of the Code of Criminal Procedure was contrary to law. It was said that the applicants were prosecuted for having abducted one Musamat Janibai aged 30 years on the night intervening between the 2nd of January and 3rd of January 1951 with intent that she may be compelled to marry one Gopaldas, and that the charge framed against the applicants also mentioned that the alleged incident took place on the night of 2nd January 1951; but that the Magistrate put to each of the accused the question viz., whether he along with his companions forcibly removed Janibai on 6th January 1951 from the house of Jagannath. It was argued that as the accused persons were never asked to explain the circumstances appearing in the prosecution evidence relating to the alleged incident on 2nd January 1951, they could not be convicted under S. 366, I. P. C. in respect of the incident of 2nd January 1951. The learned Government Advocate concedes, and it is also clear from the record that in the questions put by the Magistrate to the accused persons, the date of the occurrence has been mentioned as 6th January 1951. But it is contended by the learned Government Advocate that this is an error which has not caused any failure of justice and that in view of the provisions of Sections 225 and 547, Criminal Procedure Code, the convictions of the applicant cannot be set aside solely on the ground of this error.

(3) In my opinion, there is considerable justification in the criticism made by the learned counsel for the applicants that the accused persons had no opportunity of explaining the circumstances relating to the alleged offence of 2nd January 1951 with which they were charged.



The provisions of Section 342, Criminal P. C. are mandatory and under these provisions the Court must question the accused after the examination-in-chief, cross examination and re-examination of the witnesses for the prosecution, with a view to enable him to explain the circumstances appearing in the evidence against him. Under sub-section (3) of Section 342 the answers given by the accused may be taken into consideration by the Court. The nature and importance of the examination of the accused under Section 342 of the Criminal P. C. has very recently been stressed by the Supreme Court in — '*Tarasingh v. State*', AIR 1951 S. C. 441. It has been observed in that case that Section 342, Cr. P. Code requires that the accused should be examined for the purpose of enabling him "to explain any circumstances appearing in the evidence against him" and that if the accused is not questioned at all and is not given an opportunity of explaining the circumstances which are intended to be used against him, then the judgment convicting him is defective. It has also been pointed out in that decision that every error or omission in the examination of the accused under section 342 would not necessarily vitiate the trial, unless by that error prejudice has been occasioned or is likely to have been occasioned to the accused.

It is thus clear that the Magistrate is not competent to question the accused regarding any fact which does not appear in the prosecution evidence against him, and if he does, both the question & the answer to it must be disregarded. In the present case the question that was put to each of the accused applicant was whether on 6th of January 1951, he along with other accused persons forcibly removed Janibai from the house of Jagannath with the intention of taking her to Lasudiya and compelling her to marry Gopaldas. This question on the face of it does not relate to the alleged offence of 2nd January 1951 about which the prosecution tendered evidence. The main question for determination in this case is whether if the reference to the date in the questions put by the Magistrate was an error, the applicants understood it to be so, and gave in fact explanations relating to the circumstances about the offence on 2nd January 1951 with which they were charged. This must be determined by the replies which the accused persons gave to the questions put to them in the examination under Section 342, Criminal Procedure Code. Each of the accused-applicants gave very general answers denying any knowledge and also denying that they removed Janibai or were taking her to Lasudiya. There is nothing in these answers to suggest that they were well aware of the fact that the Magistrate was really questioning them as regards the circumstances of the incident of 2nd January 1951 appearing in evidence against them and that their denial was about these circumstances. That being so, I think it must be presumed that the applicants were not examined at all as regards the circumstances connected with the alleged offence on 2nd January 1951, and that they have been prejudiced by failure of the Magistrate to give them an opportunity to explain the circumstances appearing in the prosecution evidence against them. The learned Sessions Judge has observed that by this error no prejudice has been caused to the applicants in their defence. In making this observation, I think the learned Judge has failed to con-

ceive the possibility that the accused might have set up a plea of alibi in regard to the alleged occurrence on 2nd January 1951.

(4) The next question for consideration is whether a retrial of the accused persons should be directed. Counsel for the applicant maintains that in view of the fact that the applicants have already served 9 months' rigorous imprisonment and also of the fact that there are many serious defects in the prosecution case, it would not be in the interests of justice to direct a retrial of the applicants. I am inclined to agree with this submission. It appears to me on a careful consideration of the material on the record that the investigation in this case, has been so perfunctory and the evidence of Janibai and other prosecution witnesses is so lacking in details as to the specific acts of each of the accused persons and the intention with which she was alleged to have been abducted by them, that I do not think any useful purpose will be served by ordering a retrial.

(5) For the above reasons I accept the revision-petition and quash the convictions and sentences imposed upon the applicants. They shall be set at liberty forthwith.

B/K.S.

Accused acquitted.

**A. I. R. 1953 M. B. 50 (Vol. 40, C. N. 26)**  
**(GWALIOR BENCH)**

**SHINDE AND DIXIT JJ.**

M/s. Ramprasad Ramnarayan, Applicants v. M/s. Harischandra Dwarkadas, Opponents.  
Civil Revn. No. 156 of 1950, D/- 7-1-1952.

(a) **Civil P. C. (1908), S. 115 — 'Case' — Interlocutory order.**

The word 'case' used in Section 115 is not identical with the word 'suit' but is used in a wider sense so as to cover even interlocutory orders, and the High Court has jurisdiction to entertain revisions against interlocutory orders. Case law discussed.

(Paras 1, 3)

Anno: C. P. C., S. 115 N. 4, 5.

(b) **Civil P. C. (1908), S. 115 — Question relating to onus of proof.**

Per Shinde J.: If the procedure laid down in Order 14 is not followed by the lower court, it may be said that the court acted illegally or with material irregularity in the exercise of its jurisdiction. A revision can be entertained touching the question relating to the onus of proof when it depends upon the correct framing of an issue. Case law discussed. (Para 6)

Per Dixit J.: As to the question in what cases the High Court should interfere in revision with an order of the trial court wrongly placing the onus of proof, it is clearly difficult to formulate any rigid rule. The order of the subordinate Court placing the onus of proof can be interfered in revision if the court in placing the burden of proof has acted illegally, or with material irregularity. (Paras 8, 9)

Anno: C. P. C., S. 115 N. 12.

(c) **Civil P. C. (1908), S. 115 — Exercise of jurisdiction illegally or with material irregularity.**

Where the law has prescribed the manner in which a court shall exercise its jurisdiction and the court acts in disregard of those provisions, it acts illegally or irregularly in the exercise of jurisdiction. But where the court exercises its jurisdiction in the manner prescribed but arrives at a conclusion or decision which is erroneous in law or fact it does not act illegally or with



material irregularity. Case law rel. on.  
(Para 4)

Anno: C.P.C., S. 115 N. 12, 13.

Bhagwandas Gupta, for Applicants; Shivdayal, for Opponents.

REFERENCES: Courtwar/Chronological/ Paras

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| ('35) 57 All 678: (AIR 1935 PC 185)              | 1    |
| ('49) AIR 1949 PC 156: (ILR (1950) Mad 1 PC)     | 4, 8 |
| ('40) ILR (1940) All 564: (AIR 1940 All 448)     | 1    |
| ('48) AIR 1948 All 288: (ILR (1948) All 337)     | 1    |
| ('49) AIR 1949 All 744: (1949 All LJ 216)        | 4    |
| ('50) AIR 1950 All 144: (1949 All LJ 439)        | 4    |
| ('27) AIR 1927 Bom 664: (101 Ind Cas 385)        | 2    |
| ('32) AIR 1932 Bom 81: (135 Ind Cas 815)         | 2    |
| ('37) AIR 1937 Bom 167: (ILR (1937) Bom 623)     | 2    |
| ('41) AIR 1941 Bom 361: (ILR (1941) Bom 658)     | 2    |
| ('40) AIR 1940 Cal 92: (ILR (1939) 2 Cal 378)    | 2    |
| ('24) 5 Lah 288: (AIR 1924 Lah 425 FB)           | 1    |
| ('43) AIR 1943 Lah 65: (ILR (1943) Lah 257 FB)   | 1, 8 |
| ('39) AIR 1939 Mad 644: (1939-1 Mad LJ 334)      | 8    |
| ('49) AIR 1949 Mad 369: (1948-2 Mad LJ 362)      | 2    |
| ('48) AIR 1948 Nag 258: (ILR (1948) Nag 16 FB)   | 1, 4 |
| ('49) AIR 1949 Orissa 77: (ILR (1949) 1 Cut 105) | 2    |
| ('42) AIR 1942 Oudh 431: (201 Ind Cas 277)       | 1    |
| ('47) AIR 1947 Pat 45: (223 Ind Cas 303)         | 2, 4 |
| ('47) AIR 1947 Pat 469: (26 Pat 393)             | 4, 8 |
| ('49) AIR 1949 Pat 410: (28 Pat 552 FB)          | 4    |

SHINDE J.: This is a reference under section 29 of the High Court of Judicature Act. The learned Judge who made this reference has not specifically mentioned the points in his order of reference. But a perusal of the order shows that the following points have been referred to us: (1) Whether this court has jurisdiction to entertain revisions against interlocutory orders? (2) If the High Court has jurisdiction can a revision be entertained touching the question of onus of proof? Although until recently there had been a sharp difference of opinion with regard to the interpretation of the words 'case decided', the preponderance of opinion is now in favour of the liberal interpretation of the words 'case decided' used in section 115 of the Civil Procedure Code. One group of High Courts like Allahabad, Lucknow, Sind and until recently Lahore favoured a more restricted interpretation of the word 'case'. While the High Courts of Calcutta, Madras, Nagpur, Orissa and Patna have all along favoured a more liberal interpretation of the word 'Case' used in section 115, C. P. C.

Allahabad High Court has, except in very few cases, held the view that the word 'Case' used in section 115 is identical with the word 'suit'. This view is based on the group (sic) that although the word 'case' is more comprehensive than the word 'suit' no instance can be quoted of its use in the Code where it would not at least include a suit and that where the case in which the revisional jurisdiction of the High Court is invoked happens to be also a suit then the suit which requires to be decided before the record is called for. The same view has been taken by Oudh High Court and in some of the earlier cases of Bombay High Court. Lahore High Court also took the same view until the decision of the Full Bench case of — 'Bibi Gurudevi v. Mohammad Bakhsh', reported in AIR 1943 Lah. 65 (FB). The Full Bench dissented from the view taken by an earlier

Full Bench in — 'Lal Chand Mangal Sain v. Beharilal Mehar Chand', 5 Lah 288. Bhide J. who wrote the principal judgment observed as follows:

"If, however, the contention of the learned counsel for the respondents is correct, the High Court cannot interfere during the pendency of a suit even if the errors are gross or palpable, and it is perfectly clear that the final decision will have to be set aside eventually in the interests of justice owing to those errors. It will obviously mean enormous waste of time and money, if errors of this type could not be rectified by the High Court at once and thus the wide powers conferred upon the High Courts by S. 115 will be rendered nugatory to a large extent." Expounding the meaning of the word 'Case' Bhide J. stated as follows:

"The crucial question, therefore, is whether the word 'case' when used with reference to a suit must be taken to mean the 'whole suit' and nothing else as held in — '5 Lah. 288'. The question is primarily that of the meaning to be assigned to the word 'case'. The word is of a very wide import. Its general meaning in legal phraseology according to the Oxford Dictionary is any 'state of facts juridically considered', as already pointed out. This meaning is wide enough to cover decisions on any set of facts which are the subject of controversy between the parties and would thus include 'interlocutory orders'. The learned counsel for the respondents referred to section 33, Civil P. C., in support of his contention that the word 'case' when used with reference to a suit must be taken to mean the 'whole suit' and nothing else. But a reference to other sections of the Code will show that this contention is not sound. For instance, 'judgment' is defined in the Code as a statement given by the Judge of the grounds of a decree or order. 'Order' is defined as the formal expression of any decision of a civil court other than a 'decree'. According to Order 20, rule 4 a judgment of any court other than a court of small causes shall contain a 'concise statement of the case, the points for determination, the decision thereon and the reasons for decision'. When the judgment related to an 'order' (e.g. one of the orders which are appealable under Order 43 and which do not come within the definition of a 'decree'), this will presumably mean the statement of 'case' so far as it relates to the 'order' in question. In other words, in this context, the word 'case' must be taken to mean the particular branch of the case to which the order relates."

This exposition of the word 'case' clearly indicates that the word 'case' used in section 115 is not identical with the word 'suit' but is used in a wider sense so as to cover even interlocutory orders. In — 'Narayan Sonaji v. Sheshrao Vithoba', AIR 1948 Nag 258 the Full Bench of the High Court assigned the same wide meaning to the word 'case decided'. Pandhye J. in the course of his judgment in that case made the following observations:

"The divergence of view can now be said to have been resolved in favour of the liberal interpretation of the word according to which the word 'case' includes interlocutory orders."

In — 'Jagdish Saran v. Bhagwat Saran', ILR (1940) All. 564, their Lordships of the Allaha-



bad High Court held that an order refusing an amendment of plaint in the matter of correct description and array of addition of parties amounts to a case decided within the meaning of section 115 of the Civil Procedure Code and revision lies therefrom. In — *'Atmaram v. Beni Prasad'*, 57 All. 678 (PC), Allahabad High Court held that where an application to join party to a suit was disposed of without proper consideration and on a misapprehension of its nature, a revision lies against that order under section 115, C. P. C. These two decisions of the Allahabad High Court show that there is a distinct tendency to depart from the old view. However, in — *'Prakash Chand v. Mahendra Kumar'*, AIR 1948 All. 288, Malik C. J. observed:

"The order passed by the court below is an interlocutory order and in our view no revision lies against that order."

Oudh High Court has also been following the old view taken by the Allahabad High Court. In — *'Ramchandra v. Birendra Bikram Singh'*, AIR 1942 Oudh 431, Thomas C. J. and Gulam Hassan J. held that where the trial court has framed an issue casting burden of proof upon the plaintiff and refused to accept the plaintiff's application to recast the issue so as to remove burden of proof imposed upon him, no revision against the order of the trial court is entertainable at the instance of the plaintiff on the ground that no case can be said to have been decided by the trial court.

(2) The High Court of Bombay also accepted the narrow interpretation of the word 'case' in some of its earlier cases on the ground that 'case' does not include a branch of a case. Vide — *'Senaji Kapurchand v. Pannaji Devichand'*, AIR 1932 Bom 81 & — *'Isa Adam v. Bai Mariam'*, AIR 1927 Bom. 664. But in a recent case it has favoured liberal interpretation of the word 'case' Vide — *'Municipal Borough of Ahmedabad v. Aryodaya Ginning and Manufacturing Co. Ltd.'*, AIR 1941 Bom. 361 and — *'Jamnadas Vrijlal v. Chandulal Jamnadas'*, AIR 1937 Bom. 167. As already stated the High Courts of Calcutta, Madras, Orissa and Patna have all along held the view that the High Court has jurisdiction to entertain revisions against interlocutory orders. Vide — *'Surpat Singh v. Ratan Chand'*, AIR 1940 Cal 92; — *'Lakshmiddevamma v. Nagayya'*, AIR 1949 Mad 369; — *'Chandra Kishore v. Babulal Agarwala'*, AIR 1949 Orissa 77 and — *'Shiba Prasad v. Nilabji Bali'*, AIR 1947 Pat 45.

(3) From the discussion of the case law above I am clearly of the opinion that the word 'case' used in section 115, C. P. C. is wide enough to include even interlocutory orders. The expression 'judgment' is defined in section 2(9) of the C. P. C. It states that judgment means the statement given by Judge of the grounds of the decree or order. Order 20, rule 4, sub-rule (2) lays down that judgments of courts other than Small Causes shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decisions. It follows, therefore, that even a judgment of an order must contain a concise statement of the case. In this view of the matter it is clear that the word 'case' is not necessarily identical with the word 'suit'. There is nothing in the language of section 115 itself to suggest that the word 'case' is used in a narrow sense. Besides except Allahabad High Court, all the

High Courts in India favour liberal interpretation of the word 'case'. In these circumstances I see no reason to take a different view from that taken by the majority of the High Courts in India. I, therefore, hold that this court has jurisdiction to entertain revisions against interlocutory orders.

(4) Turning now to the question as to whether revision, touching the question of the onus of proof, can be entertained or not, we have to examine whether the language of section 115 allows scope for such interference or not. In this case there is not so much a question of exercising jurisdiction not vested or failure to exercise jurisdiction vested. The question mainly is whether the lower court has acted in the exercise of its jurisdiction illegally or with material irregularity. It has been held that where the law has prescribed the manner in which a court shall exercise its jurisdiction and the court acts in disregard of those provisions, it acts illegally or irregularly in the exercise of jurisdiction. But where the court exercises its jurisdiction in the manner prescribed but arrives at a conclusion or decision which is erroneous in law or fact it does not act illegally or with material irregularity. Vide — *'Lakshmi Shanker v. Rama Kant'*, AIR 1950 All 144; — *'Abdul Majid v. Dalip Singh'*, AIR 1949 All 744; — *'Dominion of India v. Hazari Lal'*, AIR 1949 Pat 410 (FB). In — *'Venkata-giri Ayyangar v. Hindu Religious Endowments Board, Madras'*, AIR 1949 P. C. 156, their Lordships of the Privy Council observed as follows:

"Section 115 applies only to cases in which no appeal lies, and where the legislature has provided no right of appeal, the manifest intention is that the order of the trial court, right or wrong shall be final. The section empowers the High Court to satisfy itself upon three matters, (a) that the order of the subordinate court is within its jurisdiction, (b) that the case is one in which the court ought to exercise jurisdiction; and (c) that in exercising jurisdiction the court has not acted illegally, that is, in breach of some provision of law, or with material irregularity that is, by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision. If the High Court is satisfied upon those matters, it has no powers to interfere because it differs, however, profoundly, from the conclusions of the subordinate courts upon questions of fact or law."

It is clear from this authority that under clause (c) of section 115 the High Court can interfere only when it is satisfied that the lower court in exercising the jurisdiction has acted illegally that is, in breach of some provision of law or with material irregularity, that is, by committing some error of procedure. Unless these conditions are satisfied the High Court cannot interfere in revision under clause (c) of section 115. Although there is a question of burden of proof involved in this case, in fact it is a question relating to the framing of an issue. Plaintiff's grievance is that issue No. 2 should be so framed as to place the burden of proof on the defendant. Hence the real grievance of the plaintiff is that issue No. 2 be reframed. Order 14, rule 1 (1) lays down that issues arise when a material proposition of fact or law is affirmed by one party and denied by the other. Order



14, rule 1(3) states that each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue. If, therefore, the procedure laid down in Order 14 is not followed by the lower court, it may be said that the court acted illegally or with material irregularity in the exercise of its jurisdiction.

In the Full Bench case the Nagpur High Court expressed its opinion on this question as follows:

"The subject of settlement of issues is dealt with in Order 14, C. P. C. and rule 1 (3) of the Order provided that each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue. The material propositions as defined by rule 1 (2) of Order 14 are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence. If a court refused to frame an issue on a material proposition affirmed by one party and denied by the other, it would be guilty of not exercising jurisdiction vested in it by law requiring it at the first hearing of the suit to record issues on which the right decision of the case depends. If on the other hand it framed issues which do not arise out of the material propositions of law or fact affirmed by one party and denied by the other, it would be acting either in excess of its jurisdiction or with material irregularity, and in either case the order of the subordinate court may be open to revision. In fact, by refusing to frame an issue which actually does arise in the case, the court shuts out a trial of a part of his case. In such a case it would be necessary for the High Court to interfere in revision and to set the matter right so as to avoid waste of time and costs." Vide — 'Narayan Sonaji v. Sheshrao Vithoba', AIR 1948 Nag. 258 Para 93.

In — 'Bir Babu v. Raghubar Babu', AIR 1947 Pat. 469 their Lordships of the Patna High Court held that the correct placing of the onus of proof is the vital point of procedure and incorrect placing of onus may, therefore, amount to material irregularity. In — 'Shiba Prasad v. Nilabji Bali', AIR 1947 Pat. 45, Ray, J. held that the provisions of Order 14, rule 5 make it obligatory upon the Judge to frame such issues as are necessary for the purpose of determining the controversy between the parties and if he refuses to frame such issues as are really necessary for determining the controversy he fails to exercise jurisdiction which is vested in him and hence in such a case revision lies against the order refusing to frame issues. Vide 'AIR 1947 Pat. 45'.

(5) For these reasons I am also of the opinion that revision can be entertained touching the question relating to the onus of proof.

(6) My answer to the questions referred, therefore, is (1) that the High Court has jurisdiction to entertain revisions against interlocutory orders and that (2) In this case a revision can be entertained touching the question relating to the onus of proof as it depends upon the correct framing of an issue.

(7) DIXIT J.: This is a reference under section 29 (b) of the Madhya Bharat High Court Act. It arises out of a petition to revise an order of the trial court placing the onus of proof

of one of the issues framed in the suit on the plaintiff-applicant. When the petition came up for hearing before a single Judge of this Court, a preliminary objection was raised on behalf of the defendant non-applicant that the revision petition was incompetent as the order of the trial court regarding the burden of proof was not a 'case decided' within the meaning of section 115 of the C. P. Code and was not, therefore, revisable by this Court. In the order of reference, the learned Single Judge, after referring to the decision of various High Courts regarding the meaning of the expression 'Case decided' and also to the decisions in which the question whether the High Court can revise an order of the trial court framing an issue or refusing to frame an issue has been considered, has expressed the view:

"That a revision petition is competent if a proper case is made out under section 115, C. P. C., as by refusing to frame an issue which does arise in the case, the court shuts out a trial of a part of the case."

(8) The precise question on which this Bench is required to express its opinion has not been formulated in the order of reference, and I must confess that I am unable to gather it from the order of reference. I, however, take it that in the context of the facts of the revision petition, the question which we have to answer is whether an order of the trial court wrongly placing the burden of proof is subject to revision by this Court under section 115, C. P. Code. It is clear from the wording of section 115, C. P. C. that if the order of the trial court regarding the burden of proof of an issue is a case decided within the meaning of that section, then the High Court can clearly interfere in revision, if the trial court has in placing the burden of proof acted illegally, that is, in breach of some provisions of law, or with material irregularity. On the question whether an interlocutory order is covered by the expression 'case decided' there is no doubt a conflict of opinion in the various High Courts. But the majority view, which appears to me, to be the correct view, is that the word "case" as used in section 115 of the Code is wide enough to include an interlocutory order, and the words 'record of any case' include so much of the proceedings as relate to an interlocutory order.

This is the view taken by the Calcutta, Patna, Madras and the former Lahore High Court. In — 'Bibi Gurudevi v. Mohammad Bakhsh', AIR 1943 Lah. 65 (FB), the entire case law on the meaning and scope of the expression "case decided" has been reviewed and it has been held that the word 'case' is wide enough to include an interlocutory order passed in a suit. I do not think I can usefully add anything to the view expressed in — 'AIR 1943 Lah 65 (FB)', with which I am in respectful agreement. As to the question in what cases the High Court should interfere in revision with an order of the trial court wrongly placing the onus of proof, it is clearly difficult to formulate any rigid rule. An order of the trial court regarding the burden of proof is an order of the subordinate court in the exercise of its jurisdiction and as pointed out very recently by the Privy Council in — 'Venkatagiri Ayyangar v. Hindu Religious Endowments Board, Madras', AIR 1949 P. C. 156 an order of the subordinate court made within its jurisdiction can be interfered in revision only if the Court has acted



illegally, that is, in breach of some provisions of law, or with material irregularity, that is, by committing some error of procedure in the course of the trial which is material in that that it affects the ultimate decision. The question, therefore, whether in placing the burden of proof about an issue, the court has acted illegally, or with material irregularity, obviously depends on the facts and circumstances of the case.

If, for example, when a statute specifically puts the burden of proof upon a certain party and the Court puts the burden of proof the other way, the court clearly acts illegally. So also if on the facts and circumstances of the case, the correct placing of the onus of proof is a vital point of procedure, then, incorrect placing of onus may amount to material irregularity. The view that the High Court can, in such circumstances, interfere in revision with an order of the subordinate Court regarding the placing of the onus of proof, is supported by the decisions in — 'Varisai Muhammad Rowther v. Marungapuri Estate', AIR 1939 Mad 644 and — 'Bir Babu v. Raghubar Babu', AIR 1947 Pat. 469. In my opinion, decisions bearing on the question whether the High Court can interfere with an order of the subordinate Court framing an issue or refusing to frame an issue are not relevant to the question before us.

(9) I would, therefore, answer the reference by saying that the order of the subordinate Court placing the onus of proof can be interfered in revision if the court in placing the burden of proof has acted illegally, or with material irregularity.

A/D.H.

Order accordingly.

**A. I. R. 1953 M. B. 54 (Vol. 40, C. N. 27)**  
**(GWALIOR BENCH)**

**DIXIT AND CHATURVEDI JJ.**

Laxman Singh, Applicant v. Raj Pramukh of Madhya Bharat and others, Non-Applicants.  
Civil Misc. Case No. 26 of 1952, D/- 3-10-1952.

**(a) Constitution of India (1950), Art. 226 — Mandamus — Contractual rights — Enforcement of.**

Mandamus or an order in the nature of mandamus will not be issued for the enforcement of a private right. Therefore it cannot be issued for enforcing a right arising out of a contract: AIR 1947 Cal 307 and AIR 1952 Cal 315 Rel. on. (Para 3)

Anno: Civ. P. C., App. III, Art. 226 N. 11.

**(b) Constitution of India (1950), Art. 226 — Mandamus — Writ against executive orders — Injury not shown — Writ will not be issued.**

No doubt, under Article 226 of the Constitution of India, the High Court has jurisdiction to issue an order against even an executive officer who has issued an administrative order in order to safeguard the fundamental rights of a citizen and to prevent injuries being caused to the rights of a citizen by the order. (Para 4)

An order passed by the Jagir Commissioner in exercise of his powers of supervision and control over Jagirdars, and confirmed by the Government in appeal, directing a jagirdar to collect rent from his tenants at the rate fixed when the lands were originally leased out and not according to the enhanced rate agreed by them under renewed leases is an executive order and not a juridical order which determines the question of rent payable by the tenants

to the jagirdars. The order has not effect of ousting the jurisdiction of court in the suits filed by the jagirdar against the tenants for enhanced rent under the renewed leases and it is open to the jagirdar to contend in those suits that the order is not valid and binding on the court if the tenants plead it in defence. If the Government assumes superintendence of the jagir on the ground of the jagirdar's disobedience to its order the latter can always approach the Court and challenge the validity of that order. But a mere apprehension that the Government may assume superintendence is not a ground for issuing the writ of mandamus. Thus against the order which neither infringes nor is likely to infringe any right of the jagirdar, the jagirdar will not be entitled to any relief by way of mandamus or an order in the nature of it either against the Commissioner or the Government. (Para 4)

Anno: Civ. P. C., App. III, Const. of India, Art. 226 N. 7.

**(c) Constitution of India (1950), Arts. 361 and 226 — Applicability — Act of Raj Pramukh done professedly under Constitution — Issue of writ of mandamus.**

The words "purporting to be done" in Article 361 are of very wide scope and even though an act done by the Raj Pramukh is outside or in contravention of the Constitution, if it is one professed to be done under the Constitution, then it would come within the protection of Article 361. AIR 1952 Cal 799 Foll.

No relief by way of a writ under Art. 226 will be available against the Raj Pramukh in respect of these rights. (Para 5)

Anno: Civ. P. C., App. III, Const. of India, Art. 226 N. 7.

**(d) Constitution of India (1950), Art. 226 — Application for writ — Prayer must be specific and precise — General words "as the Court may be pleased to grant such writs as it may think fit" should be avoided: AIR 1952 Cal 601 Rel. on. (Para 6)**

Anno: Civ. P. C., App. III, Const. of India, Art. 226 N. 1.

Anand Bihari Mishra, for Applicant.

**REFERENCES:** Courtwar/Chronological/ Paras  
(47) AIR 1947 Cal 307 3  
(51) 87 Cal LJ 149: (AIR 1952 Cal 315) 3  
(52) 56 Cal WN 651: (AIR 1952 Cal 799) 5  
(52) AIR 1952 Cal 601: (56 Cal WN 232) 6

**DIXIT J.:** This is an application under Art. 226 of the Constitution of India for the issue of writ in the nature of mandamus or any other direction or an order or a writ against the non-applicants declaring an order passed by the Jagir Commissioner on 12-9-50 and affirmed by the Madhya Bharat Government on 14-5-52 as illegal and ultra vires and for an order restraining the non-applicants No. 1 to 3 from taking any action against the applicant in the event of his failure, to comply with those orders.

(2) The petitioner states that he is a Jagirdar of Harsi Jagir; that he was not required under any law to introduce within his jagir either Zamindari or Raiyatwari system of land administration and that, therefore, he had leased out in 1909 lands to the non-applicant-tenants No. 4 to 31 under separate contracts. The petitioner further states that in 1938 these leases were revised and the rents enhanced, and that since the revision of the leases the



tenants paid enhanced rents until 1949. In this year on complaint by the tenants to the Madhya Bharat Government the Jagir Commissioner passed an order directing the applicant to realise the rents according to the pattas issued in 1908 and to refund the tenants the excess amount realised from them since the revision of the rent in 1938. The petitioner then appealed to the Madhya Bharat Government against the said order of the Jagir Commissioner and the order was upheld in appeal.

(3) After hearing Mr. Anand Bihari Misra learned counsel for the applicant, I think this application must be dismissed. In so far as the non-applicant-tenants are concerned, it is clear that the petitioner's right to realise from them rent at a certain rate is based on a contract. If any of the tenants refuses to pay rent according to the contract of tenancy entered by him, the petitioner's obvious remedy is to file a suit for the recovery of rent on the basis of the contract. A writ of mandamus or an order in the nature of mandamus cannot be issued for enforcing a right arising out of a contract. It is well-settled that mandamus or an order in the nature of mandamus will not be issued for the enforcement of a private right. I need only refer to the cases reported in — 'B. K. Banerjee v. Simonds', AIR 1947 Cal 307; — 'Carlsbad Mineral Water Manufacturing Co. Ltd. v. Jagtiani', 87 Cal L J 149. As a matter of fact as the petitioner himself has stated, suits have already been filed by the applicant against the non-applicant-tenants for the recovery of rents at the stipulated rates.

(4) A writ or an order prayed for cannot also be issued against the Raj Pramukh or the Madhya Bharat Government or the Jagir Commissioner. It is not the case of the applicant that the Madhya Bharat Government is empowered under any law to make an order under certain circumstances directing a Jagirdar to realise rents from his tenants at a particular rate and that such an order when passed is a quasi-judicial order. The petitioner also does not allege that the Madhya Bharat Government is bound under some law to see that the tenants of a Jagirdar pay rent to him at the rate agreed to by them, that is, by the tenants. In fact the petitioner says that the non-applicants No. 1 to 3 cannot under any law intervene in any dispute between a Jagirdar and his tenants as regards the rent. The orders complained of are in my opinion, purely executive orders. In the order dated 14-5-52 of the Government by which the Jagir Commissioner's order was maintained it has been distinctly stated that the order passed by the Jagir Commissioner was an administrative order passed by him in exercise of his powers of supervision and control over the Jagirdars. No doubt, under Art. 226 of the Constitution of India this Court has jurisdiction to issue an order against even an executive officer who has issued an administrative order in order to safeguard the fundamental rights of a citizen and to prevent injuries being caused to the rights of a citizen by the order. But then the petitioner has not been able to show that any real injury has already been caused to him or about to be caused by the order of the Government. The orders of the Government and the Jagir Commissioner challenged by the petitioner do not oust the jurisdiction of the subordinate Courts

to determine the rent cases already instituted by the applicant against his tenants. Again, the orders have not the effect of a juridical determination of the question of the rent payable by the tenants to the petitioner. If in the rent-suits filed by the applicant, the tenants plead in defence, the orders of the Jagir Commissioner and the Madhya Bharat Government, it is open to the applicant to say in those suits that the said orders are of no validity and are not binding on the Court. Learned Counsel for the applicant urged that if he does not comply with the orders of the Government his Jagir might be placed under a Court of Wards by the Government. The apprehension that Government might assume the superintendence of the Jagir of the applicant in the event of his failure to obey the orders of the Government, cannot in my opinion, be a good ground for the issue of a writ in favour of the applicant. If and when the Government passes an order placing the management of the Jagir of the applicant under Court of Wards, the petitioner can come up to this Court challenging the validity of that order. At present, no right of the petitioner has been infringed or about to be infringed by the orders of the Government.

(5) The application in so far as it seeks relief against the Raj Pramukh is wholly incompetent. Under Article 361 the Raj Pramukh is not "answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties." It is clear from this Article that it affords complete immunity to the Raj Pramukh not only in respect of the exercise and performance of the powers and duties of the office but also in respect of "any act done or purporting to be done by him" in the exercise or performance of those powers and duties. Learned Counsel for the petitioner sought to argue that as the order dated 14-5-52 passed by the Raj Pramukh as the Head of the Madhya Bharat Government was altogether unauthorised and outside the Constitution, it did not fall within the protection of Article 361. I am unable to accede to this argument. The words "purporting to be done" are of very wide scope and even though the act done is outside or in contravention of the Constitution, but if it is one professed to be done under the Constitution, then it would come within the protection of Article 361. As observed by the Calcutta High Court in a recent case — 'Biman Chandra v. Dr. H. C. Mukerjee', 56 Cal W N 651 dealing with Art. 361 that "if the act is ostensibly done in exercise of the power given under the Constitution and it is not established that the act is done dishonestly or in bad faith or in other words, out of any improper motive, the immunity attaches to the exercise of the power. The protection is intended to be real and not merely illusory." I am in respectful agreement with these observations of the Calcutta High Court with regard to the extent and scope of Art. 361 of the Constitution of India.

(6) Before I conclude I must observe that Counsel making applications under Art. 226 of the Constitution of India would do well to study the nature of the various writs before making the prayer in their applications for the issue of a writ in the nature of mandamus or cer-



tiorari or prohibition or a suitable writ. I fully endorse the observations of Banerjee J. in — 'Union of India v. Elbridge Watson', AIR 1952 Cal 601 by which he protested against prayers being couched in applications under Art. 226 in such general words as the Court may be pleased to grant such writs as it may think fit and said that the prayer must be specific and precise.

(7) For the above reasons, I would dismiss this petition.

(8) CHATURVEDI J.: I agree that the petition be dismissed.

A/M.K.S.

Petition dismissed.

**A. I. R. 1953 M. B. 56 (Vol. 40, C. N. 28)**

**(GWALIOR BENCH)**

**DIXIT AND CHATURVEDI JJ.**

The State v. Kanhiyalal and others, Non-Applicants.

Criminal Ref. No. 35 of 1951, D/- 13-8-1952.

**(a) Criminal P. C. (1898), S. 30 — Magistrate invested with S. 30 powers during pendency of committal proceeding — Notification is not retrospective.**

The difference between the procedure of the trial of a case by a S. 30 Magistrate and the procedure in a case triable by a Sessions Court is not merely procedural but it is one of substance and of such a character that a change from one procedure to the other affects any vested or statutory right. Among other things the difference lies also in the substantive rights of appeal and of being tried by a jury or with the aid of assessors. Such substantive rights vest in an accused person at the date when the criminal proceedings are instituted against him. (Para 3)

Consequently the notification dated 17th May 1950, which did not contain any provision making it retrospective conferring S. 30 powers on certain Magistrates, held was not retrospective in operation. The Magistrate thus invested with S. 30 powers and before whom the committal proceedings in a case were pending must therefore, continue the committal proceedings against the accused and either discharge them or commit them to the Court of Sessions for trial. He himself could not try them exercising S. 30 powers. (Para 5)

Anno: Criminal P. C., S. 30 N. 2.

**(b) Interpretation of Statutes — Retrospective operation — Rule of.**

Every statute which takes away or impairs a vested right acquired under the existing law or creates a new obligation or imposes a new duty or attaches a new disability in respect of transactions or considerations already passed must be presumed to be intended not to have retrospective operation. If there are words in the enactment which either expressly state or necessarily imply that the statute is to be given retrospective operation, then the Act should have retrospective operation even though the consequences may appear unjust and hard. A statute is not to be considered to have greater retrospective operation than its language renders necessary. As no person has a vested right in any course of procedure, alterations in procedure are to be retrospective, unless there is some good reason against it. And the right of appeal is not a mere matter of procedure but is a vested right which inheres in a party from

the commencement of the action in the Court of first instance. (Para 2)

Anno: Civil P. C., Preamble N. 7.

Sheodayal, Deputy Government Advocate, for the State; Hari Har Nivas, for Non-Applicants.

REFERENCES: Courtwar/Chronological/ Paras ('17) AIR 1917 PC 25: (18 Cri LJ 471) 3

('25) 6 Lah 262: (AIR 1925 Lah. 446: 27 Cri LJ 421) 3

('50) Cri. Ref. No. 27 of 1950 (Madh B) 1, 5

('50) AIR 1950 Madh B 112: (1 Madh B LR 229 FB) 2

('50) AIR 1950 Madh B 37: (51 Cri LJ 933 FB) 3

('51) AIR 1951 Madh B 29: (52 Cri LJ 77) 6

('52) ILR (1952) Madh B 15: (AIR 1951 Madh B 1 FB) 2

('43) AIR 1943 Pat 18: (44 Cri LJ 273 FB) 3

DIXIT J.: This case has been referred to this Bench for decision under section 29 (a) of the Madhya Bharat High Court Act of Samvat 2005. The facts are that a challan in respect of an offence under sec. 388, I. P. C., was presented against the non-applicants before the Additional District Magistrate of Gwalior. During the pendency of the committal proceedings the Magistrate was invested with Sec. 30 powers by a notification dated 17th May 1950 which did not contain any provision to make it retrospective and which on the other hand expressly made it effective from 1st June 1950. Thereupon the learned Magistrate instead of continuing the committal proceedings, proceeded to try the accused persons in exercise of his powers under Sec. 30 of the Criminal Procedure Code. An objection was then taken by the prosecution that as the notification investing the Magistrate with Sec. 30 powers was not retrospective the Magistrate had jurisdiction either to commit the accused to the Court of sessions or to discharge them and that he had no authority to try the case as Sec. 30 Magistrate. The objection was overruled by the Magistrate. A revision petition was then filed by the State before the Sessions Judge of Gwalior. The learned Sessions Judge now relying on a decision of Shinde J., (as he then was) in — 'Cri. Reference No. 27 of 1950 (Madh. B.) made a reference to this court recommending that the decision of the Magistrate to try the accused persons in the exercise of Sec. 30 powers is illegal and that he be directed to continue with the committal proceedings. When this case first came up for hearing before my learned brother Chaturvedi, J., he felt some doubt as to the correctness of the view taken by Shinde J., in — 'Cri. Reference No. 27 of 1950', that the notification dated 17th May 1950 investing certain Magistrates with Sec. 30 powers was not retrospective. He, therefore, directed that the case be placed before the Chief Justice for the constitution of a Division Bench for the hearing of the reference made by the Sessions Judge. Accordingly this Bench has been constituted for the disposal of the reference made by the learned Sessions Judge of Gwalior.

(2) The sole point for determination in this case is whether if during the pendency of committal proceedings, the Magistrate holding the proceedings is invested with Sec. 30 powers by a notification, which does not contain any provision to make it retrospective, can the Magistrate instead of continuing with the committal proceedings try the accused in the exercise of sec. 30 powers? The question is fairly simple. The answer to it depends on the inter-



pretation of the notification in question by an application of the well-established principles as regards the retrospective operation of statutes. These principles have been indicated in two Full Bench decisions of this Court, namely, — 'Daulat Singh v. The State', AIR 1950 Madh. B. 112 (FB) and — 'Gulabchand v. Kudilal', ILR (1952) Madh. B. 15 (FB). In these two cases it has been laid down after a review of all the well-known authorities that (1) every statute which takes away or impairs a vested right acquired under the existing law or creates a new obligation or imposes a new duty or attaches a new disability in respect of transactions or considerations already passed must be presumed to be intended not to have retrospective operation; (2) if there are words in the enactment which either expressly state or necessarily imply that the statute is to be given retrospective operation, then the Act should have retrospective operation even though the consequences may appear unjust and hard; (3) a statute is not to be considered to have greater retrospective operation than its language renders necessary; (4) as no person has a vested right in any course of procedure, alterations in procedure are to be retrospective, unless there is some good reason against it; (5) and the right of appeal is not a mere matter of procedure but is a vested right which inheres in a party from the commencement of the action in the Court of first instance.

(3) The principal question which we have to decide is whether the difference between the procedure of the trial of a case by a sec. 30 Magistrate and the procedure in a case triable by a Sessions Court is merely procedural or whether it is one of substance and of such a character that a change from one procedure to the other affects any vested or statutory right. For this purpose it is pertinent to note the difference in the two procedures. A Magistrate exercising sec. 30 powers has to follow the procedure laid down in Chapter XXI of the Code for the trial of warrant cases. An appeal from conviction and sentence by a Sec. 30 Magistrate lies to the Sessions Judge; if the Magistrate passes any sentence of imprisonment for a term exceeding four years, or any sentence of transportation then the appeal of all or any of the accused persons convicted at the trial lies to the High Court. The provisions of the Criminal Procedure Code with regard to cases exclusively triable by a Court of Session are that during the pendency of the magisterial enquiry the accused may be discharged under Sec. 209 and even if a charge is framed against him under Sec. 210, the Magistrate may, under sec. 212 examine the defence witnesses whose names might have been given by the accused in the list under S. 211, and after such examination the Magistrate may under S. 213 (2) cancel the charge and discharge the accused if he is satisfied that there are not sufficient grounds for committing him. If the accused is not discharged either under S. 209 or under S. 213 (2) an order of commitment to the Sessions Court is made, and thereafter the trial takes place either by a jury or with the aid of assessors. An appeal of a person convicted on a trial held by a Sessions Judge lies to the High Court.

It would be seen from these provisions that the difference in the two procedures is not merely in the mode of conducting proceedings in Court. It lies also in the substantive rights

of appeal and of being tried by a jury or with the aid of assessors. That a right of appeal is a substantive right is well settled. That the accused person's right of trial by a jury is a substantive right, is also well established. See. — 'Dalsingh v. King Emperor', AIR 1917 P. C. 25; — 'Emperor v. Fitzmaurice', 6 Lah 262).

It is true that in this State there is no trial by jury and all trials before a Court of Sessions are with the aid of assessors. But it is clear to me that the right of a trial with the aid of assessors is as much a substantive right of an accused person as his right of trial by a jury. In principle there is no difference between a trial by a jury and one with the aid of assessors. A trial without the aid of assessors is altogether void in this State, where no notification under S. 269 has been issued by the Government. There is also no distinction in the procedure at the trial by a jury & one with the aid of assessors except as to the summing up in the case of the former, and the manner in which the verdict of the jury and the opinion of the assessors are taken. In a trial with the aid of assessors the Judge is no doubt the sole Judge of law and fact and the responsibility of the decision rests solely with him. But in reaching the decision the Judge is expected to take into consideration the opinion of each assessor. It is true that in actual experience, as observed by this Court in — 'Manjur v. State', AIR 1950 Madh B 37 (F.B.).

"it is usual to find the assessors no wiser at the end of the trial than at the commencement and they rarely serve any useful purpose save the satisfaction of the judicial conscience in following the provisions of law".

But nonetheless the right of a trial with the aid of assessors is a substantive and statutory right of an accused person, whatever may be its practical utility.

It must be further remembered that in a case triable by a Court of Sessions the accused is entitled to substantive rights such as the right of appeal and the right of trial with the aid of assessors or by a jury, as existed at the time when the criminal proceedings are instituted against him before the committing Magistrate. He cannot be deprived of these rights by giving retrospective effect to the notification under consideration. The view that such substantive rights vest in an accused person at the date when the criminal proceedings are instituted against him is supported by the observations of Fazl Ali J., in — 'Banwari Gope v. Emperor', AIR 1943 Pat 18 (F.B.).

In that case the learned Judge while considering the question whether the Special Criminal Courts Ordinance (2 of 1952) was applicable to those cases in which the criminal proceedings had started before the Ordinance came into force, said

"Now, there can be no doubt that if a party to a civil action is deemed to have a right of appeal vested in him at the date of the institution of the suit, a similar right must be conceded to an accused person at the date when the criminal proceedings are instituted against him. There was some discussion before us as to what was, for the purpose of a criminal prose-



cution the stage corresponding to the institution of a civil suit, but in my opinion upon the authorities as well as upon general principles there can be no doubt that so far as criminal prosecutions are concerned, the corresponding date must be the date when a Magistrate takes cognizance of the offence alleged to have been committed by an accused person, signifying thereby that the accused must be proceeded against for the offence in question ..... It seems to me however to be academic to discuss here what properly speaking is "inquiry" and what is "trial" because all that we have to find in view of the authorities on the subject is when the criminal case was registered or started against the accused person. In my opinion, as soon as the Magistrate takes cognizance of an offence there is a criminal case against the accused person and at that point of time he acquires such right of appeal or revision, as the case may be, as the law confers upon him."

In — 'Emperor v. Fitzmaurice', 6 Lah 262 also it was held that the right of being tried by a jury vested in the accused person at the time of the opening of the proceedings before the Committing Magistrate.

(4) The position then in this case is, that the notification of 17th May 1950 conferring S. 30 powers on certain Magistrates does not contain any words to show that it has been made retrospective, either expressly or by necessary intendment so as to take away such rights as the non-applicants had acquired in the matter of a trial by a Sessions Court before the S. 30 powers conferred on the Magistrates became effective. As the criminal proceedings against the non-applicants had been initiated before the Committing Magistrate long before he was invested with S. 30 powers, it follows he had no authority to drop the committal proceedings and to begin to try the accused persons in the exercise of S. 30 powers because the substituted procedure involved an inroad on the rights of the non-applicants of an unqualified appeal to the High Court from the conviction and sentence by a Court of Session and of a trial with the aid of assessors, which accrued to them at the time of the institution of criminal proceedings against them before the committing Magistrate. On the rules of interpretation to which I have already referred the notification dated 17th May 1950 must be held not to apply to the case of the present non-applicants. In saying that the notification in question does not contain any words to make it retrospective, I should not be taken as saying that if the wording of the notification had been such as to invest the Magistrate with S. 30 powers retrospectively, the notification would be valid. The question whether a notification purporting to invest such powers retrospectively is valid, does not arise in the present case, and I express no opinion on the question.

(5) For the above reasons I find myself in agreement with the view taken by Shinde J., in — 'Crl. Reference No. 27 of 1950' that the notification dated 17th May 1950 conferring S. 30 powers on certain Magistrates, including the one in the instant case, is not retrospective in operation. The Additional Magistrate must therefore, continue the committal proceedings against the non-applicants and either discharge

them or commit them to the Court of Sessions for trial. He himself cannot try them exercising S. 30 powers.

(6) B. K. CHATURVEDI J.: Though the selection of forum relates to the law of procedure, there is some doubt on the point whether the trial by a Court of Sessions, with the aid of assessors, can be claimed to be a substantive right. So far as the right of appeal is concerned I do not find any substantial difference between a trial by S. 30 Magistrate and by court of Sessions if the accused are sentenced to a term of imprisonment exceeding 4 years. In both cases appeals would lie to this court. So the right of appeal cannot be made a criterion in this case. My attention however has been drawn to one of my decisions — 'Brindaban v. State', reported in AIR 1951 Madhya B. 29 wherein I have held that though the assessors are not members of the court of session still it is mandatory that the court would be aided till the conclusion of the trial by at least one assessor attending the trial throughout and giving his opinion. As it is incumbent on the court of sessions to consider the opinion of the assessors, I should be disposed to think that, only on this basis, a trial by a court of Sessions in Madhya Bharat can be held to be a substantive right which the notification dated 17th May 1950 could not have impaired or taken away. In this view of the matter, I agree with the conclusion arrived at by my learned brother.

B/R.G.D.

Order accordingly.

**A. I. R. 1953 M. B. 58 (Vol. 40, C. N. 29)**  
**(GWALIOR BENCH)**

**SHINDE C. J. AND DIXIT J.**

Gangaram, Applicant v. The State.

Civil Misc. Appln. No. 3 of 1951, D/- 29-2-1952.

(a) **Constitution of India, Art. 226 — Petitioner in affidavit stating facts which are false beyond doubt — Petition deserves to be rejected.** AIR 1951 Nag 38; AIR 1951 Nag 16; AIR 1951 All 746; AIR 1952 Cal 72; (1917) 1 KB 486 Rel. on. (Para 4)

(b) **Constitution of India, Art. 226 — Order or direction can be issued only for enforcement of fundamental right or legal right — Unilateral decision of Government to give land on lease to petitioner — No agreement of lease — Petitioner has no present right to the lease of the land — If no lease is granted, no legal right of the petitioner is violated.** (Para 5)

Patankar, for Applicant; Government Advocate, for the State.

REFERENCES: Courtwar/Chronological/ Paras

(51) AIR 1951 All 746: (1951 All LJ 576 FB) 8

(52) AIR 1952 Cal 72: (56 Cal WN 302) 8

(50) Petn. No. 16 of 1950: AIR 1951 Nag 16 4, 8

(50) Misc. Petn. No. 46 of 1950: (AIR 1951 Nag 38) 4

(1917) 1 KB 486: (86 LJ KB 257) 8

SHINDE C. J.: This is a petition for the issue of a writ in the nature of Mandamus or some appropriate order or direction against the State. The petition alleges that the applicant was a tenant of a portion of land known as the Sewage farm Gwalior from 1935 to 1942; that in 1942 the then Gwalior Government ordered acquisition of the land and property situated upon it for the purpose of handing it over to the Gwalior Dairy Company Ltd. and accordingly on 1-7-1942 the applicant was



forcibly ejected from the land contrary to the terms of the agreement; that after the above event the applicant applied to the Government to compensate him for the loss and to give him fresh land for cultivation; that the matter regarding giving of the land remained pending before the then Gwalior Government: that after the formation of Madhya Bharat Mr. Syad Hamid Ali the then Minister appointed Mr. Ramkrishna Dixit as an arbitrator for deciding the dispute; that after perusing the record and hearing the parties Mr. Ramkrishna Dixit gave his award in which he recommended the Government to hand over 60 acres of land of the Sewage Farm after the termination of the lease of the Gwalior Dairy Ltd.; that Shree Syad Hamidali confirmed the said award and passed orders accordingly; that after the said order of the Minister the Government published a notice inviting tenders for the same land in the Government Gazette dated 15th April, 1950; that the applicant, after the said Notification protested against it but to no effect; that the applicant has been deprived of the valuable right by not receiving the possession of the land to which he is entitled. On these allegations the petitioner prays that a writ of Mandamus or some other appropriate order or direction be issued directing the non-applicant to execute the order passed by Shree Syad Hamidali.

(2) In the return filed against the petition the Secretary Local Self Government states that it is emphatically denied that the former Gwalior Government ejected him in breach of any agreement; that the petitioner had been given a lease for seven years in 1935 which lease expired on 30-6-1942; that after due notice on 14-5-42 possession was taken from him and the petitioner took back the deposit he had made in connection with the lease; that it is untrue that Shree Ramkrishna Dixit recommended to the Government to hand over 60 acres of the land to the petitioner after the termination of the lease of The Gwalior Dairy Ltd.; that there was no lease or an agreement of lease made between the petitioner and the opposite party; that it is emphatically denied that any Government orders were passed; that the Gwalior Dairy Ltd. claims a right to continue in possession firstly on the strength of the revenue law then in force in Madhya Bharat and secondly on the basis of an order passed by the ruler of the former Gwalior State in 1942; that the land is held by and is in the actual possession of the Gwalior Dairy Ltd.;

(3) A copy of the lease given by the Gwalior Government has been produced by the Secretary Local Self Government. A perusal of this lease shows that the land in dispute was given on lease of seven years commencing from 1st July, 1935. There is also a copy of the notice given to the petitioner by the Sanitary Engineer Gwalior Government on record. That notice clearly states that as the lease expires on the 1st Day of July 1942 the petitioner is to hand over the possession of the plots to the Sanitary Engineer. From these two documents it is evident that the allegation of the petitioner that he was forcibly ejected from the land by the Gwalior Government is false. A copy of the award given by Shree Ramkrishna Dixit has also been filed by the non-petitioner. All that the award states is as follows:—

“इसके संबंध में महकमे की ओर से यह बताया गया है कि भूतपूर्व मिनिस्टर साहब की कोई भी आज्ञा इस संबंध में नहीं हुई है. मेरे सामने ठेकेदार ने एक प्रत की नकल प्रस्तुत की है. जिसका नम्बर ४१८६ दिनांक ९-३-४५ है. संबंधित

प्रकरण यदि कोई हो तो उसे बरामद किया जाकर यदि माननीय मिनिस्टर साहब की कोई आज्ञा हो तो उसकी लाइट में ठेकेदार की उपरोक्त मांग का फैसला किया जा सकता है.”

This does not amount to any recommendation that 60 acres of land be given to the petitioner.

(4) In — ‘Mohammad Ibrahim v. High Commissioner for India in Pakistan’, Mis. Petn. No. 46 of 1950 (Nag) Mangalmurti and Mudholkar JJ. held as follows:—

“The power which the court exercises under Article 226 is discretionary and the court would certainly bear in mind the conduct of the applicant in exercising the discretion. The Court would refuse to exercise discretion in favour of an applicant where the application is wanting in bona fides.”

In — ‘Zikar Yusuf v. Government of Madhya Pradesh’, Petn. No. 16 of 1950 (Nag) their Lordships of the Nagpur High Court observed as follows:—

“Where an ex parte application has been made to a High Court under article 226 (1) if the court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts but stated them in such a way as to mislead the court as to the true facts the court ought for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits. This is a power inherent in the court but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. Before coming to this conclusion a careful examination will be made of the facts as they are and as they have been stated in the applicant's affidavit and everything will be heard that can be urged to influence the view of the court when it reads affidavit and knows true facts. But if the result of this examination and hearing is to leave no doubt that the court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has only been set in motion by means of a misleading affidavit and reject the application.”

As the facts alleged in the affidavit by the petitioner are false beyond doubt, this petition deserves to be rejected summarily.

(5) Apart from this a writ or an order or direction can be issued under article 226 only for the enforcement of fundamental rights or any other legal right. There is no allegation in the affidavit that any fundamental right has been infringed. As far as any other legal right is concerned it does not appear from the facts that any legal right has been violated. The non-petitioner has emphatically denied that any Government orders have been passed in favour of the petitioner. It appears from the reply of the non-petitioner that Shree Hamidali had proposed to give to the petitioner benefit of a fresh lease at a time when he was not aware of the plea of the Gwalior Dairy Ltd. Even conceding that Shree Hamidali did pass an order that a fresh lease be given to the petitioner, no right has accrued to the petitioner. It is at best a unilateral decision to enter into legal relationship. It is neither an agreement nor a lease. According to the allegation of the petitioner Shree Hamidali confirmed the recommendation of Shree Ramkrishna Dixit that land be given to the petitioner after the termination of the lease of the Gwalior Dairy Ltd. It is clear from the return filed by the non-petitioner that the land is still in possession of the Gwalior Dairy Ltd. Consequently the



petitioner has no present right, if he has any, to the lease of the land concerned. In these circumstances as no legal right has been violated, this petition must be dismissed.

(6) In the result we think that this petition has been misconceived and consequently it is dismissed. The petitioner should pay the costs to the non-petitioner which we fix at Rs. 100/-

(7) DIXIT J.: I have also come to the conclusion that this petition must be dismissed with the direction that the applicant should pay to the opponent Rs. 100/- as costs of the petition. The applicant invokes the power of this Court under Article 226 to enforce an alleged order of the Government allotting certain lands on lease to the applicant. Learned Counsel for the petitioner failed to satisfy us that there was in existence any such order of the Government, or that if there was one, the Government was under a statutory duty or obligation to give the lands to the applicant and to give effect to its order. From the facts as revealed at the hearing of the petition, it appears that at one time, a Minister of the Madhya-Bharat Government considered the question of giving some lands to the petitioner on lease. If the petitioner thinks that this consideration by the Minister concerned ultimately ended in a contract with him on the one part and the Government on the other for the grant of the lands, his remedy is obviously to resort to Civil Courts for the enforcement of the contract. An order in the nature of mandamus cannot be issued under Article 226 for the enforcement of an obligation arising under a contract.

(8) In fact, I think the applicant has forfeited his right to invoke the power of the Court to issue the direction, he seeks, by failing to be candid in his statement of the facts. The applicant stated that in 1942, he was forcibly ejected from certain lands by the former Gwalior Government and that this action of the Government was contrary to the terms of the agreement. At the hearing, it was found that the applicant had not been forcibly ejected but that he was asked to hand over the possession of the land to the Gwalior Government on the expiry of the lease in 1942, and that accordingly after due notice, the applicant vacated the land and also took back the deposit he had made in connection with the lease of the land. The statement of the applicant that he was forcibly ejected, taken together with other inaccurate statements in his petition led this Court to issue a rule nisi thinking that the action of the Government appeared to be illegal. If the petitioner had correctly stated the material facts, he would have had considerable difficulty in the way of getting a rule nisi issued from this Court.

It has been authoritatively laid down in — 'Rex v. Kensington Income Tax Commissioners', (1917) 1 KB 486 that the rule of the Court requiring *uberriema fides* on the part of the applicant for an *ex-parte* injunction applies equally to the case of an application for a rule nisi for a writ of prohibition and that where there has been a suppression of material facts, the Court will refuse the writ without going into the merits of the case. This principle has been quoted with approval in — 'Zikar v. Govt. of Madhya-Pradesh', AIR 1951 Nag 16; — 'Asiatic Engineering Co. v. Achhru Ram', AIR 1951 All 746 (FB) and — 'Ratan Chandra v. Adhar Biswas', AIR 1952 Cal 72.

This petition must, therefore, fail on this ground also.

A/R.G.D.

Petition dismissed.

A. I. R. 1953 M. B. 60 (Vol. 40, C. N. 30)

(GWALIOR BENCH)

DIXIT J.

Mahabir Prasad, Applicant v. The State.  
Criminal Ref. No. 26 of 1952, D/- 6-10-1952.

(a) Contempt of Courts Act (1926), S. 2 —  
Contempt by inferior judicial officers and magistrates — Power of High Court.

Judges of inferior Courts and Magistrates can be punished for contempt of Court for acting unjustly, oppressively or irregularly in the execution of their duties, by whom colour of judicial proceedings wholly unwarranted by law, or for disobeying writs issued by the High Court requiring them to proceed or not to proceed in matters before them. (1906) 1 KB 32; 14 Ind Cas 808 (Cal); AIR 1922 Mad 337 and laws of England, Hailsham Edn., Vol. 7 Para 35, Rel. on.

(Para 3)

(b) Contempt of Courts Act (1926), S. 1 —  
Criticism of High Court's decision by inferior judicial officer or Magistrate — Amounts to Contempt — (Precedent).

A decision of the High Court may not appear to the subordinate judicial officers and Magistrates as laying down the correct law. It may be subsequently overruled by the High Court or set aside by the Supreme Court. But so long as it has not been so overruled or set aside, it is binding on all. Judicial Officers and Magistrates have not the liberty of criticising the decisions of the High Court. Much less can they deliver to the High Court a homily on the matters it should take into consideration while examining the correctness of any decision. If they do so, their act is, no doubt, in common parlance an act of insubordination, but in law it amounts to a contempt of Court and they are liable to be dealt with as such for that act. The fact that the criticism or the suggestions have been made by a judicial officer or a Magistrate in the course of judicial proceedings cannot alter the nature of the act. (Para 3)

Anno: Cont. of Courts Act, S. 2 N. 3; C.P.C., Pre. N. 15.

Shiv Dayal, Govt. Advocate, for the State.

REFERENCES: Courtwar/Chronological/ Paras  
(12) 14 Ind Cas 808: (15 Cal LJ 335) 3  
(22) AIR 1922 Mad 337: (66 Ind Cas 566) 3  
(1906) 1 KB 32: (75 LJBK 104) 3

ORDER: This reference arises out of a criminal case pending in the Court of Additional District Magistrate, Bhind in which the accused persons are said to have been granted "anticipatory bail" by the Additional District Magistrate on the authority of the decision of Abdul Hakim J., in Criminal Miscellaneous Application No. 2 of 1951. By this reference purporting to be one under S. 438, Criminal P. C., Mr. L. C. Gupta the District Magistrate of Bhind desires that this Court should take into consideration the points mentioned in para. 4 of the reference while reconsidering the decision of this Court in Criminal Miscellaneous application No. 2 of 1951. The District Magistrate says in his reference:

"3. Since I understand that the said ruling is still under consideration of the High Court. I make this reference for consideration of the High Court mainly on the ground that the wordings of the section 497 as they stand today do not admit of grant of anticipatory bail as discussed in para. 2 above and therefore, the order of the A. D.M., Bhind is against law.



4. Grant of anticipatory bail besides being illegal creates following difficulties in properly completing the investigation by the police:

(i) Accused persons remain in hiding till bail is granted and thereby delay in investigation.

(ii) Chances of getting approver's testimony are made difficult.

(iii) Minimising the chances of getting evidence under Ss. 27, 29 and 30 of Evidence Act.

(iv) Minimising the chances of getting the circumstantial evidence at the time of arrest of the accused by his reaction and conduct at the time.

(v) Tampering with the evidence during investigation.

The case is, therefore, forwarded to the High Court of Judicature M. B. Indore for consideration under S. 439, Criminal P. C. File of lower Court is enclosed."

(2) From what has been stated above, it is clear that the reference made by Mr. L. C. Gupta the District Magistrate of Bhind is not for setting aside the order of the Additional District Magistrate granting bail to certain persons, on the ground that in the circumstances of the case bail should not have been granted to those persons. The primary purpose of the reference, seems to me, to suggest to this Court certain points, which according to the District Magistrate this Court ought to take into consideration while reconsidering the decision of Abdul Hakim J. It must be noted that when this reference was made, the decision of Abdul Hakim J., was actually being reconsidered by a Full Bench of this Court.

(3) When this reference first came up for hearing before me in the presence of the learned Deputy Government Advocate for the State, I observed that this was a very extra-ordinary and unwarranted reference. I also said that in making this reference the District Magistrate had transgressed all limits of balance and propriety expected from judicial officers and Magistrates subordinate to this Court. As I wanted to consider the matter carefully, I reserved orders in the reference. As a sequel to the observations made by me, Mr. L. C. Gupta, District Magistrate, Bhind has now tendered before me an apology expressing his regret for the unwarranted reference he has made and for the observations in para. 3 and 4 of the reference, which he now realises, were disrespectful to this Court. In view of this apology, I do not wish to pursue the matter further and dismiss it as a lapse on the part of an officer, whose zeal as an executive officer responsible for maintaining law and order has outweighed his duties as a Magistrate subordinate to this Court. But I must add for the benefit of the judicial Officers and Magistrates subordinate to this Court that a decision of this Court may not appear to them as laying down the correct law. It may be subsequently overruled by this Court or set aside by the Supreme Court. But so long as it has not been so overruled or set aside, it is binding on all. Judicial Officers and Magistrates have not the liberty of criticising the decisions of this Court. Much less can they deliver to this Court a homily on the matters it should take into consideration while examining the correctness of any decision. If they do so, their act is, no doubt, in common parlance an act of insubordination, but in law it amounts to a contempt of Court and they are liable to be dealt with as such for that act. The fact that the

criticism or the suggestions have been made by a Judicial Officer or a Magistrate in the course of judicial proceedings cannot alter the nature of the act. There is ample authority for the proposition that Judges of inferior Courts and Magistrates can be punished for contempt of Court for acting unjustly, oppressively or 'irregularly in the execution of their duties' by colour of judicial proceedings wholly unwarranted by law, or for disobeying writs issued by the High Court requiring them to proceed or not to proceed in matters before them. See — 'Rex v. Davies', (1906) 1 KB 32; Hallsbury's Laws of England, Halisham edition, Volume 7 para. 35; — 'Satinath Sikdar v. Ratanmani Naskar', 14 Ind Cas 808 (Cal); — 'In re-Palani Kumara Chinnayya', AIR 1922 Mad 337.

(4) With these observations I reject the reference. It is needless to say that it is open to the state to move the Sessions Judge of Bhind for the cancellation of bail on the ground that in the facts and circumstances of the case, the Additional District Magistrate, Bhind should not have exercised his discretion in favour of the accused persons in granting them anticipatory bail.

A/D.R.R.

Reference rejected.

**A. I. R. 1953 M. B. 61 (Vol. 40, C. N. 31)**  
**(GWALIOR BENCH)**

**DIXIT AND CHATURVEDI JJ.**

Gyarsibai w/o Jagannath, Appellant v. The State.

Criminal Appeal No. 5 of 1952, D/- 23-10-52.  
**Penal Code (1860), S. 300 (4) — "Without any excuse aforesaid" — Woman jumping in well with her children — Death of children — Offence.**

The words "without any excuse..... aforesaid" indicate that the imminently dangerous act is not murder if it is done to prevent a greater evil. If the evil can be avoided without doing the act, then there can be no valid justification for doing the act which is so imminently dangerous that it must, in all probability, cause death or such injury as is likely to cause death. (Para 5)

There used to be constant quarrels between the accused and her sister-in-law. At one of such quarrels the sister-in-law asked the accused to leave the house. Thereupon, the accused left the house, taking her three children with her and saying that on account of her sister-in-law she would jump into a well. Soon after, she went to a well and threw herself into the well along with the children who died. The accused was rescued.

Held that the act of the accused in jumping into the well with her children was clearly one done by her knowing that it must in all probability cause the death of her children. She had no excuse for incurring the risk of causing the death of her children. The fact that there were quarrels between her and sister-in-law and that her life had become unbearable on account of this family discord could not be regarded as a valid justification. The act of the accused was, therefore, clearly murder under S. 300 (4). AIR 1940 All 486 and AIR 1925 Bom 310, Disting.

(Para 5)

Anno: Penal Code, S. 300 N. 7.

Pratap Narayan, for Appellant; Mungre, Government Advocate, for the State.



REFERENCES: Courtwise/Chronological/ Paras  
(40) ILR (1940) All 647: (AIR 1940

All 486: 42 Cri LJ 146)

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(25) AIR 1925 Bom 310: (26 Cri LJ 1016)

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L. XIT J.: The appellant has been convicted by the Sessions Judge of Shajapur of an offence under S. 302, Penal Code, for the murder of her three children and also of an offence under S. 309, Penal Code, for an attempt to commit suicide. She has been sentenced to transportation for life under S. 302, Penal Code, and to six months simple imprisonment under S. 309, Penal Code. Both these sentences have been directed to run concurrently. She has now preferred this appeal from Jail against the convictions and sentences.

(2) The facts of this case are very simple. The prosecution alleged that the appellant, her children, her husband Jagannath and her sister-in-law Kaisar Bai used to reside together. There were constant quarrels between the appellant and her sister-in-law and very often Jagannath used to slap the appellant for picking up a quarrel with her sister-in-law Kaisar Bai. It is alleged that one such quarrel took place on the morning of 14-8-1951 when Jagannath was away from his home. In this quarrel Kaisar Bai asked the appellant to leave the house. Thereupon, the appellant left the house, taking her three children aged 7 years, 5 years and 1½ years and saying that on account of her sister-in-law she would jump into a well. Soon after, the appellant went to a well in the village and threw herself into the well along with her three children. A few hours after, some inhabitants of the village found Gyarasibai supporting herself on an edge of the well and the three children dead in the well. The appellant admitted before the Committing Magistrate as well as before the Sessions Judge that she jumped into the well together with her children on account of her sister-in-law Kaisar Bai's harassment.

(3) The facts have been amply established by the prosecution evidence. From the statement of Kaisar Bai and Narayan it is clear that on the morning of the day of occurrence, there was a quarrel between Kaisar Bai and Gyarasi Bai, and during this quarrel when Kaisar Bai asked the appellant to leave the house, she left the house with her three children saying that she would jump into a well. Kaisar Bai also admits that some times Jagannath used to give two or three slaps to the appellant for quarrelling with her. The other prosecution witnesses deposed to the recovery of the bodies of three children and to the rescue of the appellant. There is no eye-witness of the fact that the appellant jumped down the well herself together with her three children. But from the statements of Kaisar Bai, Narayan and the statement of the appellant herself before the Committing Magistrate and the Sessions Judge, I am satisfied that the version given by the appellant in her own statement is correct and that she jumped into the well herself along with her three children in order to escape harassment at the hands of her sister-in-law Kaisar Bai.

(4) On these facts the only question that arises for consideration is whether the appellant is guilty of the offence of murder of the three children and of attempted suicide. The learned Sessions Judge has found her guilty under S. 302, Penal Code, but he has not stated under which clause of S. 300, Penal Code, the

act of the appellant in jumping down into a well together with her three children is murder. I think this act of the appellant clearly falls under the 4th clause of S. 300, Penal Code, which defines murder. On the facts it is clear that the appellant Gyarasi Bai had no intention to cause the death of any of her children and she jumped into the well not with the intention of killing her children but with the intention of committing suicide. That being so, Cls. 1, 2 and 3 of S. 300, Penal Code, which apply to cases in which death is caused by an act done with the intention of causing death or causing such bodily injury as is likely to cause the death of person or sufficient in the ordinary course of nature to cause death cannot be applied to the present case. The only clause of S. 300, Penal Code, which then remains for consideration is the 4th clause. This clause says:

"If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid."

(5) It will be seen from this clause that if death is caused merely by doing an act with the knowledge that it is so imminently dangerous that it must, in all probability, cause death, then the act is not murder as is defined in clause 4, but is mere culpable homicide not amounting to murder. In order that an act done with such knowledge should constitute murder, it is essential that it should have been committed "without any excuse for incurring the risk of causing death or such bodily injury". The question, therefore, is whether when the appellant jumped into the well together with her three children, she had the knowledge that her act was so imminently dangerous, as to cause in all probability the death of her children and further whether if she had such knowledge her act in jumping into a well with her children was "without any excuse for incurring the risk of causing death or such bodily injury as is mentioned in cl. 4 of S. 300, Penal Code. Now I think it cannot be said in the present case, with any degree of force that when the appellant jumped into a well with her children she had not the knowledge that her act was so imminently dangerous as to cause the death of her children. Her life might have become unbearable owing to domestic troubles and perhaps on account of these troubles, she decided to take her own life. I am also prepared to hold that on account of the discord in the house, the appellant was subjected to severe exasperation and to a long course of conduct causing suffering and anxiety. But when on account of all these reasons, she left the house on the day of the occurrence saying that she would jump into a well with her children, it cannot be said that she was in such an abnormal state of mind that could not have any knowledge of the nature of her act.

Every sane person—and in this case we are bound to take it that the appellant was sane—is presumed to have some knowledge of the nature of his act. This knowledge is not negated by any mental condition short of insanity. In my opinion, the act of the appellant in jumping into a well with her children is clearly one done by the appellant knowing that it must in all probability cause the death of her children. I do not find any circumstances to



come to the conclusion that the appellant had some excuse for incurring the risk of causing the death of her children. The fact that there were quarrels between the appellant and sister-in-law and that her life had become unbearable on account of this family discord, cannot be regarded as a valid justification for appellant's act of jumping into a well with her children.

The words used in cl. 4 of S. 300, Penal Code are "without any excuse for incurring the risk of causing death or such injury as aforesaid". These words indicate that the imminently dangerous act is not murder if it is done to prevent a greater evil. If the evil can be avoided without doing the act, then there can be no valid justification for doing the act which is so imminently dangerous that it must, in all probability, cause death or such injury as is likely to cause death. Here there is no material, whatsoever, to come to the conclusion that the appellant could not have escaped the harassment at the hands of her sister-in-law except by jumping herself into a well with her three children. I am, therefore, inclined to think that the appellant's act is clearly murder under cl. 4 of S. 300, Penal Code.

(6) I must, however, notice two cases in which the question of the offence constituted by an act of a woman deliberately jumping into a well with a child in circumstances somewhat different to those present in this case has been considered. The first case is one reported in — 'Emperor v. Dhirajia', ILR (1940) All 647. In this case a village woman left her home with her six months old baby in her arms on account of her husband's illtreatment; after she had gone some distance from the home, she turned round and saw her husband pursuing her. She became panicky and jumped down into a well nearby with the baby in her arms. The baby died, but the woman survived. On these facts, the learned Judges of the Allahabad High Court held that an intention to cause the death of the child could not be attributed to the woman, though she must be attributed with the knowledge that such an imminently dangerous act as jumping down the well was likely to cause the child's death.

But the learned Judges held that considering the state of panic she was in, the culpable homicide did not amount to murder as there was an excuse for incurring the risk of causing death. Mst. Dhirajia was thus found guilty under S. 304, Penal Code. It is not necessary to consider whether upon the facts of that case, the conclusion that the woman was guilty of culpable homicide not amounting to murder was justified. But it must be observed that the learned Judges of the Allahabad High Court thought that the fear of her husband and the panic into which she was thrown could be an excuse for incurring the risk of causing death. Here there is no question of any panic or fright of the appellant. It is, no doubt, true, as the learned Judges of the Allahabad High Court say that in assessing what is excuse or is not excuse, we must consider the state of mind in which the accused person was.

But I think in considering the question we must take into account the state of mind of a reasonable and legally sane person and then determine whether the risk of causing death could have been avoided. On this test, there can be no room for thinking in the present case that the appellant was justified in jumping into a well with her three children merely on ac-

count of her sister-in-law's attitude towards her. The other decision is of the Bombay High Court in — 'Supadi Lukada v. Emperor', AIR 1925 Bom 310. In that case too, a girl of about 17 years of age who was carrying her baby on her back jumped into a well because her husband had ill-treated her and had prevented her from returning to her parents.

The learned Judges of the Bombay High Court held that when the girl attempted to commit suicide by jumping into a well she could not be said to have been in a normal condition and was not, therefore, even aware of the child's presence and that as she was not conscious of the child, there was not such knowledge as to make S. 300 (4) applicable. The learned Judges of the Bombay High Court found the girl guilty under S. 304-A. The Bombay case is clearly distinguishable on the facts. In the present case when the evidence shows that the appellant left her home saying that she would jump into a well with her three children, it cannot clearly be held that she was not aware that her children were with her. In my opinion, these two cases are not of much assistance to the appellant.

(7) As regards the conviction of the appellant for an attempt to commit suicide, I think she has been rightly convicted of that offence. When she jumped into the well, she did so in a conscious effort to take her own life.

(8) The appellant has been sentenced to transportation for life under S. 302, Penal Code. This is the only sentence which could legally be passed in this case. But having regard to the fact and circumstances of the case and also to the fact that the appellant though not legally insane was not and could not be in a normal state of mind when she jumped into a well with her three children, I think this is not a case deserving of a severe punishment. I would, therefore, recommend to the Government to commute the sentence of transportation for life to one of three years rigorous imprisonment. The sentence of six months' simple imprisonment awarded to the appellant for the offence under S. 309 is appropriate.

(9) In the result this appeal is dismissed.

(10) CHATURVEDI J.: I agree.  
B/V.R.B. Appeal dismissed.

**A. I. R. 1953 M. B. 63 (Vol. 40, C. N. 32)**  
**(GWALIOR BENCH)**

**CHATURVEDI J.**

Municipal Committee Ujjain v. Ram Shanker  
Civil Misc. Appeal No. 18 of 1949, D/- 13-9-52.  
† Civil P. C. (1908), S. 48 (1) (b) — Subsequent order — Meaning of — Order of executing Court — Decree converted by compromise into decree for payment by instalments — Starting point.

Where the original decree has been converted by compromise into a decree for payment by instalments and the decree-holder cannot execute the decree until the judgment-debtor has defaulted, the decree-holder's application though after 12 years from the date of the original decree but within three years of the last payment by the judgment-debtor under the compromise, should be held to be within time. The judgment-debtor is also precluded from contending that the mode of payment of the decree by instalments agreed to by him is not binding on him. AIR 1944 Lah 106 and AIR 1932 All 273 (FB), Dissent. from.

(Para 6)

Anno: C. P. C., S. 48 N. 11 Pts. 3 to 12 N. 12.



Shiv Dayal, for Appellant; Karkare, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras  
(30) 66 Ind App 84: 14 Luck 192:

AIR 1939 PC 80 3, 5

(32) AIR 1932 All 273: 54 All 573 (FB) 3

(19) AIR 1940 All 107: (186 Ind Cas 614) 5

(40) AIR 1940 All 270: (ILR (1940)

All 377 FB) 5

(40) ILR (1940) All 536: AIR 1940 All 423 3, 5

(44) AIR 1944 Lah 106: (ILR (1944)

Lah 592 ) 2, 5

(49) 1949 Mad BLR 95 5

Civ. Misc. Appeal No. 12 of 2004 (Madh B) 5

JUDGMENT: This is an appeal directed against the judgment and decree of the Additional District Judge, Ujjain, by which he held that the execution of a decree by the decree-holder is barred by the provisions of section 48 C. P. C. as the application for execution was made more than 12 years after the date of the original decree passed on 6-10-1928.

(2) If the decree-holder had sought for execution of the decree of 1928 there is no question that an application would have been barred by limitation. But it appears in this case that in the execution of the original decree, in which there were more than one execution proceedings, at one such proceeding, the parties came to terms and in execution case No. 468 of 1991 a compromise was entered into by the parties and certified by the Court on 16-2-1938 and the judgment-debtor promised to satisfy the remaining claim by instalments. It was agreed that in default of payment of instalments on specified date the decree-holder would be entitled to realise entire sum by execution. When the execution application No. 264 of 1998 was filed the judgment-debtor objected that the decree was incapable of execution by the 12 years rule. This objection was overruled and the appeal was also dismissed on 22nd Dec. 1943. Then another execution application was filed on 25-7-1946 and it was mentioned that it was for the revival of the execution case No. 264 of 1998 and the judgment-debtor again raised the same objection.

This objection was overruled by the executing Court but in appeal the learned Additional District Judge, Ujjain, placed reliance on — 'Zaheer-ud-Din v. Mt. Amtur Rasheed', A. I. R. 1944 Lah. 106 for the proposition that an order of the Court which does not direct the payment of money at a certain date or at recurring periods but merely takes notice of and refers to the compromise to pay the decretal amount by instalments does not come within section 48 sub-clause (1) (b) and cannot give rise to a fresh starting point of limitation. It had been held in this Lahore case that in the absence of any direction by the Court to the parties to receive and pay the money in accordance with the fresh contract arrived at between them, the order cannot be construed so as to contain a direction in regard to the payment of money at any date different from what was provided by the decree.

(3) The same view had been held in — 'Gobardhan Das v. Dau Dayal', AIR 1932 All. 273: 54 All. 573 (FB). But after the Privy Council ruling in — 'Oudh Commercial Bank Ltd. Faizabad v. Bindbasni Kuer', 66 Ind App 84: 14 Luck 192: AIR 1939 P. C. 80 it was held by a Division Bench of the Allahabad High Court in — 'Chhatra Pati Pertab Bahadur v. Hari Ram', ILR (1940) All 536: AIR 1940

All 423 that a compromise between the decree-holder and the judgment-debtor entered into in the course of the execution proceedings, which was duly recorded is enforceable in execution proceedings and that the period of twelve years would be computed from the date of the default of payment of the instalment.

(4) Subsequent to this ruling several Courts have held that once the Court accepts the compromise and passes an order striking off the execution proceedings the Court intends that the decretal amount should be payable by instalments and the order which it passes striking off the execution proceedings is in essence and substance an order made under section 48 of the C. P. C. which extends the period of limitation. So there is a conflict of opinion on the point.

(5) I remember of a case — 'Bal Kishan v. Laxman Rao', Civil Misc. Appeal No. 12 of 2004 (Madh. B.) in which I, as a Judge of the Gwalior State High Court, referred this point to a Division Bench for determination of this question. The Division Bench (Dixit C.J. & myself) dissented from the proposition enunciated in — 'Zheer-ud-Din v. Mt. Amtur Rasheed', AIR 1944 Lah 106 and relying on certain observations made by their Lordships of the Judicial Committee in — 'Oudh Commercial Bank Ltd. Faizabad v. Bindbasni Kuer', AIR 1939 PC 80 concurred in the views propounded by the Allahabad High Court in three cases in 1940. These cases are reported at pages 107, 270 and 423 of 1940 Vol. of All India Reporter — 'Bhiki Mal Murari Lal v. Kundan Lal', A. I. R. 1940 All 107, — 'Mahendra Rao v. Bishambhar Nath', AIR 1940 All 270 (FB) and — 'Chhatra Pati Pertab Bahadur v. Hari Ram', AIR 1940 All 423. Subsequently it appears, the same view was taken by Justice Rege in — 'Punam Chand v. Jagannath', 1949 Madh. B. L. R. 95 in which it was held that if the compromise contained any operative words, those words become an order of the executing Court and that being so, they would come within the intention of the word 'any subsequent order' contained in section 48, sub clause (1)(b) C.P.C.

(6) On a review of these cases I come to the conclusion that where original decree has been converted by compromise into a decree for payment by instalments and the decree-holder cannot execute the decree until the judgment-debtor has defaulted, the decree-holder's application though after 12 years from the date of the original decree, but within three years of the last payment by the judgment-debtor under the compromise, should be held to be within time. The judgment-debtor, in my opinion, is also precluded from contending that the mode of payment of the decree by instalments agreed to by him is not binding on him.

(7) In this view of the matter in my judgment the learned Additional District Judge, Ujjain, was clearly in error and his order must be set aside. I therefore hold that the execution was within limitation.

(8) I would therefore allow this appeal with costs, set aside the judgment and the decree passed by the Additional District Judge Ujjain, and, restore the order of the City Sub Judge Ujjain so far as the point of limitation is concerned.

A/V.R.B.

Appeal allowed.



\*A.I.R. 1953 M. B. 65 (Vol. 40, C. N. 33)

(INDORE BENCH)

(FULL BENCH)

SHINDE C. J., DIXIT AND MEHTA JJ.

Sarup Chand and Hukumchand, a firm of Indore, Petitioners v. Union of India and another, Opponents.

Civil Misc. Case No. 6 of 1952, D/- 10-11-1952.

† \* (a) Income-tax Act (1922), Ss. 2 (14 A), Proviso (b), 3, 4, 4A, 4B, 64 — Assesseees in Madhya Bharat — Liability to assessment in respect of income accruing in year from 1-4-49 to 31-3-50.

The combined result of sub-cl. (i) and (ii) of cl. (b) of the proviso to S. 2 (14 A) is to give jurisdiction to the Income-tax Officer, Indore, to charge the assesseees to tax in respect of the income which accrued to them in the year ending on 31-3-50 in a taxable territory without Madhya Bharat, it being an income which accrued to the assesseees who are deemed to be 'resident' in the taxable territories of Madhya Bharat in that year under sub-cl. (i) of cl. (b) of the proviso. Under sub-cl. (iii) the income which accrued to the assesseees in Madhya Bharat during the period from 1-4-49 to 31-3-50 is an income which accrued in a taxable territory for the purpose of making any assessment of the year ending on 31-3-51. It is clear from a careful reading of Ss. 3, 4, 4A, 4B and 2 (14A) of the Act that once it is held that under cl. (b), (iii) of the proviso to S. 2 (14A) a Part 'B' State is, during the period from 1-4-49 to 31-3-50 which is a period included in the previous year for the purpose of making an assessment of the year ending on 31-3-1951 or for any subsequent year, a taxable territory, it follows as a necessary and logical conclusion that chargeability of the income accruing in that year to tax arises under Ss. 3 and 4 of the Act. When, the express words of the proviso to S. 2 (14A) make the income accruing in Madhya Bharat in the year from 1-4-49 to 31-3-50 chargeable to tax under the Act, the effect of these words cannot be narrowed or whittled down by applying a rule of construction about statutes which are not by express words or necessary intendment retrospective. The income which accrued to the assesseees in the year from 1-4-49 to 31-3-50 in Madhya Bharat is chargeable to tax under the Indian Income-tax Act, and that irrespective of whether this income is, or is not chargeable under the Act, sub-cl. (i) and (ii) of Cl. (b) of the proviso of S. 2 (14A) read with S. 64 give jurisdiction to the Income-tax Officer, Indore, to tax the assesseees in respect of the income which they derived in that year from without Madhya Bharat. AIR 1947 FC 32, Foll.; (1926) AC 37, Rel. on; AIR 1951 Raj 94, Dissent. (Paras 10, 14, 18, 19)

Anno: Income-tax Act, S. 3 N. 1, 2; S. 4 N. 1, S. 4A N. 1; S. 4B N. 1; S. 64 N. 1, 2.

(b) Constitution of India, Art. 372 — Power to amend Income-tax Act imposing income-tax in Madhya Bharat on income accruing before 26-1-50.

Article 372 does not save the Covenant of the Madhya Bharat, which is not a statute and which did not itself impose any

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restrictions on the powers of the Dominion Legislature. Nor does the Article preserve Ss. 6 and 101 of the repealed Government of India Act, 1935, which permitted restrictions being put on the power of the Dominion Legislature by Instruments of Accession. There is no justification for reading Art. 372 (1) as laying down any limitation upon the power of the Parliament to amend the Income-tax Act and make it applicable to Part 'B' States so as to tax income accruing in States prior to 26-1-50. AIR 1941 FC 16; AIR 1952 Madh-B 57 (FB); AIR 1952 Madh-B 181, Foll.

(Para 22)

(c) Income-tax Act (1922), S. 22 (2) — Notice to adult member.

A notice issued to any adult member of a Hindu Undivided family for submitting a return of the income of the family is a valid notice.

(Para 23)

Anno: Income-tax Act, S. 22 N. 3.

(d) Income-tax Act (1922), S. 22 — Invalid notice — Effect.

The jurisdiction of the Income-tax Officer to assess and the liability of the assessee to pay the tax are not conditional on the validity of the notice. AIR 1947 FC 32, Foll.

(Para 23)

Anno: Income-tax Act, S. 22 N. 8.

(e) Income-tax Act (1922), S. 64 (3) — Objection as to place of assessment.

An objection as to the place of assessment must be specific and sub-s. (3) becomes operative only when a question as to the place of assessment arises. If, therefore, the statements made by an assessee in his return about the principal place of business or residence in any area are accepted by the Income-tax Officer, it cannot be said that there is for determination a question as to the place of assessment. The fact that the return filed by the assessee was marked as 'under protest', does not mean that the assessee raised an objection as to the place of assessment. The statement by the assessee to the effect that the income which accrued to him in Madhya Bharat in the year 1949-50 could not be taxed under the Income-tax Act and that, therefore, he was not liable to pay any tax, cannot be read as even suggesting remotely that the assessee objected to the place of assessment. The question as to the place of assessment is more one of administrative convenience than of jurisdiction. It cannot be said that the assessment is bad as the Income-tax Officer did not follow the procedure laid down in S. 64 (3). AIR 1945 FC 9, Foll. (Para 25)

Anno: Income-tax Act, S. 64 N. 3.

(f) Income-tax Act (1922), S. 64 — Jurisdiction of Income-tax Officer to assess.

Where the assessee's principal place of business is Indore and the family resides in Indore, the jurisdiction of the Income-tax Officer, Indore, to assess the assessee is not excluded by the fact that the Income-tax Officer, Bombay, has commenced assessment proceedings in respect of the income accruing and received by the assessee within his area.

(Para 26)

Anno: Income-tax Act, S. 64 N. 1, 2.



(g) **Income-tax Act (1922), S. 30 — Provisional assessment — Denial of liability to be assessed — Appeal.**

Under S. 23B there is no right of appeal against a provisional assessment. Under S. 30 (1), an appeal lies against any assessment made under any of the sub-sections of S. 23 and against certain orders of the Income-tax Officer which are expressly specified in S. 30 (1). No appeal lies before any assessment is made. An assessee who denies his liability to be assessed is entitled to appeal on that ground only after the assessment is made. (Para 27) Anno: Income-tax Act, S. 30 N. 1.

(h) **Constitution of India, Art. 226 — Order restraining Income-tax officer from enforcing assessment — Order by Income-tax Officer passed on same day subsequent to High Court's order — Validity.**

The Income-tax Officer made a provisional assessment and assessed the assessee to a tax in respect of the income and gave a notice to the assessee on 19-2-52. Thereafter on 28-2-52 application under Art. 226 was presented and the assessee obtained from the High Court on 29-2-52 an order restraining the non-applicants from enforcing or taking any steps to enforce the provisional assessment order and the notice of the demand of the tax. This order was served on the Income-tax Officer on 3-3-52. But the order imposing penalty was passed by the Income-tax Officer at the close of the day after the High Court had issued earlier in the day the order of injunction.

Held that the order of the Income-tax Officer imposing penalty was clearly without jurisdiction and illegal.

Held further that the warmth and vehemence with which the counsel for the assessee urged that the Income-tax Officer desired to forestall the High Court was justified in the circumstances of the case.

(Para 31)

R. J. Kolah and S. M. Samvatsar, for Petitioners; K. A. Chitale Advocate-General Madhya Bharat Govt. and Kirpal, for Opponents.

REFERENCES: Courtwise/Chronological/ Paras

('38) AIR 1938 PC 175: ILR 1938 Bom 487 11

('41) AIR 1941 FC 16: (ILR (1941) Kar FC 72) 22

('45) AIR 1945 FC 9: (ILR (1945) Kar FC 88) 24, 25

('47) AIR 1947 FC 32: (26 Pat 442) 14, 23

('52) ILR (1952) Madh-B 178: (AIR 1952 Madh-B 57 FB) 20

('52) Civil Misc. Petn. No. 237 of 1951: (AIR 1952 Madh-B 181) 20, 22

('51) AIR 1951 Raj 94: (1951-20 ITR 214) 2, 9, 12, 16, 21

(1926) AC 37: (95 LJKB 165) 14

DIXIT, J.: This is an application by the petitioners styling themselves as the firm Messrs Sarup Chand Hukumchand of Indore, under Art. 226, Constitution of India, for a writ of certiorari and a writ of prohibition or a writ of like nature or an order, for quashing a provisional assessment of the tax payable by the firm for the assessment year 1950-1951, made by the Income-tax Officer, Indore, under S. 23B, Income-tax Act, 1922, and for restraining the opponents from enforcing the assessment order and a notice of demand dated 19-2-52 by which the applicants were directed to pay

the amount of the tax, namely Rs. 2,58,154-8-0 on or before 29-2-1952. The petitioners have also filed another application in these proceedings challenging the propriety and validity of an order said to have been made on 29-2-52 by the Income-tax Officer, ignoring an order of interim injunction issued by this Court on 29-2-52 prohibiting the Income-tax Officer from taking any action to enforce the provisional assessment and the notice of the demand dated 19-2-52, and imposing a penalty of Rs. 25,000/- for the failure of the petitioners to pay the amount of the tax before the time fixed for its payment.

(2) The case of the petitioners before us is that until 31-3-50, they carried on business as a firm of Shroffs and also dealt in gold, silver speculation business and that the firm had its offices at Bombay, Calcutta, Ujjain and Indore; that on or about 25-11-1950 the Income-tax Officer 'A' Ward Indore, issued a notice under S. 22, Income-tax Act (hereinafter referred to as the Act) to Sir Hukumchand, a member of the petitioner-firm requiring him to make a return of his income for the income-tax assessment year 1950-1951. In response to this notice, Sir Hukumchand while submitting a return under protest, addressed a letter dated 19-12-50 to the Income-tax Officer saying that as the Act was made applicable to Madhya Bharat only from 1-4-50, he could not be asked to furnish a return of his income prior to 1-4-50 or assessed any tax on that income. In the letter Sir Hukumchand also stated that he was a member of Hindu undivided family and as such had no separate source of income and further that he was submitting the return of the income "with a view to avoid penal action without admitting any liability to tax under the Indian Income-tax for 1950-51". On 6-1-51 the Income-tax Officer informed Sir Hukumchand that the return of the income required from him was of the Hindu undivided family and not in his capacity as an individual and that accordingly in the return the income accruing to the family be shown.

Nothing was done regarding the filing of a return of the income of the undivided family until 4-1-52. On this date, the Income-tax Officer sent a letter to Sir Hukumchand drawing his attention to the fact that although a notice under S. 22(2) of the Act had been duly served on him as far back as 25-11-50, he had not submitted a return of the total income and total world income for the assessment year 1950-1951. After referring to the provisions of the Act with regard to his power to make an assessment to the best of his judgment in default of a return, the Income-tax Officer advised Sir Hukumchand to furnish a return of the income without any further delay. The Income-tax Officer also mentioned in this letter

"that as a special case it has been decided by the Government that tax-demand for the assessment year 1950-1951 will not be enforced till the decision of the Supreme Court in the appeal pending before them."

We are informed by the learned Counsel for the parties that the appeal referred to in this letter is an appeal from the decision of the Rajasthan High Court in — 'Madan Gopal v. Union of India', AIR 1951 Raj 94. As a sequel to this letter Sir Hukumchand filed on 18-2-52 a return of the total income and the total world income accruing to his Hindu undivided



family during the previous year ending on 31-3-1950.

In the return which was marked as 'under protest' the principal place of business was shown as Indore; the income arising in Madhya Bharat was shown as Rs. 18,84,604/- while the income arising without Madhya Bharat was shown as Rs. 3,37,380. On receipt of the return, the Income-tax Officer made a provisional assessment of the tax on the income arising outside Madhya Bharat and assessed the petitioners to a tax of Rs. 2,58,154-8-0 in respect of the income and gave a notice to Sir Hukum Chand on 19-2-52 to pay the amount of the tax on or before 29-2-52. On this very date, the Income-tax Officer wrote a letter to Sir Hukumchand explaining the provisional assessment and pointing out to him the fact that the assurance given by him in his letter of 4-1-52 related to the postponement of the assessment of the income accruing in Madhya Bharat only and not to the postponement of the assessment of the income arising outside Madhya Bharat, about the assessment of which there was no dispute. Thereafter on 28-2-52 this application was presented and the petitioners obtained from this Court on 29-2-52 an order restraining the non-applicants from enforcing or taking any steps to enforce the provisional assessment order and the notice of the demand of the tax. This order was served on the Income-tax Officer on 3-3-52. But it appears that in the meantime the Income-tax Officer passed an order on 29-2-52 recording the fact that the amount of tax provisionally determined as payable by Sir Hukum Chand had not been paid till the close of the treasury on 29-2-52 and imposing upon him a penalty of Rs. 25,000/- under S. 46(1) of the Act.

(3) In this petition, the validity of the assessment is questioned on the grounds that (1) as Madhya Bharat became a taxable territory from 1-4-50, the income accruing or arising to the petitioners or received by them before this date was not liable in Madhya Bharat to any income-tax or super tax and that, therefore, the Income-tax Officer had no power or authority to assess the petitioners to any tax for the assessment year 1950-1951 on any income whether arising within or without Madhya Bharat; (2) that Parliament had no power to make any law imposing income-tax or super-tax on any income accruing or arising in Madhya Bharat prior to 26-1-50; (3) and that no proper or valid notice was issued or served on the petitioners under S. 22(2) of the Act. The petitioners also make a grievance that in making the provisional assessment of the tax on income arising outside Madhya Bharat the Income-tax Officer has gone behind the assurance given by him in his letter dated 4-1-52.

It is further said that for the last several years the petitioners had been assessed to tax by the Income-tax Officer Bombay in respect of their income arising outside Madhya Bharat and that the Income-tax Officer of Indore had no jurisdiction to change the place of assessment and assess the petitioners in Indore in respect of the said income. At the hearing of this petition the petitioners filed a further affidavit stating that they had already filed before the Income-tax Officer, Bombay, returns of the income of the firm of Messrs Sarup Chand Hukum Chand for the assessment years 1948-1949, 1949-50 and 50-51. It is, however,

admitted in para 3 of this affidavit, that no return for the assessment years 1949-50 and 1950-51 of the income of the Hindu undivided family of Sir Hukum Chand has been filed before the Income-tax Officer, Bombay.

(4) The facts and circumstances narrated above, in which the provisional assessment was made and the notice of demand was issued to the petitioners, are not disputed by the non-applicants. It is, however, denied by them that during the material period the petitioners were a firm carrying on business in Bombay, Indore and other places. The non-applicants maintain that the status of the petitioners according to the return filed by them is that of a Hindu undivided family. As to the grounds on which the petitioners challenge the assessment, the rejoinder of the Income-tax Officer, Indore, is that S. 3 read with proviso (b) to S. 2(14A) of the Act authorises the levy of the tax on incomes which accrued, arose or were received in Madhya Bharat prior to 1-4-50; that Parliament has the power under Art. 246 of the Constitution read with the agreement entered into between the President of India and the Raj Pramukh of Madhya Bharat on 26-2-50 to impose tax on income which accrued, arose or was received in Madhya Bharat prior to 26-1-50 and that the provisions of Indian Income-tax Act, 1922, and the Indian Finance Act, 1950, which authorise the levy of the tax for the year 1950-1951 are neither ultra vires nor illegal.

As regards the validity of the notice the non-applicants stated in para 11A of the return that "the validity or otherwise of the notice under S. 22(2) has no importance for the point to be decided by the Hon'ble High Court. A return can be filed either voluntarily under S. 22(1) or by an order of the Income-tax Officer under S. 22(2). The provisional assessment now in dispute was made after the receipt of such a return and hence the objection of the petitioners is uncalled for."

The opponent No. 2 also submits in his reply to the petition that as under the Act a person can be assessed only by one Income-tax Officer on all income arising at different places, he had jurisdiction to assess the petitioners to tax in respect of the income arising outside Madhya Bharat. According to non-applicant 2 the assurance contained in his letter dated 4-1-52 was only with regard to the postponement of the assessment of the tax on the petitioner's income in part B States. Lastly, it is submitted in the return that the petitioners have no case for the issue of any of the writs prayed for and that they have other specific and adequate legal remedy for challenging the provisional assessment.

(5) It will be seen from what has been stated above that the petitioners have been assessed to tax for the assessment year 1950-1951 not on the income which accrued to them in Madhya Bharat but on the income arising without Madhya Bharat, to wit in Part A States. The liability of the petitioners to pay tax on this income on an assessment in a Part A State is not disputed before us. The main complaint of the applicants is that the Income-tax Officer Indore has no jurisdiction to assess them to tax on the income which they derived from without Madhya Bharat during the year ending on 31-3-50; that it is the competent Income-tax Officer in Part A State who alone can make an



assessment of tax on this income and that as a matter of fact assessment proceedings in respect of this income are pending before the Income-tax Officer, Bombay. The real question for decision, therefore, is as to the jurisdiction of the Income-tax Officer, Indore to assess the petitioners to tax in respect of the income which accrued to them outside Madhya Bharat in the assessment year 1950-1951.

But Mr. Kolah the learned Counsel appearing on behalf of the petitioners has made the question of the assessability of the income which accrued to the applicants within Madhya Bharat in the year ending on 31-3-50 as the foundation of his attack on the jurisdiction of the Income-tax Officer, Indore, to tax the income which the applicants derived from without Madhya Bharat. It, therefore, becomes necessary to consider the question whether the income which accrued to the petitioners in Madhya Bharat in the accounting year 1949-1950 is liable to tax.

(6) I do not propose to set out here the elaborate and helpful arguments of the learned Counsel for the petitioners and of Mr. Chitale the learned Advocate General of Madhya Bharat who appeared on behalf of the Union of India. A reference will be made to them, where necessary, while dealing with the questions raised by the submissions made by the learned Counsel. The questions are (1) whether under S. 3 read with S. 2(14A) of the Act, the income accruing to the petitioner in the accounting year 1949-1950 in Madhya Bharat is liable to tax; (2) whether if the said income is not liable to tax, the Income-tax Officer, Indore, can assess tax on the petitioners' income which accrued to them in Part A States during the year ending on 31-3-50; (3) whether the provisions of the Indian Income-tax Act, 1922, as amended by the Indian Finance Act, 1950, in so far as they authorise the levy of the tax on income accruing in Madhya Bharat in the period prior to 26-1-50 are ultra vires; (4) whether the notice issued to the petitioners under S. 22 of the Act requiring them to submit a return of their undivided family was a valid notice; (5) and whether the petitioners raised before the Income-tax Officer, Indore, an objection as to the place of assessment; and, if they did, whether the Income-tax Officer was right in making the assessment without following the procedure laid down in S. 64(3) for the determination of the question as to the place of assessment.

(7) The first two questions involve the true construction of S. 2(14A) of the Act and the proviso to it or really the construction of the proviso. Before considering the proviso, it is pertinent to observe that the Income-tax Act, 1922, was made applicable to Madhya Bharat from 1-4-50. Prior to this date, there was no law imposing tax on income in the territories comprising of the former Indore State or of any other covenanting State of Madhya Bharat. The Finance Act, 1950, amended the Income-tax Act and made it applicable to the whole of India except the State of Jammu and Kashmir and inter alia introduced in the Act a definition of the term "taxable territories". Now under S. 3 of the Act, income-tax is charged at the rate or rates fixed for the year by the Annual Finance Act. The charge is on every individual, Hindu undivided family, company, local authority, firm itself or partners of the

firm individually, and other association of persons or the members of the association individually. The income taxed is that of the previous year and not of the year of assessment. The levy of the tax is on the total income of the assessee computed in accordance with and subject to the provisions of the Act. Section 2(15) defines "total income" as

"total amount of income, profits and gains referred to in sub-s. (1) of S. 4 computed in a manner laid down in this Act."

The material provision of S. 4(1) is as follows:

"Subject to the provisions of this Act, the total income of any previous year of any person includes all income, profits and gains from whatever source derived which—

(a) are received or are deemed to be received in the taxable territories in such year by or on behalf of such person; or

(b) if such person is resident in the taxable territories during such year,—

(i) accrue or arise or are deemed to accrue or arise to him in the taxable territories during such year, or

(ii) accrue or arise to him without the taxable territories during such year, or

(iii) having accrued or arisen to him without the taxable territories before the beginning of such year and after the 1st day of April, 1933, are brought into or received in the taxable territories by him during such year, or

(c) if such person is not resident in the taxable territories during such year, accrue or arise or are deemed to accrue or arise to him in the taxable territories during such year."

(8) The effect of Ss. 3 and 4 is to tax the person resident in the taxable territories during the previous year, that is, the year previous to the year of assessment on all his income whencesoever derived and to tax the person not resident in the taxable territories upon all income which accrued or deemed to have accrued to the person in the taxable territories during the previous year.

(9) It is thus clear from Ss. 3 and 4 of the Act that if Madhya Bharat was a taxable territory in the year ending on 31-3-1950, the petitioners are assessable by reference to the income which they derived within or without Madhya Bharat in that year. Learned Counsel for the petitioners, however, contends that under S. 2(14A) Madhya Bharat became a taxable territory from 1-4-1950 and was not a taxable territory during the accounting year 1949-1950. In support of this contention he strongly relied on the decision of the Rajasthan High Court in — '*Madan Gopal v. Union of India*', AIR 1951 Raj 94, which he read out to us in extenso. He supplemented the reading by addressing arguments to emphasise the conclusions arrived at by the learned Judges of the Rajasthan High Court and their reasons for the conclusions.

Mr. Chitale on the other hand urged that though under sub-cl. (d) and (e) of S. 2(14A) Madhya Bharat became a taxable territory from 1-4-1950, the proviso (b), (iii) to that section treats Madhya Bharat as if it were a taxable territory during the period from 1-4-49 to 31-3-50 for the purpose of making any assessment and that on a plain and natural construction of the wording of cl. (b), (iii) of



the proviso, the income which accrued to the petitioners in the year ending on 31-3-50 was chargeable to income-tax under S. 3 of the Act. The question raised must, therefore, be decided by an examination of the provisions of S. 2(14A). This section classifies "taxable territories" into five categories as respects different period of time. I do not propose to burden the judgment with the details of the now too well-known historical changes in the territory of India during the years 1947-50 which form the basis of the classification in S. 2(14A). They have been noted with clarity in para 16 of the decision of the Rajasthan High Court. For our purposes it is sufficient to refer to the material provisions of S. 2(14A).

These are as follows:

"Taxable territories" means—

.....

(d) as respects any period after 31-3-1950 and before 13-4-1950, the territory of India excluding the State of Jammu and Kashmir and the Patiala and East Punjab States Union, and

(e) as respects any period after 12-4-1950, the territory of India excluding the State of Jammu and Kashmir:

Provided that the taxable territories shall be deemed to include—

.....

(b) The whole of the territory of India excluding the State of Jammu and Kashmir—

(i) as respects any period, for the purposes of Ss. 4A and 4B,

(ii) as respects any period after 31-3-1950, for any of the purposes of this Act, and

(iii) as respects any period included in the previous year for the purpose of making any assessment of the year ending on 31-3-1951, or for any subsequent year;"

(10) It will be noted from these provisions that if the matter stood alone on cls. (d) and (e) of S. 2(14A) without the proviso, then the territories of Madhya Bharat could not be regarded as taxable territories during the accounting year 1949-1950 and the Income-tax Officer, Indore, would have no jurisdiction to assess the petitioners on the income which accrued to them in Madhya Bharat during that year. But when the words of the proviso (b) are written in, as they must be written in, to S. 2(14A) then on a true construction of the proviso, a fiction is created and the whole of the territory of India including Madhya Bharat but excluding the State of Jammu and Kashmir is regarded as taxable territory as respects certain periods and certain purposes not otherwise covered by the cls. (d) and (e) of the substantive part of the definition of "taxable territory" given in S. 2(14A). Thus, so far as Madhya Bharat is concerned, whereas under cls. (d) and (e) of the substantive part of the definition "taxable territory", it is not a taxable territory as respects any period prior to 1-4-1950, it is deemed to be such under the proviso (b), (i) for the purposes of S. 4A and 4B. I do not think that the words "any period" in cl. (b), (i) of the proviso can be construed as meaning any period after 31-3-50. For to do so is to ignore the full effect of the words "shall be deemed to include" which

occur in the proviso. Sub-cl. (ii) of cl. (b) of the proviso regards the whole of the territory of India excluding the State of Jammu and Kashmir as taxable territory as respects any period after 31-3-1950, for any of the purposes of the Act.

When it is remembered that under cls. (d) and (e) of the definition the Patiala and East Punjab States Union become taxable territory from 13-4-50, the effect of this sub-clause of the proviso is inter alia to artificially regard the Patiala and East Punjab State as a taxable territory from 1-4-50 for any of the purposes of the Act. But on a plain and natural meaning of the words of this clause, this does not appear to me the sole object of the clause. It is also to place beyond dispute the fact that it is not for any particular purpose or purposes that the whole of the territory of India is a taxable territory as respects any period after 31-3-1950, but that it is so, for any of the purpose of the Act. This clause, as the learned Advocate General suggested, enables the authorities appointed under the Act to set in motion the whole procedure laid down in the Act from 1-4-1950, in the territories which were before this date not taxable territories and where the machinery under the Act did not exist. To me, it seems that the combined result of sub-cl. (i) and (ii) of cl. (b) of the proviso, so far as the petitioners are concerned, is to give jurisdiction to the Income-tax Officer, Indore, to charge them to tax in respect of the income which accrued to them in the year ending on 31-3-50 in a taxable territory without Madhya Bharat, it being an income which accrued to the petitioners who are deemed to be 'resident' in the taxable territories of Madhya Bharat in that year under sub-cl. (i) of cl. (b) of the proviso. Coming now to sub-cl. (iii) of cl. (b) of the proviso, we find its language plain enough. It makes the whole of the territory of India including Madhya Bharat and excluding the State of Jammu and Kashmir a taxable territory during the period from 1-4-49 to 31-3-50 for the purpose of making any assessment of the year ending on 31-3-1951. Under this clause the income which accrued to the petitioners in Madhya Bharat during the period 1-4-49 to 31-3-50 is an income which accrued in a taxable territory for the purpose of making any assessment of the year ending on 31-3-51.

(11) At this state it would be convenient to refer to the decision of the Rajasthan High Court on which the learned Counsel for the petitioners has founded his arguments, and the reasoning and the conclusions of which he commends us for acceptance. In that case the question arose whether under the Indian Income-tax Act, 1922, income accruing or arising in Rajasthan (which is also like Madhya Bharat a Part B State) before it became on 1-4-1950 a taxable territory under the Act, was liable to income-tax. One of the contentions that was put forward on behalf of the petitioner, one Madan Gopal Kabra, in that case was that as Rajasthan was not a taxable territory during the accounting year 1949-50, he was immune from liability to assessment on the income of that year. In answer to this contention, the Counsel appearing for the Union of India relied on cl. (b), (iii) of the proviso to S. 2(14A) of the Act to show that income arising or accruing in the year from 1-4-49 to 31-3-50 in Rajasthan was liable to tax. The learned



Judges of Rajasthan High Court while accepting the contention of the petitioner before them observed that cls. (d) and (e) of S. 2(14A) made Rajasthan a taxable territory from 1-4-49 to 31-3-50 and "the extended meaning given by the proviso was to be restricted so far as may be expressly stated therein."

They dealt with the proviso in para 18 of their judgment as follows:

"The proviso (b) can be divided into three portions and the whole of the territory of India (excluding Jammu and Kashmir) is declared to be the taxable territory of India, firstly as regards any period for the purpose of Ss. 4 A and 4 B. These sections relate to a definition of persons who may be classed as 'residents' or 'not ordinarily residents' in taxable territories in any year, and residence for certain periods prior to the year for which assessment has to be made, is directed to be taken into account. The first clause in proviso (b) means to say that the earlier residence in Part 'B' States will be taken to be residence in taxable territories while taking account of the residence for a certain prior period. The said proviso secondly declares the whole of the said territory to be taxable territory as respects the period after 31-3-50, for any of the purposes of Income-tax Act, 1922. So far as Rajasthan is concerned, the same matter is stated in cl. (d) of the definition, but it also makes Patiala and East Punjab States Union as taxable territories for the period from 1st April to 12th April, although according to cl. (e) in the definition, it was not declared to be taxable territory in that clause. Clause (ii) of the proviso was obviously enacted in order to get over the difficulty of separate assessment of tax for the period from 1st April to 12th April as regards individuals in Patiala and East Punjab States Union.

In this second clause the words "for any of the purposes of this Act" clearly signify that the aforesaid territory including Rajasthan is a taxable territory for the purposes of levy, assessment and collection of income-tax. In the third clause, the whole of the territory of India (excluding Jammu and Kashmir) is declared to be taxable territory as regards any period included in the previous year for the purposes of making any assessment of the year ending on 31-3-51 or for any subsequent year. Assuming for the moment that the words "assessment of the year" mean the same thing as "assessment for the year" and assuming that the previous year of the individuals affected, runs from 1st of April of any year to 31st day of March of the succeeding year, the previous year referred to in the clause for the purpose of making any assessment in the year beginning on 1-3-50 and ending on 31-3-51 would be the year from 1-4-49 to 31-3-50, but the proviso makes the whole of the territory of India taxable territory only for the purpose of making any assessment of the year 1950-1951, and for no other purpose. According to the scheme of the Income-tax Act, it is divided into seven chapters, and while charge of income-tax is dealt with in chapter I, the assessment is dealt with in chapter IV.

Their Lordships of the Privy Council have observed in the case of — 'Commissioner of

Income-tax Bombay Presidency and Aden v. Khem Chand Ramdas', AIR 1938 P C 175: ILR (1938) Bom 487 that:

"One of the peculiarities of most Income-tax Acts is that the word 'assessment' is used as meaning sometimes the 'computation of income', sometimes 'the determination of the amount of tax payable', and sometimes 'the whole procedure laid down in the Act for imposing liability upon the tax payer'. The Indian Income-tax Act is no exception in this respect".

"Section 23 which occurs in Chapter IV refers to assessment, as the marginal note to the section indicates and the word 'assess' and its derivatives 'assessment' 'assessed' have been used in the sense of 'computation of income'. In our opinion, it is at best in the sense of the determination of the amount of tax payable that the word has been used in cl. (iii) and not in the sense of 'the whole procedure laid down in the Act for imposing liability upon the tax-payer'."

The learned Judges of the Rajasthan High Court further said in para 19 of the judgment that:

"In order that persons may not escape taxation during the intervening period from 1-4-49 to 31-3-50 in areas where there existed law relating to income-tax, the provision appears to have been made in cl. (iii) of proviso (b) to S. 2(14A). This clause makes the territory in which tax was leviable by any other law as also taxable territory for the purpose of making assessment in the year 1950-51. The language used in cl. (iii) is 'for the purpose of making any assessment of the year ending on 31-3-1951'. As observed earlier, there are three stages in connection with the imposition of a tax. The first is the declaration of liability, the second is the assessment and the third is the collection. This clause makes the territory a taxable territory for the purpose of making any assessment, but not for the purpose of chargeability. The chargeability is left to arise by some other law, and the law is the previous State Law referred to in S. 13, Finance Act, 1950."

(12) As to S. 13 of the Finance Act, 1950, it was observed in the Rajasthan High Court decision that it kept alive the State Law not only for the purpose of levy, assessment and collection of income-tax on the income of the year 1948-1949, but also for the above purpose in the subsequent year and that, therefore, the income accruing or arising in Rajasthan for any period prior to 1-4-50 was chargeable to income-tax not under the Indian Income-tax Act but under the State Law, if any, in force prior to 1-4-50. It is important to note that the ratio decidendi of the decision in — 'Madan Gopal Kabra's case', (AIR 1951 Raj 94) that income accruing or arising in Rajasthan in the year from 1-4-49 to 31-3-50 was not liable to tax under the Indian Income-tax Act, is not that Rajasthan was not a taxable territory under the Act during that year. But it is that it was a taxable territory for the purpose of making an assessment only and not for the purpose of chargeability under the Indian Income-tax Act.

(13) Learned Counsel for the Union of India has no quarrel with the meaning put by the Rajasthan High Court on the first sub-clause



of Cl. (b) of the proviso. As to the other two sub-clauses, his criticism is that the learned Judges of the Rajasthan High Court have not construed the words of these sub-clauses according to their plain and natural meaning. It is said that the purpose of the second sub-clause is not only to make the Patiala and East Punjab State Union a taxable territory from 1-4-1950, but it is also to enable the assessment machinery being set up in the taxable territories where it did not exist before 1-4-1950, and further that the first two sub-clauses of the proviso (b) read with S. 64 of the Act give to the Income-tax Officer, Indore, jurisdiction to assess to tax the income which accrued to the petitioners in the accounting year 1949-50 outside Madhya Bharat in a taxable territory. It was further argued that if in enacting sub-cl. (ii) of cl. (b) of the proviso, the intention had been only to make the Patiala and East Punjab State Union a taxable territory from 1-4-50, the Legislature would have used in sub-cl. (ii) a specific language to that effect and not a general language such as is found in that sub-clause.

With regard to the sub-cl. (iii), the argument of Mr. Chitale is that chargeability under the Indian Income-tax Act is determined on the definition of the term "taxable territory" and if under the Act, a territory is a taxable territory during any particular year, then there can be no escape from the conclusion that the income for that year is chargeable under the Indian Income-tax Act. The learned Advocate General of Madhya Bharat proceeded to argue that as the intention to charge a tax in respect of the income accruing in the year from 1-4-49 to 31-3-50 was apparent on the face of the Indian Income-tax Act, it was not open to the Court to cut down the general words imposing the tax by reference to extraneous considerations such as the report of the Indian States Finance Inquiry Committee, or possible intention of the legislature gathered from other Acts, and that S. 13 of the Finance Act, 1950, is perfectly intelligible if it is read as keeping alive the State law for the purposes of levy, assessment and collection of tax on the income of the period before 31-3-49.

(14) In my view, there is considerable force in the argument of the learned Counsel appearing on behalf of the Union of India. I have already indicated above the construction that ought to be put on the first sub-clause of clause (b) of the proviso. It is in no way different from that put by the Rajasthan High Court. As to the second sub-clause, I have already said that its object is not merely to make Patiala and East Punjab States Union a taxable territory from 1st April to 12th April, 1950, the period not included in the definition under clause (e); it is also to exclude the risk of a territory declared to be a taxable territory from 1-4-50 not being so regarded for all purposes and to set in motion the whole machinery laid down in the Act for imposing liability on the tax payers where the machinery already did not exist. I, however, part company with the learned Judges of the Rajasthan High Court when they say that although cl. (b), (iii) of the proviso makes a part B State like Rajasthan or Madhya Bharat a taxable territory as respects the period from 1-4-49 to 31-3-1950, it is only for the purpose of making assessment of the year ending on 31-3-51 and not for the purpose of the chargeability which is

left to arise not under the Indian Income-tax Act but under some other law. With the greatest respect for the opinion of the learned Judges of the Rajasthan High Court, I do not think that such a construction of clause (b), (iii) of the proviso is warranted either by the language of the sub-clause or by the scheme of the Indian Income-tax Act, 1922.

The definitions of the term "taxable territory" and of other words and expressions in the Act are for the purpose of construing the provisions of the Act wherever the words and the expressions are used. It is with reference to the definition given in section 2(14A) of the term "taxable territories" that sections 3 and 4 of the Act which according to the decision of the Federal Court in — 'Chhattu Ram v. Commissioner of Income-tax Bihar', AIR 1947 F C 32 are charging sections, have to be read. The expression "taxable territory" is the pivot round which the question of assessability and chargeability under the Act turns. Under section 4 in many cases the question of assessability depends on the accrual or receipt of income in the taxable territories. Again, chargeability varies with the factor of residence, which has been defined in the Act with reference to the "taxable territories". It is clear from a careful reading of Ss. 3, 4, 4A, 4B and 2(14A) of the Act that once it is held that under cl. (b), (iii) of the proviso to S. 2(14A) a Part 'B' State is during the period from 1-4-49 to 31-3-50 which is a period included in the previous year for the purpose of making an assessment of the year ending on 31st day of March 1951 or for any subsequent year, a taxable territory, it follows as a necessary and logical conclusion that chargeability of the income accruing in that year to tax arises under Ss. 3 and 4 of the Act. There can be no question of assessment under the Indian Income-tax Act, of tax on the income accruing in any particular year, if the liability of tax under the Act is not already in existence.

As observed by Lord Dunedin in — 'Whitney v. Commissioner of Inland Revenue', (1926) A. C. 37, there are three stages in the imposition of a tax. He said:

"There is the declaration of liability, that is, the part of the statute which determines what persons in respect of what property are liable. Next there is the assessment. Liability does not depend on assessment. That ex hypothesi has already been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly, come the methods of recovery if the person taxed does not voluntarily pay."

(15) This passage has been relied upon (in?) the Federal Court decision referred to above. The observation "Liability does not depend on assessment. That ex hypothesi has already been fixed" is important and deserves to be noted. It shows that assessment under any Act presupposes the existence of a liability to tax under that Act. That liability exists in the Indian Income-tax under Ss. 3 and 4. The deciding factor which seems to have weighed with the Rajasthan High Court in coming to the conclusion that chargeability does not arise under the Indian Income-tax Act is the use of the words "for the purpose of making any assessment" in sub-cl. (iii) of cl. (b) of the proviso. I can see no ground for treating these words as excluding the operation of the charging



sections in respect of the income accruing in the previous year referred to in cl. (b), (iii) of the proviso. With all respects to the learned Judges of the Rajasthan High Court, the construction put by them on this sub-clause fails to take account of the fundamental act that assessment under the Indian Income-tax Act presupposes liability to tax under that Act, and altogether renders the sub-clause nugatory and purposeless. If the charge of tax on the income accruing in the year 1949-50 is to arise not under the Indian Income-tax Act but under some other law, it is difficult to see the object and the purpose with which this sub-clause was introduced in the Indian Income-tax Act.

(16) In 'Kabra's case', (AIR 1951 Raj 94) section 13 of the Finance Act 1950 has been referred to as supposing (supporting?) the view that the income accruing to a person in a Part B State in the accounting year 1949-50 is not chargeable under a State Law, if any. The relevant portion of S. 13, Finance Act is as follows:

"If immediately before the 1st day of April, 1950, there is in force in any part B State other than Jammu and Kashmir or in Manipur, Tripura or Vindhya Pradesh or in the merged territory of Cooch Bihar any law relating to income-tax or super-tax or tax on profits of business, that law shall cease to have effect except for the purposes of the levy, assessment and collection of income-tax and super-tax in respect of any period not included in the previous year for the purpose of assessment under the Indian Income-tax Act, 1922 (XI of 1922), for the year ending on the 31st day of March, 1951, or for any subsequent year, or as the case may be, the levy, assessment and collection of income-tax on profits of business for any chargeable accounting period ending on or before the 31st day of March, 1949."

(17) In regard to this section, it has been said by the learned Judges of the Rajasthan High Court that under this section the State Law is kept alive not only for the purpose of levy, assessment and collection on the income of the year 1948-49, but also for the above purposes in the subsequent year. So that if prior to 1-4-1950, there was a law imposing income-tax in any part of Part 'B' State, then the income accruing in that part in the year from 1-4-48 to 31-3-49, as also in the year 1-4-49 to 31-3-1950 would be chargeable under the State Law and not under the Indian Income-tax Act. I am unable to agree with this reading of S. 13, Finance Act, 1950. To my mind, S. 13, Finance Act, preserves the operation of the State Law imposing income-tax, super-tax or tax on profits of business for the purpose of levy, assessment and collection of the tax only in respect of the income accruing in the period before 31-3-1949. It does not permit of the income accruing in any part B State in the year 1-4-49 to 31-3-50 being charged to tax under the State Law. For the period from 1-4-49 to 31-3-50 though not included in the previous year for the purposes of assessment for the year ending on 31-3-1952 is included in the previous year for the purpose of assessment for the year ending on 31-3-1951. Thus the period not included in the previous year for the purposes of assessment for any subsequent year would be included in the previous year for the purposes of assessment for the year before.

The words used in S. 13 are not "the subsequent year" but they are "any subsequent year"; & if the reasoning of the Rajasthan High Court is accepted, then one is led to the strange conclusion that the State Law is to continue in force under S. 13, Finance Act, for the levy, assessment and collection of the tax on income accruing not only in the year from 1-4-48 to 31-3-49 but also accruing in all the subsequent years. In other words, the provision in S. 13, Finance Act, 1950 repealing the State Law except for a very limited purpose and the provisions of the Indian Income-tax Act in their applicability to Part B states become wholly ineffective. It is highly improbable that this was the intention of S. 13, Finance Act, or of the other provisions of that Act by which the Indian Income-tax Act was amended and made applicable to Part B States.

(18) Learned Counsel for the petitioners also urged that the Income-tax Act has no retrospective operation and that when the Act was made applicable to this State only from 1-4-1950, it cannot be construed so as to permit taxation under the Act of the income accruing in the State before 1-4-1950. In reply, the Counsel for the Union of India said that the Act, no doubt, came into force in Madhya Bharat on 1-4-50 but as under S. 3 of the Act it is the income accruing during the previous year which is taxed in the subsequent year, that is, the year of assessment and as the proviso to S. 2(14A) makes this State a taxable territory during the previous year 1949-50, the Act is operative to levy tax on the income accruing in Madhya Bharat in the year 1-4-49 to 31-3-50 and the Act to this extent is retrospective. The contention may be disposed of by saying that when, as I have already shown, the express words of the proviso to S. 2(14A) make the income accruing in Madhya Bharat in the year from 1-4-49 to 31-3-50 chargeable to tax under the Act, the effect of these words cannot be narrowed or whittled down by applying a rule of construction about statutes which are not by express words or necessary intendment retrospective.

(19) For all these reasons, I am disposed to accept the argument of the learned Counsel for the Union of India and hold that the income which accrued to the petitioners in the year from 1-4-49 to 31-3-50 in Madhya Bharat is chargeable to tax under the Indian Income-tax Act, and that irrespective of whether this income is, or is not chargeable under the Act; sub-cl. (i) and (ii) of cl. (b) of the proviso of S. 2(14A) read with S. 64 give jurisdiction to the Income Tax Officer Indore to tax the petitioners in respect of the income which they derived in that year from without Madhya Bharat.

(20) As to the contention of the learned Counsel for the petitioners that Parliament has no power to make a law imposing income-tax in Madhya Bharat on income accruing before 26-1-50, the argument is that under the Government of India Act, 1935, the Indian Legislature had no power to make laws for Indian States with regard to any matter; that this limitation on the power of the Legislature was continued under S. 8(3) of the Indian Independence Act, 1947, and the Dominion Legislature also had no power to make any law for the Indian States; that the Dominion Legislature derived the power to make laws for Madhya Bharat with respect to certain matters by an Instru-



ment of Accession executed by the Raj PramuKh under Article VIII of the Covenant of 1948 by which the United State of Gwalior, Indore and Malwa (Madhya Bharat) was brought into existence; that the Instrument of Accession excluded the authority of the Dominion Legislature to impose any tax in the territory of Madhya Bharat; that the Covenant under which the Instrument of Accession was executed was a law in force in Madhya Bharat immediately before the commencement of the Constitution; that this law has been continued under Article 372 of the Constitution and that, therefore, Parliament has no power to impose tax on income accruing in Madhya Bharat before 26-1-1950. This argument does not impress me. It is based on a misconception of the constitutional position of this State before and after 26-1-50.

The Covenant under which this State was constituted is, as pointed out, by a Full Bench of this Court in — 'Shri Ram Dube v. Govt. of the State of Madhya Bharat', ILR (1952) Madh B 178, not a statute. I said in that case that the Covenant was as its name implies a compact between the signatories to the Covenant, the object of which was to secure the welfare of the people of the region by the establishment of a new State comprising of the territories of the Covenantee States with a common Executive, Legislature and Judiciary. The Covenant did not, and indeed could not, put restrictions on the powers of the Dominion Legislature. The limitation on the powers of the Dominion Legislature to make laws for Indian States arose under the provisions of the Government of India Act, 1935 itself. Section 6 of the Government of India Act permitted the Ruler of an Indian State to accede to the Dominion of India by executing an Instrument of Accession specifying inter alia the matters with respect to which the Dominion Legislature could make laws for the State. Section 101 of the Government of India Act, 1935 made it clear that the Dominion Legislature could make laws for an acceding State only in accordance with the Instrument of Accession of that State and subject to the limitations contained therein. With the repeal of the Government of India Act, 1935, by the new Constitution, which was accepted by the Rulers of Gwalior, Indore and the Covenantee States as the Constitution for the United State of Madhya Bharat by executing a supplementary Covenant in 1949, the constitutional position of the State has entirely changed.

The distinction which existed under the Government of India Act, 1935, between the Provinces & the Acceded States is gone. Under Article 1 of the Constitution, India is now a compact territory and a Union of States. Leaving aside the case of Kashmir, the States specified in Part B of the First Schedule of the Constitution are on a par with the States mentioned in Part A of the Schedule, with this difference that they are subject to the supervisory powers of the Centre for the transitional period of ten years under Article 371 and the provisions of Part VI of the Constitution apply to them with the modifications and omissions mentioned in Article 238. The Legislative competence of Parliament in relation to Part B States is as varied and wide as it is in the case of Part A States. The extent of the power of Parliament to legislate is defined in Chapter I of Part XI of the Constitution. I

had occasion to consider in the case of — 'Shanta Devi v. Custodian of Evacuee Property, M. B. Govt.', Civil Misc. Petn. No. 237 of 1951 (Madh-B) the question whether the Parliament had power to legislate retrospectively for Part B States with respect to a matter excluded from the legislative competence of the Dominion Legislature by virtue of an Instrument of Accession executed under S. 6, Government of India Act, 1935. I also considered the question whether Parliament could under the Constitution give to its laws retrospective operation.

I then observed that Parliament had the power to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the Union List and the Concurrent List and that this power to legislate within the appointed limits was absolute and supreme, and further that the Constitution did not restrict or limit the legislative competence of Parliament so as to make it exercisable only with regard to that part of territory of India or with regard to those subjects in respect of which the Dominion Legislature had before 26-1-50 the power to legislate and that it was to the provisions of the present Constitution that we must look for determining the power of Parliament.

I also made the observations:

"Now the principle that the Parliament and the State Legislatures are within the statutory limits assigned to them bodies possessing plenary powers is so well settled as to be free from doubt. From this principle of the supremacy of the Parliament and the State Legislatures within their allotted spheres, it follows, that in the absence of express provision to the contrary, the Parliament and any State Legislature can give to their laws otherwise valid, retrospective or prospective operation. There is in our Constitution a limitation on the power of the Legislatures to make retroactive criminal legislation. These limitations are stated in Article 20. But except for this Article, there is no other provision in the Constitution which points to any limitation on the plenary powers of the Parliament and the State Legislatures so long as they keep within the ambit of the subjects of the legislation specifically assigned to them.

There is nothing in Arts. 245, 246 and 248 to indicate an intention to withhold from the Parliament the same absolute discretion as the British Parliament has with regard to past events as well as present and future, provided of course Parliament confines itself to the specified subjects and legislates within the limitations prescribed by Article 20. It would indeed be a violent straining of the wide words of the power to make laws conferred by Articles 245, 246 and 248 if we were to read into them a prohibition of retrospective laws. To do so would be to add to the Constitution, without express words, the prohibition of retrospective laws over and above the limits set out in Article 20."

(21) In that case I expressed my dissent from the view taken by the Rajasthan High Court in — 'Kabra's case', AIR 1951 Raj 94 that as the authority of the Dominion Legislature under the Government of India Act, 1935 in the matter of Legislation for the purpose of imposition of income-tax was excluded in Rajas-



than before 26-1-50 and as the Government of India Act, 1935 had been repealed by Art. 395 of the Constitution, therefore, by virtue of Article 367 and S. 6, General Clauses Act, the previous operation of S. 101 of the Government of India Act, 1935 could not be affected by subsequent legislation. While expressing my dissent from this view, I said:

"I find it difficult to see how section 6 of the General Clauses Act could be invoked in such cases for holding that the effect of the repeal of the Government of India Act, 1935 is to confirm for ever the rights vested in the citizens just before the commencement of the Constitution and deny to the Parliament and the State Legislatures the power of interfering with those rights by enacting retrospective Legislation under the powers conferred on them by Articles 245 and 246 of the Constitution. It appears to me that S. 6, General Clauses Act, which merely lays down one of the general rules of construction of statutes, can have no applicability where the Government of India Act, 1935 is not merely repealed but is substituted by a new Constitution under which the Parliament and the State Legislatures are not prohibited from legislating for the past and of interfering with vested rights. Section 6, General Clauses Act, would have again no applicability where the Parliament and the State Legislatures with the legislative competence of retrospective legislation pass an enactment giving it in express terms retrospective effect."

(22) It is true that I made these observations in a case in which the question was of validity of the Administration of the Evacuee Property Act, 1950 in its applicability to this State and I took care to mention that in making those observations I should not be taken as deciding in any way the point as to the validity of the imposition of income-tax in circumstances such as those present in the Rajasthan case. But nothing which the learned Counsel for the petitioners said before us persuades me to revise the opinion I expressed in — 'Shanta Devi's case', Civil Misc. Petn. No. 237 of 1951 (MB). It must be said that the learned Counsel for the applicants did not go to the length of saying that Parliament had no power under the Constitution to legislate retrospectively. He, however, strongly relied on Article 372 of the Constitution to show that the limitations imposed on the powers of the Dominion Legislature under the Government of India Act, 1935 to legislate for the Indian States, are also operative in relation to the Parliament under the new Constitution. This contention seems to me untenable.

Article 372 does not save the Covenant which, as I have said before, is not a statute and which did not itself impose any restrictions on the powers of the Dominion Legislature. Nor does the Article preserve Ss. 6 and 101, of the repealed Government of India Act, 1935, which permitted restrictions being put on the power of the Dominion Legislature by Instruments of Accession. This article is analogous to S. 292, Government of India Act, 1935 and as observed by the Federal Court in — 'United Provinces v. Mt. Atiqua Begum', AIR 1941 F C 16

"a provision like section 292 is usually inserted in similar Acts to indicate that the repeal of the parent Act shall not be deemed to have repealed all the laws passed under that Act,"

and that the provision did not mean that no later Act of the Legislature can by words of retrospective operation antedate its effect so as to affect rights acquired under a previous law down to the date of the new legislation. There is, therefore, no justification for reading Article 372 (1) as laying down any limitation upon the power of the Parliament to amend the Indian Income-tax Act and make it applicable to Part 'B' States so as to tax income accruing in States prior to 26-1-50, and the petitioners' contention to that effect must be rejected.

(23) It was next urged that the notice served on the petnrs. under S. 22(2) of the Act was not valid. The objection is that the notice which was issued on 22-11-1950 was addressed to Sir Hukum Chand as an individual and not as a member of a Hindu Undivided Family and that, therefore, the assessment made on the income of the Hindu Undivided Family is not valid. There is no substance in this objection. In the notice issued to Sir Hukum Chand (Ex. 22) by which he was required to submit a return, the various capacities in which a return has to be filed were indicated one above the other but the notice went to the assessee without any one of these capacities having been scored out. The contention of the assessee seems to be that he did not know exactly as to in which capacity of his, he was required to submit a return & therefore, the notice was illegal. I do not think that the assessee was left in doubt as to what he had to do in the matter of submitting a return. After the receipt of the notice, Sir Hukum Chand addressed a letter to the Income-tax Officer Indore saying that he was a member of Hindu Undivided family and that as he had no separate source of income of his own, he could not be taxed. In reply to that letter the Income-tax Officer informed Sir Hukum Chand on 6-1-51 that the return of income which was required from him was of his Hindu Undivided family and not in his capacity as an individual. It is thus clear that Sir Hukum Chand knew that he had to furnish a return of income of his Hindu Undivided family and as a matter of fact Sir Hukum Chand did submit a return on 18-2-52 making it clear in the return that it was of his Hindu Undivided family.

A notice issued to any adult member of a Hindu Undivided family for submitting a return of the income of the family is a valid notice. When such a notice was issued in the present case and on that notice a return of the undivided family was filed, the petitioners cannot legitimately be allowed to raise the question of the validity of the notice under S. 22(2). Again, as has been held by the Federal Court in — 'Chattu Ram v. Income-tax Commissioner Bihar', AIR 1947 F C 32 the jurisdiction of the Income-tax Officer to assess and the liability of the assessee to pay the tax are not conditional on the validity of the notice. Their Lordships observed in this case that

"the Income-tax assessment proceedings commence with the issue of a notice. The issue or receipt of a notice, is not, however the foundation of jurisdiction of the Income-tax Officer to make the assessment or of a liability of the assessee to pay the tax. It may be urged that the issue and service of a notice under S. 22(1) or (2) may affect the liability under the penal clauses which provide for failure to act as required by the notice. The



jurisdiction to assess and the liability to pay the tax, however, are not conditional on the validity of the notice."

These observations fully apply to the present case and on their basis, the contention of the petitioner as to the assessment being without jurisdiction because of an invalid notice, cannot be accepted.

(24) The last contention of the petitioners is that they raised before the Income-tax Officer Indore an objection as to the place of assessment and that the Income-tax Officer was not justified in making the assessment without following the procedure laid down in S. 64 (3). On this point the submission of the learned Counsel for the petitioner was that when the petitioners filed the return marked as 'under protest' and that when in his letter dated 19-12-50 addressed to the Income-tax Officer Indore, Sir Hukum Chand distinctly stated that he was not liable to tax under the Income-tax Act in respect of the income which accrued to him in Madhya Bharat before 1-4-50, it meant that an objection as to the jurisdiction of the Income-tax Officer Indore to assess them was taken. According to the learned Counsel, in other words, it meant that the petitioners raised before the Income-tax Officer Indore an objection as to the place of assessment. Mr. Chitale's argument in answer to this was that inasmuch as the petitioners say that the notice given to them to furnish a return under S. 22 (2) was not a valid notice, it must be taken that the return submitted by them was in response to the notice under sub-sec. (1) of S. 22 and that as in this return the petitioners had stated Indore as the principal place of their business, they were precluded under the second proviso to sub-sec. (3) of S. 64 from raising an objection as to the place of assessment.

It was further said by the learned Counsel for the Union of India that the procedure laid down in S. 64 (3) applies only when an objection as to the place of assessment is specifically raised by the assessee; that the petitioners did not raise the objection before the Income-tax Officer Indore; and that the filing of a return "under protest" or making a statement denying the liability to tax is not tantamount to taking an objection as to the place of assessment. He also urged that the petitioners had themselves stated in the return of income filed by them that their principal place of business was Indore and that their Hindu Undivided family resided in Indore and that when these statements were accepted by the Income-tax Officer, it could not be said that there was any dispute between the petitioners and the Income-tax Officer Indore as to the place of assessment requiring the Income-tax Officer Indore to follow the procedure indicated in Section 64 (3). The learned Counsel for the Union of India also drew our attention to the case of — 'Wallace Brothers & Co. Ltd. v. Commissioner of Income-tax Bombay, Sind and Baluchistan', AIR 1945 FC 9 in which it was observed that the question as to the place of assessment under S. 64 (3) was more one of administrative convenience than of jurisdiction and that in any event it was not one for adjudication by the Court.

(25) In my view, this contention urged on behalf of the petitioners is without any force. Section 64 of the Act provides that where an assessee carries on business at any place he

shall be assessed by the Income-tax Officer of the area in which that place is situated, and where the business is carried on in more places than one, then by the Income-tax Officer of the area in which the principal place of business is situated. In all other cases, an assessee is assessed by the Income-tax Officer of the area in which he resides. Under sub-sec. 3 of S. 64 if any question arises to the place of assessment then the question is to be determined by the Commissioner or by the Central Board of Revenue. The Income-tax Officer is also required under this sub-section to refer the matter as to the place of assessment for determination if the place of assessment is called in question by the assessee. Section 64 (3) also says that the place of assessment shall not be called in question by an assessee who has made a return in response to the notice under sub-s. (1) of S. 22 and has stated therein the principal place of his business, or if he has not made such a return, it shall not be called in question after the expiry of time allowed by the notice under S. 22(2) or S. 34 for making a return.

It is clear from these provisions that an objection as to the place of assessment must be specific and that sub-section (3) becomes operative only when a question as to the place of assessment arises. If, therefore, the statements made by an assessee in his return about the principal place of business or residence in any area are accepted by the Income-tax Officer, it cannot be said that there is for determination a question as to the place of assessment. In the present case, it is obvious from the notice (Ex. 22) on record that the notice issued to the petitioners was under S. 22(2). The fact that the notice issued and served on the petitioners was under S. 22(2) was admitted by the Income-tax Officer in his letter dated 4-1-52 which he addressed to Sir Hukum Chand reminding him of the fact that he had failed to submit a return in response to the notice. In face of these facts, the opponents cannot now be permitted to say that the return filed by the petitioners was in response to the general notice issued under S. 22(1). The fact that the petitioners say here that the said notice was not valid, does not, in my opinion, alter the legal position that the return submitted by them under that notice, which I have held to be a valid notice, was a return in response to a notice under S. 22(2). The return was, no doubt, marked as 'under protest.' But this only means that the return was not a voluntary one. It does not mean that the petitioner raised an objection as to the place of assessment.

An assessee may be unwilling to furnish a return for a variety of reasons. He may deny liability to taxation on any income and may be thus unwilling to submit a return and yet at the same time may accept the position that a particular Income-tax Officer has jurisdiction to assess income-tax if the liability exists. The words 'under protest' by themselves do not give any indication as to the precise reason or reasons for the unwillingness of the assessee to furnish a return. Again, I fail to see how the statement in the letter addressed by Sir Hukum Chand on 19-12-50 to the effect that the income which accrued to him in Madhya Bharat in the year 1949-50 could not be taxed under the Indian Income-tax Act and that, therefore he was not liable to pay any tax can be read as even suggesting remotely that the petitioners



objected to the place of assessment. It is one thing to deny liability and quite different to say that a particular Officer has no jurisdiction to assess. It is important to note that "the place of assessment" has no reference at all to the liability of an income accruing in any period or in any area to tax under the Act, or to the competency of the Income-tax Officer in the sense of his general authority to assess. The petitioners, no doubt, denied that they were assessable by reference to the income which accrued to them in Madhya Bharat in the year in question. But at no time did they call in question the place of assessment before the Income-tax Officer, Indore. The petitioners themselves stated in the return 'Indore' as the principal place of their business, and residence of the Hindu undivided family. This statement was accepted by the Income-tax Officer Indore. There was, therefore, no issue between the petitioners and the Income-tax Officer as to the place of assessment.

Learned Counsel for the applicants said that the petitioners were not bound by the statements in the return as it having been filed under protest, must be regarded as non-existent. I am unable to accept this effect of the expression "under protest". A return marked as "under protest" only safeguards the position of the assessee and ensures that it may not be said that the return made was a voluntary one. As the petitioners did not raise any objection as to the place of assessment before the Income-tax Officer Indore, they cannot now be allowed to say that the Income-tax Officer should have followed the procedure laid down in S. 64 (3). The matter seems to me to be concluded by the decision of the Federal Court in — *'Wallace Brothers and Co. Ltd. v. Income-tax Commissioner Bombay'*, AIR 1945 F C 9. In that case also, a return was filed by the assessee 'under protest' and without in any way admitting any liability to tax on the world-income and an objection was raised for the first time before the appellate tribunal as to the place of assessment. The Federal Court held that an objection as to the place of assessment must be taken and determined before the assessment is allowed to go on; it cannot be allowed to be raised on an appeal against the assessment after the assessment had been made. It was also observed in that case that the question as to the place of assessment was more one of administrative convenience than of jurisdiction. Following these observations, the contention of the petitioners that the assessment is bad as the Income-tax Officer did not follow the procedure laid down in S. 64 (3) must be repelled.

(26) During the course of his arguments on the objection as to the place of assessment, learned Counsel for the petitioners repeatedly stressed the fact that for several years the petitioners were being assessed by the Income-tax Officer Bombay, and that they had in fact filed returns in Bombay for the assessment years 1948-1949, 1949-50 and 1950-51. In my view, this fact has no bearing in the present case. In the affidavit filed by the petitioners during the hearing of this petition, it has been admitted by them that the returns of the Hindu Undivided family of Sir Hukum Chand for the assessment years 1949-50, 1950-51 have not been filed before the Income-tax Officer Bombay. Again, as the petitioner's principal place of business is Indore and the family resides

in Indore, the jurisdiction of the Income-tax Officer Indore to assess the petitioners is not excluded by the fact that the Income-tax Officer Bombay has commenced assessment proceedings in respect of the income accruing and received by the petitioners within his area.

(27) Having regard to the view I have taken of the various contentions urged on behalf of the petitioners, it is unnecessary to deal with the point raised by Mr. Chitale that this Court should not interfere under Article 226 as the petitioners could have availed themselves of the adequate remedy provided by the Income-tax Act itself by way of an appeal under S. 30 or a revision under S. 33A of the Act. But I ought to notice the argument of the learned Counsel as regards the remedy of an appeal under S. 30. It is conceded that under S. 23B, there is no right of appeal against a provisional assessment. It is, however, said that sub-s. (1) of S. 30 gives the right of appeal inter alia to any assessee "denying his liability to assess under the Act". I do not accede to this contention. The short answer to this is that under S. 30 (1), an appeal lies against any assessment made under any of the sub-sections of S. 23 and against certain orders of the Income-tax Officer which are expressly specified in S. 30 (1). No appeal lies before any assessment is made. An assessee who denies his liability to be assessed is entitled to appeal on that ground only after the assessment is made.

(28) For all these reasons, I am inclined to think that the assessment order and the notice of demand dated 19-2-1952 are valid and the petition under Article 226 for the issue of a writ or an order for quashing the assessment and the notice of demand must be refused.

(29) There remains for consideration the application of the petitioners challenging the validity of the order dated 29-2-1950 of the Income-tax Officer, imposing the penalty of Rs. 25,000/- on the petitioners for their failure to pay the amount of tax within the fixed time, and questioning the bona fides of the Income-tax Officer in making that order. I have already mentioned in the beginning that the petition under Article 226 was filed on 28-2-52 and that on the next day this Court passed an order restraining the Income-tax Officer from taking any action to enforce the provisional assessment order and notice of demand of the tax. This order was served on the Income-tax Officer on 3-3-1952. But in the meantime on 29-2-1952 itself, the Income-tax Officer passed an order imposing the penalty of Rs. 25,000/-. The petitioners state that after the filing of the application in this Court, their Counsel Mr. Samvatsar addressed a letter on 28-2-1952 to the Income-tax Officer informing him of the presentation of the petition and of the fact that the petitioners had therein prayed to the Court for an interim order for restraining him from enforcing the assessment order, and that the petition was likely to be heard on 29-2-1952, and requesting the Income-tax Officer to stay further action in the matter till the hearing of the petition by this Court. The petitioners further allege that on 29-2-1952 when they obtained from this Court an interim order, their Secretary one Mr. Koria and their Income-tax Adviser one Mr. Shroff immediately went to the office of the Income-tax Officer to inform him of the order passed by this Court; but the Income-tax Officer did not grant them any interview.



It is further stated that on 1st March, 1942, the office of the opponent No. 2 refused to accept service of the order of injunction passed by this Court and also refused to accept a letter addressed by the petitioner's Secretary to the Income-tax Officer informing him of the fact of the issue of the prohibitory order by this Court. The explanation which the Income-tax Officer has offered is that he did not take any notice of the letter addressed by Mr. Samvatsar as he had not filed any letter of authority for his appearance before him on behalf of the petitioner: that he did not evade granting an interview to the petitioner's representatives Messrs. Koria and Shroff; that the 1st day of March 1952 being a Saturday, his office was closed to public business at 1-30 p.m. and it was not bound to accept any letter from the public after that time. While admitting that an order from this Court could be delivered to him "wherever he was found even after the close of the office," the Income-tax Officer denies that such an order was presented to him before 3-3-52. It is also admitted that the order imposing penalty was passed on 29-2-52. But it is said by the Income-tax Officer that he had no knowledge of any proceedings before this Court.

(30) On these facts, Mr. Kolah, the learned Counsel for the petitioners argued with warmth and vehemence that the order imposing penalty having been passed after the issue of the prohibitory order by this Court, was without jurisdiction and illegal, and that in making that order the Income-tax Officer intended to forestall this Court. Mr. Chitale rightly did not support the order imposing penalty. But he sought to assure us that at the time of making that order the Income-tax Officer had no knowledge of the order made by this Court, and he had no intention of defying any order of this Court.

(31) As is clear from the order imposing penalty, it was passed by the Income-tax Officer at the close of the day after this Court had issued earlier in the day the order of injunction. The order of the Income-tax Officer imposing penalty is thus clearly without jurisdiction and illegal. I must, however, say that the warmth and vehemence with which the learned Counsel for the petitioners urged that the Income-tax Officer desired to forestall this Court, is, perhaps, justified in the circumstances stated above. That an Income-tax Officer may exercise his powers under the Act and impose a penalty thereunder cannot be in doubt and this Court does not wish to prevent his doing so without anticipating any prohibitory order from this Court in any matter pending before him. But I feel nothing would have been lost in this case if the Income-tax Officer had shown the same care and vigilance in ascertaining the result of the hearing of the petition by this Court on 29-2-1952, as he exhibited in ascertaining at the close of the day on 29-2-1952 from the treasury that the petitioners had not paid the tax into the treasury till then and in imposing the penalty. It cannot be gainsaid that the Income-tax Officer was aware of the proceedings in this Court as he had been in fact so informed on 28-2-52 by the petitioner's Counsel Mr. Samvatsar.

I appreciate the statement of the Income-tax Officer that an order of this Court could be delivered to him at any hour and at any time. I would only point out that if the Income-tax

Officer had made adequate arrangements for this being done, he would not have placed himself in a situation such as this. As it is, it appears from the report of the process-server that on 1-3-52 when he went to the Income-tax Officer to serve the order of injunction on the Income-tax Officer, a clerk in the office refused to accept service and informed him that the Income-tax Officer was not in the office; and that when thereupon, the process-server inquired about the residence of the Income-tax Officer, he was not given the necessary information to enable him to go to the residence of the Income-tax Officer for effecting service of the order. I hope that this state of things is remedied soon by the Income-tax Officer.

(32) In the result the order dated 29-2-52 of the Income-tax Officer imposing the penalty of Rs. 25000/- is declared illegal and without jurisdiction and is set aside. The petitioners' application under Article 226 of the Constitution to quash the provisional assessment and the notice of demand dated 19-2-52 is dismissed. In the circumstances of the case, I would leave the parties to bear their own costs.

(33) SHINDE C. J.: I agree.

(34) MEHTA J.: I agree.

A/D.H.

Order accordingly.

**A.I.R. 1953 M. B. 77 (Vol. 40, C. N. 34)**  
**(GWALIOR BENCH)**

**DIXIT J.**

Fool Chand, Appellant v. Pratap Singh, Respondent.

First Appeal No. 16 of 1951, D/- 17-10-1952.

**(a) Civil P. C. (1908), Ss. 145 and 96 — Discharge of surety — Surety for production of judgment-debtor — Bond in general terms for production until disposal of objection to arrest and thereafter on notice — Arrest declared legal in appeal and execution ordered to be proceeded with — Surety not a party to appeal — Liability of surety.**

The liability of a surety for production of the judgment-debtor before Court must be determined on the terms of the bond passed by him to the Court: AIR 1927 Bom 84 and AIR 1919 PC 55, Rel. on. (Para 4)

Where in the bond offered by the surety for the release of the judgment-debtor, arrested in execution of a decree, he gave an undertaking in general terms that on the rejection of the objections of the judgment-debtor and on the order being passed for his arrest, he would produce the judgment-debtor in the Court and in the event of his failing to produce the judgment-debtor, he would pay the decretal amount, and there is nothing to show in the bond, even though it was open to the surety to have so limited his liability by using proper language to the effect, that the surety would not be liable under it if the judgment-debtor's objections are rejected by the Court of appeal and an order is ultimately made by that Court for the arrest of the judgment-debtor, it is fair to hold that the surety was for the appearance of the judgment-debtor, whether the lower Court in requiring the surety to produce the judgment-debtor was acting on its own decision or was acting in pursuance of an order made by the appellate Court. On the terms of the



bond, it makes no difference to the liability of the surety whether the objections of the judgment-debtor were dismissed and his arrest was ordered consequently by the lower Court or by the higher Court in appeal. (Para 4)

The liability of the surety in such a case arises quite independently of the decree which is sought to be executed. He being not a party to the execution proceedings of the decree and in view of the form in which he had executed the surety bond has no 'locus standi' to object to the execution of the decree or the validity of the arrest of the judgment-debtor for whom he stood surety and therefore his liability to produce the judgment-debtor is in no way affected by the fact that in the appeal in which it was held that the arrest of the judgment-debtor was proper, he was not made a party. (Para 2)

Anno: Civ. P. C., S. 145 N. 9; S. 96 N. 6.

**(b) Civil P. C. (1908), S. 145 — Liability of surety — Surety for production of judgment-debtor on notice — Period of notice not fixed in bond — Sufficient notice.**

The question of sufficiency of notice to surety for production of a person has to be determined according to the principles of justice, equity and good conscience and in all cases where the period of notice required to be given is not specified that notice must be a reasonable notice. In ascertaining what is a reasonable notice the question is not whether the surety could have voluntarily produced the judgment-debtor at any time he liked, but it is whether when under the bond the surety undertook to produce the judgment-debtor on a notice being given to him the notice which was actually given to him was a reasonable notice. (Para 5)

Anno: Civ. P. C., S. 145, N. 91.

Bhagwan Das Gupta, for Appellant; Anand Bihari Misra and Hargovind Misra, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras  
(19) 46 Ind App 228: (AIR 1919 PC 55) 4  
(27) 51 Bom 31: (AIR 1927 Bom 84) 4  
(30) AIR 1930 Mad 514: (53 Mad 334 FB) 3

**JUDGMENT:** The facts of this appeal are that in execution of a decree held by the respondent Pratap Singh against Bag Mal, Raj Mal and Phool Mal, the judgment-debtor Phool Mal was arrested on 13-5-46. He was released on 14-5-46 when the appellant Phool Mal executed a bond promising to produce the judgment-debtor on 30-5-46 or to pay the decretal amount in default. On 30-5-46, the judgment-debtor Phool Mal raised various objections to the execution petition and to his arrest. On this very date the appellant Phool Chand again executed a fresh bond promising to produce the judgment-debtor at any time till and also after his objections to the execution petition were disposed of. On the dismissal of the objections he further promised to produce the judgment-debtor at any time on a notice being given to him to that effect and failing he promised to pay the decretal amount. The judgment-debtor's objections were disposed of by the District Judge of Gwalior on 30-9-48. The learned District Judge holding that the arrest of the judgment-debtor was illegal, dismissed the execution petition and discharged the appellant who stood surety for the appearance of the

judgment-debtor. The decree-holder then appealed to this Court from the said order of the District Judge. In the appeal (Civil Misc. Appeal No. 16 of 2005) a Division Bench of this Court held that the arrest of Phool Mal was proper and that he was "wrongly released from prison". In the appeal this Court directed the executing Court to proceed according to law in the light of the observations made in that appeal. When the matter went back to the lower Court, the appellant was served with a notice on 30-3-51 to produce the judgment-debtor on 2nd April 1951. The appellant failed to produce the judgment-debtor on this date, and contended that his liability ended with the dismissal of the execution petition by the lower Court on 30-9-48; that he was not bound by any proceedings taken thereafter in this Court by the decree-holder; and that it was not possible for him to produce the judgment-debtor in the Court on a short notice of two days. The lower Court rejecting these objections directed the appellant to deposit in the Court on or before 15-5-1951 the decretal amount. It is against this order that the present appeal has been filed.

(2) Mr. Bhagwandas Gupta learned counsel for the appellant firstly contends that as the appellant was not made a party in the appeal Civil Misc. No. 16 of 2005 preferred by the decree-holder, he is not bound by the decision in that appeal holding the arrest of the judgment-debtor proper and directing the execution proceedings to be continued. This objection is, in my opinion, without any substance. The liability of the appellant as a surety in this case arises quite independently of the decree which is sought to be executed. He is not a party to the execution proceedings of the decree. He has, therefore, no 'locus standi' to object to the execution of the decree or the validity of the arrest of the judgment-debtor for whom he stood surety. The bond that was required from the appellant for the appearance of the judgment-debtor was irrespective of the fact whether the arrest of the judgment-debtor was or was not proper. The appellant having executed the surety bond in the form he had done, could not raise the objection that the arrest of the judgment-debtor was not legal or that the execution of the decree by the arrest of the judgment-debtor was not legal. That being so, the liability of the appellant to produce the judgment-debtor is in no way affected by the fact that in the appeal in which this Court held that the arrest of the judgment-debtor was proper, the appellant was not made a party.

(3) It is next urged that the bond which the appellant gave for producing the judgment-debtor was only with respect to the proceedings then pending in the lower Court and that he was not liable to produce the judgment-debtor in execution proceedings taken in pursuance of the order made by this Court. To support this contention, learned Counsel for the appellant relies on a decision of the Madras High Court in — 'Balaraju Chettiar v. Masilamani Pillai', AIR 1930 Mad 514 (FB) in which it was held that upon the dismissal of a suit, the attachment before judgment ceases & if the dismissal is set aside and the suit is decreed in appeal, then the attachment is not revived. There are a number of cases in which various High Courts have taken a contrary view. There are also cases in which various High Courts have held



that when execution proceedings are dismissed for default, any subsequent proceedings are entirely distinct from the proceedings in respect of the prior execution proceedings that were dismissed and the surety could only have contemplated becoming so for the appearance of the judgment-debtor during the proceedings that were then pending and not for proceedings that had not then even been contemplated. Again, there are also cases in which it has been held that if a suit previously dismissed for default is restored on an application by the plaintiff, then with the restoration of the suit all the ancillary proceedings must be deemed to be restored also and that a surety bond given in the suit is also deemed to have been restored. In my opinion, none of these cases are of any guide in the matter before us. There is no uniformity in these decisions.

It seems to me that the question whether the surety bond passed by the appellant was meant only for the proceedings in the lower Court which were then pending or whether it was passed also for any proceedings taken by the lower Court in pursuance of the order made by this Court, has to be decided solely with reference to the terms of the bond. It was by giving security that the judgment-debtor Phool Mal was set at liberty and the present appellant stood surety for the appearance of the judgment-debtor. The bond which was executed by the appellant in favour of the Court on 30-5-46 in these terms.

"In this case the judgment-debtor Phool Mal has been set free on my security. I continue the security until the disposal of his objections and promise to produce the judgment-debtor if his objections are dismissed and an order is passed for his arrest. If I fail in this, I promise to pay the decretal amount from my person and property. After the disposal of the objections, I shall be bound to produce the judgment-debtor on a notice being given to me to produce him on a date fixed."

(4) It is clear from these terms of the bond that they in no way limit the operation of the bond to the order which the lower Court would make on the objections of the judgment-debtor. By the bond, the appellant gave an undertaking in general terms that on the rejection of the objections of the judgment-debtor and on the order being passed for his arrest he would produce the judgment-debtor in the Court and in the event of his failing to produce the judgment-debtor, he would pay the decretal amount. There is nothing to show in the bond that the surety would not be liable under it if the judgment-debtor's objections are rejected by the Court of appeal and if an order is ultimately made by that Court for the arrest of the judgment-debtor. It was, no doubt, open to the surety to limit his liability by using proper language to that effect. But when he has not used such language, it is fair to hold that the appellant stood surety for the appearance of the judgment-debtor, whether the lower Court in requiring the appellant to produce the judgment-debtor was acting on its own decision or was acting in pursuance of an order made by this Court. On the terms of the bond, it makes no difference to the liability of the surety whether the objections of the judgment-debtor were dismissed and his arrest was ordered consequently by the lower Court or by this Court in appeal. That in a case such as this, the

liability of the surety must be determined on the terms of the bond passed by him is supported by the decision of the Bombay High Court in — 'I. S. Patil v. Irbasappa', 51 Bom. 31 and of the Privy Council in — 'Raghubar Singh v. Jai Indra Bahadur Singh', 46 Ind App 223 (PC). On the reading of the bond in the present case it is clear to me that it has reference to the ultimate issue of the objections of the judgment-debtor. As the judgment-debtor's objections were ultimately rejected by this Court and his arrest was ordered, the appellant is liable under the bond to produce the judgment-debtor in the lower Court.

(5) The appellant further urges that he was not given a reasonable time to produce the judgment-debtor. It is said that he was served with a notice on 30-3-51 to produce the judgment-debtor on 2-4-51 and that in this short time, he could not produce the judgment-debtor who was a resident of Bara Kota. This complaint is well-founded. The question of sufficiency of notice in such cases has to be determined according to the principles of justice, equity and good conscience and in all cases where the period of notice required to be given is not specified, the Courts have always held that a notice to be given must be a reasonable notice. The learned District Judge has not seriously considered the question whether notice given to the appellant to produce the judgment-debtor was a reasonable one. He dismissed the contention of the surety as to the sufficiency of the notice by simply saying that there was no substance and that if the appellant had really intended to produce the judgment-debtor, he could have done so even at the time of the hearing of the arguments before him on the question of the default of the judgment-debtor. In adopting this reasoning, the learned District Judge has missed the real point which he should have considered. The question is not whether the surety could have voluntarily produced the judgment-debtor at any time he liked. But it is whether when under the bond the appellant undertook to produce the judgment-debtor on a notice being given to him and the notice which was actually given to him was a reasonable notice. I have no hesitation in holding that the time of two days given to the appellant to produce the judgment-debtor from Bara Kota was clearly not a reasonable notice. On this ground I would accept this appeal and setting aside the order of the lower Court directing the appellant to deposit the decretal amount, order that the lower Court should now give a reasonable notice to the appellant to produce the judgment-debtor and dispose of the execution proceedings in accordance with law.

(6) In the result, the appeal is allowed. In the circumstances of the case, there will be no order as to costs of this appeal.

B/M.K.S.

Appeal allowed.

A.I.R. 1953 M. B. 79 (Vol. 40, C. N. 35)  
(GWALIOR BENCH)

DIXIT J.

Sitaram Bhola Ram and others, Applicants  
v. The State.

Criminal Revn. No. 122 of 1952, D/- 13-10-1952.

Penal Code (1860), S. 379 — Dishonest intention — Property removed in assertion of bona fide claim of right.



To constitute the offence of theft, the prosecution must establish that there was dishonest intention on the part of the accused in taking the property. The dishonest intention cannot be said to be present when the property is removed in assertion of a bona fide claim of right though unfounded in law and fact. Again, if the claim is asserted in the presence of the complainant and the property is removed in his presence, it cannot be said that the property is not removed in the assertion of a bona fide claim of a right. It is, no doubt, true that a mere colourable pretence to obtain and keep possession of the property does not negative the dishonest intention. But the question whether the removal of property was in assertion of a bona fide claim of right must be determined upon all the circumstances of the case, and a Court cannot convict unless it holds that the claim is a mere pretence. (Para 3)

Where, therefore, the accused at the time of taking the bullock had a bona fide belief that they had a right to demand and take away another bullock from the complainant in replacement of the one first sold by the complainant to them and the accused made this belief known to the complainant at that very time:

Held that the claim of the accused to the bullock could not be held to be a mere pretence and though it might have been unfounded in law or fact, that by itself was not sufficient to infer the conclusion that they had dishonest intention in taking the bullock. (Para 3)

Anno: Penal Code, Ss. 378 and 379 N. 1.

Nagarkar, for Applicants; Mungre, Government Advocate, for the State.

REFERENCES: Courtwise/Chronological/ Paras  
(26) 50 Bom 250: (AIR 1926 Bom 218:  
27 Cri LJ 440) 4

(17) AIR 1917 Cal 648: (17 Cri LJ 456) 3

ORDER: This is an application for a revision of an order of the Sessions Judge of Guna affirming the convictions of the applicants under S. 379, Penal Code and sentencing them to pay a fine of Rs. 50/- each.

(2) According to the prosecution on the afternoon of 12-10-50, the applicants went towards the field of the complainant Thakur Lal, unyoked a bullock belonging to the complainant and took it away against the wishes of the complainant and left in its place a bullock which the applicants had some months before purchased from the complainant. Sitaram pleaded alibi. The applicant Narayan said that the complainant voluntarily handed over the bullock to the applicant; while the remaining two applicants Jagdish and Ajju said that when Thakur Lal sold a bullock to the applicants, he had promised that in case the applicants were not satisfied with the bullock sold to them, he would give them another bullock and that accordingly they went to the field of the complainant to return to him the bullock first taken and to receive another bullock. The applicants Ajju and Jagdish also stated that while taking the bullock alleged to have been stolen, they informed the complainant that they were taking it according to the sale-agreement.

(3) The facts of the case are not in dispute. Learned Counsel for the applicants urged that

the applicants cannot be held guilty of the offence of theft, for in taking the bullock from the field of the complainant, they only asserted their 'bona fide' right. This contention was raised by the accused in the Courts below also. It was rejected there on the ground that the applicants had failed to prove that it was a term of the purchase of a bullock from the complainant that he would replace it by another bullock in case the applicants did not find it serviceable. The plea was rejected also on the ground that even if the applicants thought that they had a right to take away the bullock, they could not take the law in their own hands and that when the bullock was forcibly taken away against the wishes of the complainant and in his presence, it could not be said that it was taken in assertion of any bona fide right.

In my opinion, the approach of all the Courts below to this question has been erroneous and the plea of the applicants that they took the bullock in assertion of a 'bona fide' right must be accepted. To constitute the offence of theft, the prosecution must establish that there was dishonest intention on the part of the accused in taking the property. The dishonest intention cannot be said to be present when the property is removed in assertion of a 'bona fide' claim of right though unfounded in law and fact. It is, no doubt, true that a mere colourable pretence to obtain and keep possession of the property does not negative the dishonest intention. But the question whether the removal of property was in assertion of a 'bona fide' claim of right must be determined upon all the circumstances of the case, and a Court cannot convict unless it holds that the claim is a mere pretence.

I need not refer to the large number of cases in which these principles have been laid down. But reference to the decision of the Calcutta High Court in — 'Suraj Ali v. Arphan Ali', AIR 1917 Cal 648, may be usefully made where the learned Judges have quoted with approval the following passage from "Pleas of the Crown" by Sir Mathew Hale:

"It is the mind that makes the taking of another's goods to be a felony or a mere trespass only, but because the intention and mind are secret, the intention must be judged by the circumstances of the fact, and though these circumstances are various and may sometimes decisive, yet regularly and ordinarily these circumstances following direct in this case. If A thinking he hath a title to the horse of B seizeth it as his own, or supposing that B holds, of him distrains the horse of B without cause, this regularly makes it no felony, but a trespass because there is a pretence of title; but yet this may be but a trick to colour a felony and the ordinary discovery of a felonious intent is, if the party doth it secretly, or being charged with the goods denies it."

It is thus clear that the 'bona fide' claim of a right cannot be rejected on the ground that the accused has not shown that the claim is founded in law and fact. Again, if the claim is asserted in the presence of the complainant and the property is removed in his presence, it cannot be said that the property is not removed in the assertion of a 'bona fide' claim of a right. Indeed as observed by Sir Mathew Hale, it is when the property is removed secretly that it could be said that it was re-



moved with a felonious intention and under a pretence. The Courts below were, therefore, not justified in rejecting the plea of the accused that they took the property in assertion of a 'bona fide' claim of right on the ground that the term of the contract had not been proved or that the property was removed or the bullock was taken away in presence of the complainant against his wishes.

From the prosecution evidence, it is clear that at the time of the taking of the bullock, the applicants had a 'bona fide' belief that they had a right to demand and take away another bullock from the complainant in replacement of the one first sold by the complainant to them and that the applicants made this belief known to the complainant at that very time. In these circumstances, it cannot be held that the claim of the applicants to the bullock was a mere pretence. The claim of the applicants to the bullock may have been unfounded in law and fact, but that itself is not sufficient to infer the conclusion that they had a dishonest intention in taking the bullock.

(4) Learned counsel for the applicants also took the objection that the charge was not read out and explained to the accused and that, therefore, the trial was illegal. In the view I have taken of the contention as regards the removal of the bullock in assertion of a 'bona fide' claim of right, it is not necessary to deal with this contention. But it appears that the Court had dispensed with the personal attendance of the accused persons and had permitted them to appear by a pleader. In these circumstances, it would appear on the authority of — 'Darabshah Bomanji Dubash v. Emperor', 50 Bom 250 that the charge could have been read out and explained to the pleader of the accused. I, however, do not wish to express any concluded opinion on the question.

(5) The result is that this revision petition is allowed and the conviction and sentence imposed on the applicants are set aside. The amount of fine if already paid by the applicants be refunded to them.

B/V.R.B.

Revision allowed.

**A. I. R. 1953 M. B. 81 (Vol. 40, C. N. 36)**  
**(GWALIOR BENCH)**

**DIXIT J.**

B. N. Viyalie, Applicant v. Pragi Lal and another, Non-Applicants.

Civil Revn. No. 48 of 1952, D/- 17-10-1952.

(a) Civil P. C. (1908), Ss. 149 and 115 — Revision — Order requiring payment of additional court-fee is revisable. AIR 1948 Nag 219 Expl.; AIR 1949 Nag 37 and AIR 1949 Nag 97 Rel. on. (Para 3)

Anno: Civil P. C., S. 149 N. 14; S. 115 N. 2, 8.

(b) Court-fees Act (1870), Sch. II, Art. 17 (iii) and S. 7(iv)(c) — Applicability — Suit for declaration that alleged receipt was forgery — Additional prayer for finding of absence of consideration if receipt was found genuine — Held latter was prayer for additional relief and 'ad valorem' Court-fee on amount involved under receipt was payable in addition to fixed fee paid on first relief. AIR 1935 Mad 203 Disting. (Para 4)

Anno: Court-fees Act, Sch. II, Art. 17 (iii) N. 1; S. 7(iv)(c) N. 1.

Moti Lal Gupta, for Applicant; Jagannath Prashad Gupta, for Non-Applicants.

1953 M. B./11 & 12

REFERENCES: Courtwise/Chronological/ Paras  
(35) AIR 1935 Mad 203: (58 Mad 448) 4  
(48) AIR 1948 Nag 219: (ILR (1947) Nag 902) 3  
(49) AIR 1949 Nag 37: (ILR (1948) Nag 210) 3  
(49) AIR 1949 Nag 97: (ILR (1948) Nag 117) 3

ORDER: This is an application by the plaintiff to revise the order dated 16-2-52 passed by the Civil Judge, First Class Gwalior in Civil Suit No. 28 of 1951.

(2) The question involved in this petition is one of Court-fees. The plaintiff has filed a suit for a declaration that a certain receipt acknowledging the receipt of Rs. 6000/- and purported to have been signed by him and which is now in the possession of the defendant, is a forgery and that he never received from the defendants Rs. 6000/-. The plaintiff filed the suit on a Court-fee stamp of Rs. 15/-. One of the issues framed by the Court was whether the Court-fee paid by the plaintiff was proper. On this issue, the lower Court found that ad valorem Court-fee was payable on Rs. 6000/-. The applicant challenges the correctness of this finding.

(3) Mr. Gupta, learned counsel for the non-applicant took the preliminary objection that this revision petition was not competent under S. 115, C. P. C. He relied on — 'Hajrabi v. Md. Ibrahim', AIR 1948 Nag 219. I do not see how this decision helps the applicant. In that case it has been distinctly held that where the question of Court-fee is mixed up with that of jurisdiction, a revision petition lies against the decision of the lower Court on the question of Court-fees. I would only refer to two other decisions of the Nagpur High Court reported in — 'Pandurang Mangal v. Bhojalu Usanna', AIR 1949 Nag 37 and — 'Paikansing Sheoramsing v. Maniksing Mohtabsing', AIR 1949 Nag 97; where it has been held that an order requiring payment of additional Court-fees is revisable. The objection of the applicant must, therefore, be overruled.

(4) In support of this petition, Mr. Moti Lal Gupta relying on the decision of the Madras High Court in — 'Nagabhushanam v. Venkatappayya', AIR 1935 Mad 203, argued that inasmuch as the plaintiff was impeaching the receipt as having been forged, he could not be regarded as being a party to it and that, therefore, it was not incumbent on him to have it cancelled or set aside and that he could sue for a mere declaration that the document was a forged one and pay court-fees in the suit accordingly. The Madras decision is, no doubt, an authority for the proposition that when a person impeaches a deed as having been forged, to refer to him as being a party to it, is an obvious misuse of words and where a forged instrument has been brought into existence as if he were a party to it, it is not incumbent on him to have it cancelled or set aside by a suit and that he can file a suit for a mere declaration that a document is a forged one and such a suit is governed by Art. 17-A(1), Court-fees Act. Learned Counsel for the non-applicant does not question the correctness of this decision. But he argues that in the present case the plaintiff is seeking not merely the relief of a declaration that the receipt is a forged one, but also the relief that it is held to be a genuine one, the amount of Rs. 6000/- evi-



denced by the receipt was not in fact received by the plaintiff. This contention of the non-applicant must, in my opinion, be accepted.

In para 8 of the plaint, the plaintiff has stated that the receipt in question is a forgery and at no time did he receive from Shambhu Dayal Rs. 6000/- and further that at no time he gave any receipt to Shambhu Dayal. In the next para, the plaintiff says that it is possible that the receipt has been forged by using some paper on which the plaintiff's signature appeared. Again, in the last para the plaintiff claimed the relief of a declaration that the receipt was a forgery and that by that receipt he never received Rs. 6000/- from the defendant. It is clear from these allegations in the plaint that the plaintiff does not stop by asking merely the relief of the declaration that the receipt is a forgery. He goes further and prays that it be further declared that he never received Rs. 6000/- from the defendant. I do not think it requires discussion to show that if the receipt is held to be a genuine receipt, the plaintiff's claim that the receipt was not given for any consideration, would still remain for investigation. The relief that Rs. 6000/- were never paid by the defendant to the plaintiff, which the plaintiff is claiming is clearly an additional relief. If the plaintiff desires that his claim about the passing of the consideration of Rs. 6000/- should be considered by the lower Court, he must pay ad valorem fee on Rs. 6000/-. It is of course open to amend the plaint and say distinctly that in the event of the receipt being held to be a genuine one, he does not propose to contest the fact of the receipt by him of Rs. 6000/-. But he must make his election at an early date and within the time fixed by the lower Court. I need not add that if the plaintiff fails to pay ad valorem Court-fees on Rs. 6000/- no issue as regards the question whether if the receipt is genuine the plaintiff received Rs. 6000/- from the defendant shall be framed and investigated.

(5) With these observations, I reject this petition. Costs of this petition will follow the result of the suit in the lower Court.  
B/M.K.S. Petition dismissed.

**A. I. R. 1953 M. B. 82 (Vol. 40, C. N. 37)**  
**(GWALIOR BENCH)**

**DIXIT AND CHATURVEDI JJ.**

Babulal s/o Murari Lal, Appellant v. Moti Lal, Respondent.

Civil Misc. Appeal No. 48 of 1951, D/- 30-9-1952.

**(a) Evidence Act (1872), S. 114, ill. (e) — Presumption of regularity of service of summons — Rebuttal of — Order refusing permission to examine witnesses held not justified.**

The presumption of regularity under S. 114 ill. (e), Evidence Act, which arises in respect of the due service of the summons, can be satisfactorily strengthened or displaced by the evidence of the process-server and of the witnesses who attested the report made by the process-server:

Held that the order of the lower Court refusing permission to the parties to supplement their affidavits by the evidence of these and other witnesses was not justified. (Para 3)

Anno: Evi. Act, S. 114 N. 29.

**(b) Civil P. C. (1908), O. 19 R. 1 — Proof by affidavit — When allowed.**

Affidavit evidence is not permitted except where there is an agreement between the parties that evidence may be taken by affidavit or where under O. 19 R. 1, Civil P. C., there is an order of the Court that particular facts may be proved by affidavits or that an affidavit of any witness may be read at the hearing: AIR 1949 Mad 689, Rel. on.

Even when the parties agree to take evidence by affidavits, they are not precluded from giving oral evidence to supplement the affidavit unless the agreement specifies that their evidence would be by affidavits alone: (1878) 47 LJ Ch 536, Rel. on. (Para 3)

Anno: C.P.C., O. 19 R. 1 N. 5, 9.

**(c) Civil P. C. (1908), O. 19 R. 3 — Affidavits — Essentials — Non-compliance with R. 3 — Affidavits are ignored.**

The provisions of O. 19 R. 3 must be strictly observed and every affidavit should clearly express how much is the statement of the deponent's knowledge and how much is a statement of his belief and the ground of belief must be stated with sufficient particularity to enable the Court to judge whether it would be safe to act on the deponent's belief: 37 Cal 259, Rel. on.

Where the affidavits filed by the parties bear only the verifications that they were sworn on oath and the contents of the affidavits were read out to the deponents and were admitted by them to be correct, the verifications make the affidavits meaningless and valueless, and not being in conformity with O. 19 R. 3, Civil P. C., they will be ignored as not existing. (Para 4)

Anno: C.P.C., O. 19 R. 3 N. 1A.

Kak, for Appellant; Mungre and Babu Lal Agrawal, for Respondent.

**REFERENCES: Courtwise/Chronological/ Paras**

('10) 37 Cal 259: (6 Ind Cas 666) 4

('49) AIR 1949 Mad 689: (1949-1 Mad LJ 434) 3

(1878) 47 LJ Ch 536: (26 WR 433) 3

**DIXIT J.:** This is an appeal from an order of the District Judge, Gwalior refusing to set aside an 'ex parte' decree passed against the appellant on 19-10-1950. The appellant sought to have the decree set aside on the ground that the summons of the suit had not been duly served on him and that the report of the process-server that the appellant refused to accept service on 27-9-50 and that he, therefore, affixed a copy of the summons on the outer-door of a house in a garden in Morar was not correct and further that as a matter of fact on the date on which the process-server is alleged to have gone to the garden for effecting service, the appellant was not residing in the garden and that he ordinarily resides and carries on business in a house in Lashkar.

(2) In support of the application for setting aside the 'ex parte' decree, the appellant filed two affidavits. The respondent also filed a counter-affidavit. The deponents were cross-examined by the opposite party on the affidavits made by them. The parties desired to produce certain witnesses also but the learned District Judge prohibited them from doing so. On the basis of the evidence of these affidavits, the learned District Judge came to the



conclusion that the defendant-appellant had failed to show that the summons had not been duly served on him. He, therefore, rejected the application for setting aside the 'ex parte' decree.

(3) In my opinion, the order of the lower Court cannot be sustained. In his affidavit, the appellant denied the fact that he was in the garden on the day on which the process-server came there for effecting service. He also denied the fact that he declined to accept service and that the process-server then affixed the summons on the outer-door of a house in the garden. In fact he denied the existence of any house in the garden. In his cross-examination he stated that he was ordinarily living in a house in Lashkar with his brother-in-law as his tenant and that at times he used to be away from Lashkar for several months and that some times he used to live in his own house in Sadar Bazar, Morar. On behalf of the plaintiff-respondent, his Mukhtyar Kanhiyalal filed an affidavit saying that he accompanied the process-server on 27-9-50 and that the appellant who was present in the garden refused to accept the service and that thereupon, the process-server affixed the summons to the outer-door of a house in the garden where the appellant resides. In his cross-examination Kanhaiya Lal said that the appellant's wife lives in Sadar Bazar, Morar and that when he had first accompanied the process-server for effecting service at this place, he was informed that the appellant did not reside there.

From these affidavits and the cross-examination of the appellant and Kanhaiya Lal, I do not find the essential material on the basis of which the learned District Judge preferred to accept the affidavit of Kanhaiya Lal. The District Judge has not, in fact, given in his order any indication of the criterion he has applied in preferring the affidavit of the respondent to the affidavit of the appellant. Again the learned District Judge overlooked the fact that the presumption under S. 114, illustration (e), Evidence Act, which arises in respect of the due service of the summons, could be satisfactorily strengthened or displaced by the evidence of the process-server and of the witnesses who attested the report made by the process-server. The process-server and the attesting witnesses Shankar Lal, Prabhu Dayal, and Madan Mohan were the material witnesses who could have deposed about the service of summons on the appellant. In the absence of their evidence, it is clearly not possible to determine whether the affidavit of the appellant or of the respondent is true. The learned District Judge was, therefore, not justified in refusing permission to the parties to supplement their affidavits by the evidence of these and other witnesses.

It appears to me that in following the procedure of disposing of the defendant's application for setting aside the ex parte decree on the affidavits filed in this case, the learned District Judge has not properly understood the circumstances in which affidavit-evidence is permitted and can be acted upon by the Court. Affidavit evidence is not permitted except where there is an agreement between the parties that evidence may be taken by affidavit or where under O. 19 R. 1, Civil P. C. there is an order of the Court that particular facts may be proved by affidavits or that an affidavit of any witness may be read at the

hearing. See — 'Marneedi Satyam v. Venkata Swami', AIR 1949 Mad 689. Here, there was no agreement between parties that their evidence would be by affidavits only. Under O. 19 R. 1 the Court is authorised to order for sufficient reasons that any particular fact or facts may be proved by affidavits. I do not find in the record before me any such order of the Court. The learned District Judge while rejecting an application filed by the respondent for being allowed to tender the process-server, the attesting witnesses and other persons as witnesses on his behalf, no doubt, stated that the parties in the case had been ordered before that their evidence would be by affidavits. It is not clear from this whether the order directing the parties to tender evidence by affidavits was an oral order or one in writing. As it is, there is on the record, no order of the Court directing the parties to prove by affidavits any particular fact or facts and containing the reasons which in the opinion of the District Judge were sufficient to give such a direction to the parties. It must be noted that even when the parties agree to take evidence by affidavits, they are not precluded from giving oral evidence to supplement the affidavit unless the agreement specifies that their evidence would be by affidavits alone — 'Glossop v. Heston and Isleworth Local Board', (1878) 47 LJ Ch 536.

In the present case the affidavits filed were not even in accordance with the provisions of O. 19 R. 3. This rule says:

"Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted provided that the grounds thereof are stated."

(4) But the affidavits filed by the parties in the present case bear only the verifications that they were sworn on oath and the contents of the affidavits were read out to the deponents and were admitted by them to be correct. These verifications make the affidavits meaningless and valueless, as they do not state how much of the affidavit is a statement of the deponent's knowledge and how much is a statement of his belief. It has been observed by Sir Lawrence Jenkins C. J., in — 'Padmabati v. Rasik', 37 Cal 259, that the provisions of O. 19 R. 3 must be strictly observed and every affidavit should clearly express how much is the statement of the deponent's knowledge and how much is a statement of his belief and the ground of belief must be stated with sufficient particularity to enable the Court to judge whether it would be safe to act on the deponent's belief. As the affidavits filed in present case are not in conformity with O. 19 R. 3, it must be held that the affidavits required by O. 19 R. 1 simply do not exist in the case. I am, therefore, of the view that the learned District Judge was not justified in holding on the basis of the affidavits without any more that the appellant had failed to show that the summons of the case was not duly served on him. This was not a case in which an affidavit filed by one party had been challenged by the opposite party merely by verbal denial without any attempt to contradict it by a counter affidavit or without asking about the attendance of the deponent for the purpose of cross-examination.

(5) I would, therefore, set aside the order of the lower Court refusing to set aside the



ex parte decree and send back the case with the direction that the learned District Judge should dispose of the application for setting aside the ex parte decree after recording the evidence of such witnesses as the parties may desire to tender on their behalf. In the circumstances of the case, the parties should bear their own costs of this application.

(b) CHATURVEDI J.: I agree.  
B/D.R.R. Application allowed.

A. I. R. 1953 M. B. 84 (Vol. 40, C. N. 38)

(GWALIOR BENCH)

DIXIT J.

Pannalal and another, Applicants v. The State.

Criminal Revn. No. 1 of 1952, D/- 25-8-1952.

(a) **Essential Supplies (Temporary Powers) Act (1946), S. 7 (1) — Breach of notification — Notification should be exhibited — Judicial notice of notification — (Evidence Act (1872), S. 57).**

Where a person is charged u/s. 7 of the Act for having contravened Cl. 15, Madhya Bharat Cotton Textile (Control) Order, 1948, for selling cloth in excess of the maximum price notified by the Textile Commissioner, one of the essential ingredients of the crime that has to be proved is the maximum price notified by the Textile Commissioner. This fact has to be proved in accordance with the provisions of the Evidence Act by actually producing and proving the notification issued by the Textile Commissioner. For judicial notice cannot be taken of such a notification under S. 57, Evidence Act. AIR 1949 Mad 459, Disting.; Cr. App. No. 37 of 1951 (Madh-B), Foll. (Paras 5, 6)

(b) **General Clauses Act (1897), S. 3 (29) — Order does not include notification.**

The word 'order' in S. 3 (29) has to be construed in the context in which it is used. The difference between law, ordinance, order, bye-law, rule or regulation is based on the difference between the authorities passing or making them. In the strict sense of the word a law is made by the legislature; an Ordinance is issued by the President, the Governor or the Raj Prammukh as the case may be; an order is made by a competent authority; a bye-law is passed by statutory authority competent in that behalf. Hence, a notification containing an executive order does not fall within this definition. AIR 1949 Mad 459, Expl.; AIR 1948 Bom 20, Rel. on. (Para 6)

(c) **Evidence Act (1872), S. 78 — Government notification — Its proof.**

A mere production of a notification issued by a proper authority of government is sufficient to prove it under S. 78.

(Para 7)

Anno: Evi. Act, S. 78 N. 2.

Dey, for Applicants; Mungre, Government Advocate, for the State.

REFERENCES: Courtwise/Chronological/ Paras  
(48) AIR 1948 Bom 20: (ILR (1949 Bom 791) 6  
(51) Cri. Appeal No. 37 of 1951 (Madh-B) 6  
(49) AIR 1949 Mad 459: (50 Cri LJ 641) 6

ORDER: The applicants Panna Lal and Bishan Dayal have been convicted by the Additional District Magistrate of Guna for an offence under S. 7 (1), Essential Supplies (Temporary Powers) Act, 1946 and sentenced to imprisonment till the rising of the Court and to pay a fine of Rs. 500 each. The learned

Sessions Judge of Guna maintained the conviction and sentence in an appeal preferred by the accused persons against their convictions and sentences.

(2) The charge against the applicants was that on 30-1-51, they sold to one Ram Narayan a pair of dhoti for Rs. 16/- that is, in excess of the control price Rs. 13-2-9 and thus contravened the provisions of Cl. 15, Madhya Bharat Cotton Textile (Control) Order, 1948, issued under the Essential Supplies (Temporary Powers) Act of 1946.

(3) The main contention of Mr. Dey the learned counsel appearing on behalf of the applicants is that in this case the fact that the control price of the dhoti alleged to have been sold by the applicant was Rs. 13-2-9, has not at all been proved by the prosecution. It is said that the notification of the Textile Commissioner under Cl. 12, Cotton Textile Control Order by which the maximum price of Dhosis of the type alleged to have been sold by the applicant was fixed at Rs. 13-2-9 has not been proved. In my opinion, this contention is well-founded and must be accepted.

(4) The Madhya Bharat Cotton Textile Control Order 1946 is an order issued under S. 3 (1), Essential Supplies (Temporary Powers) Act, 1946. Clause 15 of the Textile Control Order provides in sub-cl. (1) that no manufacturer shall sell or offer to sell any cloth or yarn at a price higher than the maximum price specified in this behalf under Cl. 13 which is as follows:

"The Textile Commissioner may by notification in the Madhya Bharat Government Gazette specify:

(a) The maximum price ex-factory, wholesale and retail at which any class or specification of cloth or yarn or cloth or yarn of any particular origin may be sold."

(5) Section 7 (1), Essential Supplies (Temporary Powers) Act prescribes the penalty for contravention of orders made under S. 3 (1) of the Act. It is thus clear that when a person is charged under S. 7 of the Act for having contravened Cl. 15, Madhya Bharat Cotton Textile (Control) Order for selling cloth in excess of the maximum price notified by the Textile Commissioner, one of the essential ingredients of the crime that has to be proved is the maximum price notified by the Textile Commissioner. This fact has to be proved in accordance with the provisions of the Evidence Act. In the present case, the maximum price of the dhosis has not been admitted by the accused. Nor is it a fact in regard to the existence of which a presumption can be drawn under the Evidence Act. The notification issued by the Textile Commissioner specifying the maximum price was also not produced and proved. That being so, it cannot clearly be held that the maximum price of the dhoti said to have been sold by the applicant Ram Narayan was Rs. 13-2-9.

(6) The learned Government Advocate frankly admits that the notification of the Textile Commissioner was not produced and proved in this case. But he contends relying on — 'Public Prosecutor v. Illur Thippayya', AIR 1949 Mad 459, that the notification issued by the Textile Commissioner being an 'order' is within the definition of "Indian Law" given in Cl. 27 (a) of S. 3, General Clauses Act and that, therefore, under S. 57, Evidence Act the Court can take judicial notice of the notification. In my view this contention must be



rejected. It has already been held by a Division Bench of this Court in — 'Criminal Appeal No. 37 of 1951, the State v. Bachu Lal', where the accused was charged with the same offence as here, that judicial notice cannot be taken of a notification issued by the Textile Commissioner under Cl. 13, Cotton Textile Order specifying the maximum price of the cloth. The decision in — 'AIR 1949 Mad 459' has no applicability to the present case. It appears from the report of the case that in the Madras case the question at issue was of the proof of certain orders made by the Government under S. 3 (1), Essential Supplies Act and not of the proof of any notification issued by the competent authority under any of those orders. It was held in the Madras case that an order issued by the Government under S. 3 (1), Essential Supplies (Temporary Powers) Act 1946 was an "Indian Law" as defined by the General Clauses Act in S. 3, Cl. (27a)\*. There can be no doubt that an order made under S. 3 (1), Essential Supplies (Temporary Powers) Act 1946 falls within the definition of "Indian Law" given in S. 3 Cl. (27a), General Clauses Act. But here the question is not of the proof of the Madhya Bharat Textile Control Order but of the proof of a notification issued by the Textile Commissioner under Cl. 15 of that Order. Such a notification is clearly an executive order and cannot be said to be included in the definition given in the General Clauses Act of the words "Indian Law". The word 'order' which occurs in S. 3 Cl. (27a), General Clauses Act has to be construed in the context in which it is used. "Law, ordinance, order, bye-law, rule or regulation passed or made at any time by any competent legislature, authority, or person in India", mean legislative provisions. The difference between law, ordinance, order, bye-law, rule or regulation is based on the difference between the authorities passing or making them. In the strict sense of the word a law is made by the legislature; an Ordinance is issued by the President, the Governor or the Raj Pramukh as the case may be; an order is made by a competent authority; a bye-law is passed by a statutory authority competent in that behalf. Again, rules and regulations have been defined in Cls. (46) and (47) of S. 3, General Clauses Act. It is thus clear that the word "order" is used in S. 3 (27a), General Clauses Act in the sense of a Legislative Order and not an executive order. This view about the meaning of the word 'order' as used in S. 3 Cl. (27a) is in accord with the view taken by the Bombay High Court in — 'Shripad Amrit v. Harsiddhbhai Divatia', AIR 1948 Bom 20.

(7) It must also be noted that under the last paragraph of the explanation to S. 57 a Court may refuse to take judicial notice of any fact unless and until the person who desires that judicial notice of the fact may be taken, produces any such book or document as the Court may consider necessary to enable it to do so. In the present case the notification, a mere production of which would have been sufficient to prove it under S. 78, Evidence Act, was never produced before the trial Magistrate. In these circumstances I think the Courts below were not justified in taking it for granted that the maximum price of the dhotis alleged to have been sold by the applicants to Ram Narayan was Rs. 13-2-9.

\*Now S. 3, Cl. (29) —Ed.

(8) For the above reasons I accept the revision petition and set aside the convictions and sentences imposed on each of the applicants. The amount of fine, if already paid by the applicant, shall be refunded to them.  
B/V.S.B. Conviction quashed.

A. I. R. 1953 M. B. 85 (Vol. 40, C. N. 39)

(Gwalior Bench)

DIXIT AND CHATURVEDI JJ.

Madhu Lal, Appellant v. Ramji Das Chironji Lal and others, Respondents.

Civil Misc. Appeal No. 6 of 2005, D/- 31-7-1952.

Civil P. C. (1908), O. 40 R. 1 — Scope of — Just and convenient — Meaning — Suit for recovery of money by simple creditor — No special equity — Receiver cannot be appointed — (Gwalior Civil P. C. (Smt. 1966), S. 451) — (Words and Phrases — Just and convenient).

The terms of O. 40 R. 1 of the Code of 1908 are wider than S. 451, Gwalior Civil P. C. and do not limit the appointment of a receiver of the property only to those cases where the property is the subject-matter of the suit. The rule confers a discretion on the Court in the matter of appointment of a receiver and the only restriction on this discretionary power of the Court is that put by the words "just and convenient". These words have been construed as meaning that "it is practicable and the interests of justice require it", (1909) 2 KB 903, Rel. on. (Para 3)

The appointment of a receiver under O. 40 R. 1 is thus essentially on equitable grounds and if a simple contract creditor fails to establish a special equity in favour of the appointment of a receiver, there can be no justification for the Court to appoint a receiver. (1853) 20 LJ Ch 314 and AIR 1930 Cal 610, Rel. on. (Para 4)

Where therefore, a plaintiff in a simple money suit has acquired no lien upon any property of the defendant, a receiver cannot be appointed simply because the defendant is delaying the proceedings of the suit by raising all sorts of objections and in the meantime appropriating the rents and profits of the property. (Para 7) Anno: C. P. C., O. 40 R. 1 N. 13 Pt. 25 N. 14.

Bhagwandas Gupta, for Appellant; Mungre, for Respondents.

REFERENCES: Courtwise/Chronological/ Paras  
(30) AIR 1930 Cal 610: (129 Ind Cas 609) 6  
(1853) 4 HLC 997, affirming 5, 6  
20 LJ Ch 314 3  
(1909) 2 KB 903: (78 LJKB 1108)

DIXIT J.: This is an appeal by the plaintiff from an order of the District Judge, Shivpuri refusing to appoint a receiver of the defendant-respondent's properties in the plaintiff's suit for the recovery of Rs. 13,527/11/6 on the basis of an account stated. The defendant is resisting the suit inter alia on the ground that it is incompetent for the reason that there was a composition between him and his creditors including the plaintiff-appellant about their debts; that the debt which the plaintiff seeks to recover was included in the composition under which the plaintiff and the other creditors of the defendant had the right to sell the defendant's properties and realise their debts and that therefore the plaintiff was not entitled to file this suit on the original cause



of action. After the institution of the suit the plaintiff presented on 26-3-46 a consolidated application under Ss. 433, 447, 451, Gwalior Civil P. C. Samvat 1966 for an attachment before judgment of the defendant's properties and in the alternative for the appointment of a receiver for the collection of the rents and profits of the defendant's properties. Before the District Judge, the plaintiff did not press the application in so far as it related to an order of attachment before judgment. He however, pressed for the appointment of a receiver on the ground that the defendant-respondent had first agreed to hand over his properties to his creditors for the realisation of their debts but later on he resiled from the agreement; that the plaintiff had therefore an equitable interest in these properties, that the defendant was heavily indebted and was putting obstacles in the plaintiff's suit by raising all sorts of objections and thus delaying the proceedings; that in the meantime he was appropriating the rents and profits and paying nothing to the plaintiff and that if a receiver was appointed for the collection of the rents and profits, there would be some assets for the satisfaction of any decree that the plaintiff might obtain against the defendant. The learned District Judge rejected the application on the short ground that under S. 451, Gwalior Civil P. C., a receiver could be appointed of any property only if it was the subject-matter of the suit.

(2) In this appeal learned counsel for the appellant contended that if in the present case no receiver could be appointed under S. 451, Gwalior Civil P. C., the trial Judge should have considered the question of the appointment of a receiver in the exercise of its inherent powers and that in any case under O. 40 R. 1, Civil P. C., 1908, which is now in force in the State, the appointment of a receiver in the present case would be just and convenient in view of all the circumstances of the case. On behalf of the respondent Mr. Mungre does not dispute that the matter is now governed by O. 40 R. 1 of the Code. But he says that in this suit of the plaintiff which is a suit for money and in which the plaintiff does not claim any right to be paid out of any particular property of the defendant, there is no equity at all in favour of the plaintiff and no receiver can, therefore, be appointed.

(3) In my view, the contention of the learned counsel for the respondent is well-founded and must be accepted. The terms of O. 40 R. 1 of the Code of 1908 are wider than S. 451, Gwalior C.P. Code and do not limit the appointment of a receiver of the property only to those cases where the property is the subject-matter of the suit. Under this Rule, a Court has the power to appoint a receiver of any property "where it appears to the Court to be just and convenient." This rule confers a discretion on the Court in the matter of the appointment of a receiver and the only restriction on this discretionary power of the Court is that put by the words "just and convenient." In — *Edwards and Co. v. Picard*, (1909) 2 KB 903, the words "just and convenient" have been construed as meaning that "it is practicable and the interests of justice require it."

(4) The question, therefore, in the present case is whether the appointment of a receiver is necessary for the protection of some rights of the plaintiff-appellant. The plaintiff's suit is

for the recovery of moneys on an account stated. Learned counsel for the appellant admits that in this suit, the plaintiff does not claim a specific charge on any property in respect of his debt. He does not claim any right to be paid out of any particular property. It is true that the respondent has pleaded that the plaintiff should have sued on the basis of a composition which gave to the plaintiff a right to realise his debt from certain properties of the defendant and that the plaintiff's suit on the original cause of action is not maintainable. But because of this pleading of the defendant, the plaintiff-appellant cannot be said to have a right in the present suit of realising his debt from any particular property. If the appellant had a right to be paid out of a particular fund or property, he could in equity obtain protection to prevent that property or fund from being dissipated so as to defeat his rights. But there can be no such equity in favour of the plaintiff-appellant, when in the present suit he does not rely on any agreement between him and the defendant that he should be paid out of a particular fund or property. The appointment of a receiver under O. 40 R. 1 is essentially on equitable grounds and if a simple contract creditor fails to establish a special equity in favour of the appointment of a receiver, there can be no justification for the Court to appoint a receiver.

(5) In — *Owen v. Homan*, (1853) 4 HLC 997 affirming 20 LJ Ch 314, the Lord Chancellor observed:

"The plaintiffs here do not claim as specific appointees of any part of the defendant's separate estate. They are merely in the nature of general creditor seeking to obtain payment by a sort of equitable action of assumpsit or debt. In such a case it is a strong exercise of authority to deprive the defendant, on motion, of property of which the plaintiffs have no specific claim in order that if they establish their claim as creditors there may be assets wherewith to satisfy them. I do not mean to say that such a course may not be taken, though I have not discovered any authority for it. Perhaps the anomalous nature of the right, where a plaintiff is claiming as a general creditor of a married woman and is seeking payment out of her separate estate, and the inability of the Court to govern the proceedings in equity in such a case by rules strictly conformable to those which regulate an action at law, may warrant the interim interference by a receiver. But a chance of doing a wrong to the defendant in such a case is certainly much greater and much more apparent, than were a right against some specific fund or estate. "It is the almost universal rule", says Pomeroy in his *Equity Jurisprudence* 4th Volume 1533, "that a creditor's bill whether to set aside a fraudulent transfer or to reach equitable assets will not lie on behalf of mere general creditors who have not prosecuted their claim to judgment nor, in any other manner, acquired a lien upon the debtor's property. The slowness and inadequacy of the legal remedies open to such creditors are not considerations that can move a Court of Equity in the absence of statutory authority, to intervene in their behalf with the instrumentality of a Receiver to preserve the debtor's property."

(6) The Calcutta High Court has also following the English case — *Owen v. Ho-*



man', (1853-4 HLC 997 affirming 20 LJ Ch 314) held in — 'Dharendra Krishna v. Surendra Krishna', AIR 1930 Cal 610 that a simple contract creditor who has no specified charge or no right to be paid out of a specified fund cannot in general ask for the appointment of a receiver. Learned Counsel for the appellant was not able to refer us to any decision of any High Court in India in which a contrary view has been taken. On the other hand in the passages read out to us by the learned Counsel from Woodroffe's "Law of Receivers", it has been observed

"the great weight of authority supports the rule that in the absence of statutory provisions to the contrary a general contract creditor before judgment is not entitled to an injunction or a receiver against his debtor upon whose property he has acquired no lien."

(7) In the instant case, the appellant has clearly acquired no lien upon any property of the defendant. That being so, a receiver cannot be appointed simply because the defendant is delaying the proceedings of the suit by raising all sorts of objections and in the meantime appropriating the rents and profits of the property.

(8) For the above reasons, I am of the opinion that this appeal must be dismissed with costs.

(9) CHATURVEDI J.: I agree.  
B/D.R.R. Appeal dismissed.

**A. I. R. 1953 M. B. 87 (Vol. 40, C. N. 40)**  
**(GWALIOR BENCH)**

**SHINDE C. J. AND CHATURVEDI J.**

Aliya s/o Garib Khan and others, Appellants v. The State.

Criminal appeals Nos. 27 and 67 of 1951, D/- 6-5-1952.

(a) **Criminal P.C. (1898), Ss. 164 and 364**  
— Non-compliance of — Accused produced from police custody for recording confessions — Confessions recorded from day to day and accused remaining in police custody throughout — Precautions and safeguards laid down in Ss. 164 and 364 not followed — No memorandum at foot of each confession as laid down in S. 164(3) — Confessions must be rejected from evidence — Oral evidence of Magistrate that they were voluntary will not cure the defect: AIR 1936 PC 253 (1), Rel. on — (Evidence Act (1872), S. 24). (Para 5)

Anno: Cr. P. C., S. 164 N. 14, 16; S. 533 N. 2, 4; Evi. Act, S. 24 N. 3.

(b) **Evidence Act (1872), S. 9 — Identification parade — Mode of conducting.**

In a test identification parade the proportion of other persons to the accused should be at least 3 to 1. If the proportion is less, there is appreciable risk of a person being implicated purely by chance; in such cases though it is not possible to discard these proceedings merely on that ground, it becomes necessary that the evidence of identification should be subjected to a rigid scrutiny. AIR 1935 All 653; AIR 1934 Pat 537; AIR 1943 Oudh 269, Ref. (Para 6)

Anno: Evidence Act, S. 9 N. 5.

Government Advocate, for the State.

**REFERENCES:** Courtwise/Chronological/ Paras  
(36) AIR 1936 PC 253(1): (38 Cri LJ 415) 5 —  
(35) AIR 1935 All 653: (36 Cri LJ 1139) 6  
(43) AIR 1943 Oudh 269: (44 Cri LJ 389) 6  
(34) AIR 1934 Pat 537: (36 Cri LJ 28) 6

**CHATURVEDI J.:** This is an appeal from an order of the Special Sessions Judge, Gwalior convicting four appellants under S. 395, I.P.C. for an offence of dacoity. Sultan alias Rustom, and Bhanwar Singh, appellants, have been sentenced to seven years' rigorous imprisonment each and also ordered to pay a fine of Rs. 25/-. The appellants Aliya and Munshi have been sentenced to five years' rigorous imprisonment each. The Sessions Judge acquitted four accused and the Government has preferred an appeal under S. 417, Criminal P. C. against the order acquitting accused Jimipal. This judgment will dispose of both these appeals.

(2) The short facts of the case are that complainants Yusuf, P. W. 9, Babu Khan, P. W. 10, Ellahibux, P. W. 11, Kamruddin and Mohammad had gone in a marriage with their musical instruments. They are professional persons and had gone with their party to play music in a 'barat'. On 1-12-1949 they were returning from Sekra village towards Chhimak village via Dabra road, and near the brink of a river eight persons met them and they asked them where they were going. On replying that they were going towards Dabra these eight persons asked them to proceed via Anand Peth. The witnesses declined to go with them and therefore these persons left by a Kacha route. The witnesses then went about two Kos and on the road met several labourers, who were sitting near a fire. The witnesses also sat there. Soon after 5 out of the 8 persons whom the witnesses had met before returned there and asked the labourers to go away. Out of these 5 Badmashes two had guns, one had revolver, one lathi, and one had a sword. It was about 5-30 P.M. that these dacoits threatened the witnesses that in case they did not part with their belongings they would lose their life; and, at the point of revolver, snatched from the witnesses their clothes and the musical instruments and other belongings and decamped with the booty, worth about Rs. 240/-. The witnesses then proceeded to Police Station Dabra eight miles distant from the place of occurrence and lodged report at 11 P.M.

(3) From the deposition of the Sub-Inspector Vijaya Singh, P. W. 7, it appears that some informer had informed him that in village Khedi Raimal, there is one Shankar Singh, at whose house many suspected persons take shelter. On 4th December 1949, the Sub-Inspector reached the place and arrested Shankar Singh and Mouji. According to Sub-Inspector, Shankar Singh though not involved in this dacoity, informed him about persons, who were involved in the dacoity on the Chhimak road. On 16th December 1949, it appears that Shankar Singh's house was raided and 8 accused were arrested. Some property was recovered from them and eight persons as stated above were challaned in this case out of which four were convicted and four were acquitted.

(3) The prosecution evidence against the four appellants in this case is of three-fold character: First, there are confessions of the accused; secondly, the prosecution relies upon the identification proceedings; and, thirdly, upon the recovery of the looted property from the possession of the appellants.

(4) I regret very much to observe that Mr. Mustafa Ahmad, the Sub-Divisional Magistrate, Antri, who recorded the confessions



ignored all the salient and mandatory provisions of law as laid down in Ss. 164 and 364, Criminal P. C.

(5) He did not question any of the accused making the confession about any thing in order to elicit whether the confessions were voluntarily made. There is no mention in the confessions that the accused were informed in the beginning that they were not bound to make the confession and if they did so they would be used as evidence against them. The learned Magistrate did not even consider it proper to make a memorandum at the foot of the confessions as laid down in sub-s. (3) of S. 164, Criminal P. C. The Magistrate, however, appeared as a witness in the case to depose that according to his knowledge the confessions so made were voluntary. As the Privy Council has observed in — '*Nazir Ahmad v. Emperor*', AIR 1936 PC 253 (1) that if such oral evidence is believed all the precautions and safeguards laid down by Ss. 164 and 364 would be of such trifling value as to be almost idle. The Magistrate himself admitted that the accused were produced before him for recording confessions at a certain date but he did not record the confessions on that very date, but continued to record confessions at his leisure from day to day; and the Police and Judicial lock-up being one at Antri, the accused remained in Police custody throughout. Under these circumstances, I agree with the learned Sessions Judge that confessions must be discarded.

(6) The manner of conducting the test of identification also shows that the learned Magistrate Mr. Mustafa Ahmad has no idea about the importance which is attached to these proceedings and to the care and precaution with which these proceedings should be conducted. The proceedings took place in the police lock-up first on 22nd December 1949, (Ex. P-10) and next on 5th January 1950, (Ex. P-11). On the first date seven accused were mixed with seven other persons. On the next date eight accused were mixed with six other persons. Where the proportion of the other persons with suspected persons is so less, the result generally, is that it becomes very easy for a witness to hit upon the suspected person. As observed in — '*Kuldip Singh v. Emperor*', AIR 1934 Pat 537; — '*Ram Singh v. Emperor*', AIR 1943 Oudh 269 and — '*Naubat Singh v. Emperor*', AIR 1935 All 653, the proportion of other persons to the accused should be at least 3 to 1. In the Allahabad case it was laid down that the proportion of five other persons to one accused for identification is a minimum desirable proportion for the purpose of satisfying a Court that the identification of the accused was not a mere accident. If the proportion is less there is appreciable risk of a person being implicated purely by chance; in such cases though it is not possible to discard these proceedings merely on that ground, it becomes necessary that the evidence of identification should be subjected to a rigid scrutiny.

In this case, however, though in the first information report hulia of every accused had been given in details, yet, the learned Judge did not exert himself to see whether the hulia of the dacoits given in the First Information Report had tallied with the hulia of any of the accused present in his Court. Jammoo, who according to Ex. P-11 had identified all the accused was not produced in the Court and about Yusuf, P. W. 9, it is written that he

identified Mouji, who was not an accused in this case. As regards Aliya, the learned Sessions Judge in his judgment, has remarked that Yusuf witness was not certain whether Aliya was amongst the five dacoits and that Ellahibux witness said in the Court that he could not identify the appellant Aliya. The learned Sessions Judge has convicted Aliya only on the evidence of Babu Khan, P. W. 10. In my opinion it is not safe to base conviction on the identification of a single witness when a proper standard had not been maintained in the mode of conducting a test identification. I would not attach any importance to such identification proceedings. (After discussion of some evidence the judgment proceeds :) Under these circumstances, it will not be safe to convict any of the accused merely on the identification proceedings. In my opinion due to the carelessness or utter lack of knowledge on the part of the Sub-Divisional Magistrate, Antri, Mr. Mustafa Ahmad, we have to discard the confession as well as identification proceedings. Considering the lawlessness prevailing in the District, where innocent people are waylaid and looted in a most reckless manner and the owners of property are deprived of their life, if once offenders are arrested it becomes the bounden duty of the Magistrate and the Courts to see that the non-compliance of the mandatory and salient provisions of law does not lead to difficulties and does not contribute to the acquittal of any of the accused. In my opinion, Mr. Mustafa Ahmad should be warned to be careful in future.

(7) The only testimony that now remains for consideration is about the recovery of the property from the possession of the accused. The most important discovery was the discovery of several Cornets (i.e. Cornet-a-pistons which are brass portable wind instruments like trumpets). These were recovered at the instance of Bhanwar Singh, appellant, from the huge heap of Karab कर्ब (After statement of some evidence the judgment proceeds :) I am of opinion that Bhanwar Singh's appeal should be dismissed.

(8) Nothing has been recovered from the possession of Munshi and clearly he is entitled to acquittal.

(9) One coat, Article E, is said to have been recovered from Aliya but the evidence is not free from suspicion. The only witness produced by the prosecution to prove this recovery is Komal Persad, P. W. 6, who deposes that he was called to the Thana at Bhitwar and he had reached the office and was sitting there when, after sometime, the eight accused were sent for and at that time when the accused had produced various clothes, Aliya had produced this coat. The witness adds that he could not say since when the clothes were in the possession of the accused. A jersey from Sultan alias Rustom was also produced before Komal Persad. In my opinion, this search seems to be a big farce and cannot be relied upon for basing the conviction thereon. It was incumbent on the Police to have prepared a Panchnama of the clothes the accused had in their possession when Shankar Singh's house at Khedi Raimal was raided on 16-12-1949 and when the accused were arrested there. No such Panchnama was prepared on that date. A search of the accused in the Police Station at Bhitwar twenty-four hours after the arrest is no proof that the accused brought the clothes to Jail from Raimal Khedi or had been wearing



these clothes. Some independent witness from Raimal Khedi, who might have seen the accused with these clothes ought to have been produced. A Chadar from Jimipal was also produced in the search in Jail. It also seems to be tainted with suspicion and Jimipal cannot be convicted on this slender material. We, therefore, dismiss the Government appeal against the order of acquittal of Jimipal.

(10) We also dismiss the appeal of Bhanwar Singh.

(11) We are, however, of opinion that there is not sufficient material for the conviction of appellants Aliya, Munshi and Sultan (alias Rustom). We, therefore, allow their appeal and order that they be acquitted.

(12) SHINDE C. J.: I agree.

B/K.S.

Order accordingly.

**A. I. R. 1953 M. B. 89 (Vol. 40, C. N. 41)**  
**(GWALIOR BENCH)**

DIXIT J.

Surajmal s/o Dayaram and others, Applicants v. The State.

Criminal Ref. No. 22 of 1952, D/- 14-10-1952.

(a) **M. B. Panchayat Vidhan, Sm. 2006 (58 of 1949), Ss. 77 and 75 — Offences cognizable by Panchayat Court — Jurisdiction of Panchayat Court is not exclusive — (Criminal P.C. (1898), Ss. 1(2), 5 and 29 — Special law).**

The existence of a special law by itself cannot be taken to exclude the operation of the Criminal Procedure Code. Unless the special law expressly or impliedly provides that certain offences shall be tried exclusively by Courts constituted under the Act, the jurisdiction of the ordinary Courts to try the offences under the Code cannot be said to have been excluded.

(Para 4)

There is no provision in the M.B. Panchayat Vidhan excluding the jurisdiction of other Courts to take cognizance of any case which is cognizable under S. 75 of the Act by a Panchayat Court. The jurisdiction which has been conferred on the Panchayat Court to try certain offences enumerated in S. 75 of the Act is not exclusive. AIR 1951 All 414 and AIR 1951 All 494, Dist.

(Para 4)

Anno: Cr. P. C., S. 1 N. 3; S. 5 N. 6, S. 29 N. 1.

(b) **M.B. Panchayat Vidhan, Sm. 2006 (58 of 1949), Ss. 77 and 75 — Case cognizable by Panchayat Court tried by Magistrate — Effect.**

Under S. 77, Madhya Bharat Panchayat Vidhan, the Magistrate has been given the discretion to transfer a case to the Panchayat Court, provided of course it is cognizable by the latter Court under S. 75 of the Act. If, therefore, in a case cognizable by a Panchayat Court, the Magistrate instead of transferring the case to the Panchayat Court, tries it himself and finds the accused guilty, it cannot be held that the trial and conviction are illegal.

(Para 5)

Mungre, Govt. Advocate, for the State.

REFERENCES: Courtwise/Chronological/ Paras  
(51) AIR 1951 All 414: (1950 All LJ 863) 4  
(51) AIR 1951 All 494: (1951 RD (HC) 17) 4

ORDER: This is a reference by the learned Sessions Judge of Guna, recommending that the conviction and sentence of the applicants Suraj Mal and others by the Sub-Divisional Magistrate of Chachoda under S. 323, I.P.C. be set aside.

(2) It appears that the applicants were challaned in the Court of the Sub-Divisional Magistrate, Chachoda, for an offence under S. 147, I.P.C. The trial Magistrate did not find the charge under S. 147 prima facie established. He accordingly charged the accused for an offence under S. 323, I.P.C. At the end of the trial the learned Magistrate convicted the accused under S. 323, I.P.C. and sentenced each one of them to pay a fine of Rs. 50/-.

(3) The accused persons filed a revision petition before the Sessions Judge of Guna who was of the opinion that an offence under S. 323, I.P.C. being exclusively triable by the Panchayat Court under the Madhya Bharat Panchayat Vidhan, Samvat 2006 (Act No. 58 of 1949), the trial and the conviction of the applicants by the Sub-Divisional Magistrate were illegal. The learned Sessions Judge has accordingly recommended to this Court that the conviction be set aside.

(4) I have heard Mr. Mungre, Government Advocate for the State who opposes the reference. In my opinion, the reference must be rejected. Under S. 75 of the Panchayat Vidhan, an offence under S. 323, Penal Code is, no doubt, within the cognizance of a Panchayat Court. Section 77 of this Act says that if at any stage of proceedings in a criminal case pending before a Magistrate it appears that the case should be tried by the Panchayat Court, the Magistrate shall at once transfer the case to the Panchayat Court. There is no provision in the Act excluding the jurisdiction of other Courts to take cognizance of any case which is cognizable under S. 75 of the Act by a Panchayat Court. It is thus clear from these provisions that the jurisdiction which has been conferred on the Panchayat Court to try certain offences enumerated in S. 75 of the Act is not exclusive. Under S. 5, Criminal P. C. all offences under the Penal Code are required to be investigated, tried and otherwise dealt with according to the Code. Sections 28 and 29 of the Code deal with the Courts constituted under the Code by which the offences under the Penal Code and under any other law are to be tried. These sections govern every criminal proceedings both as regards the tribunal by which a crime is to be tried and as to the procedure to be followed. Sub-section (2) of S. 1, Criminal P. C., no doubt, provides that nothing in the Code shall affect any special law, in the absence of any specific provision to the contrary. But the existence of a special law by itself cannot be taken to exclude the operation of the Criminal Procedure Code. Unless the special law expressly or impliedly provides that certain offences shall be tried exclusively by Courts constituted under the Act, the jurisdiction of the ordinary Courts to try the offences under the Code cannot be said to have been excluded. The learned Sessions Judge has placed reliance on two decisions of the Allahabad High Court reported in — 'Kirpa Ram v. Ram Asrey', AIR 1951 All 414 and — 'Jaisri Tiwari v. State', AIR 1951 All 494 in which it has been held that the Panchayati Adalat established under the U.P. Panchayat Raj Act, 1947 has exclusive jurisdiction to try the offences mentioned in S. 52 of the Act. These decisions have no applicability here, because there is a material difference between the Uttar Pradesh Act and the Madhya Bharat Act. The difference lies in this; that whereas in the Uttar Pradesh



Act by S. 55, the jurisdiction of any other Court to take cognizance of any case which is cognizable under the Act by Panchayati Adalat is expressly excluded, in the Madhya Bharat Act, there is no such provision. Again, under S. 56 of the U.P. Act a Magistrate is required to transfer the case to the Panchayati Adalat if it appears to him at any stage of proceedings in a criminal case that the case is triable by a Panchayati Adalat. In our Act the words used in S. 77 are:

"Yadi aparadh sambandhi kisi abhiyoga men jo kisi Magistrate ke samane ho kisi samaya bhi yah malum ho ki is abhiyoga ki sunavi kisi Nyaya Panchayat ko karana chahiye to wah us abhiyoga ko turant saksham Nyaya Panchayat ke pas bhej dega. Jo abhiyoga ki sunavi arambha ho sakegi."

(5) It will be seen that under this section it must appear to the Magistrate that the case should be tried by the Panchayati Adalat before it can be transferred to the Panchayat Court. It is not sufficient for the transfer of a case to the Panchayat Court that it is triable by that Court. The question whether any particular case is cognizable by a Panchayat Court, should or should not be tried by that Court has to be determined by the Magistrate on the facts and circumstances of that case. Thus under S. 77, Madhya Bharat Panchayat Vidhan, the Magistrate has been given the discretion to transfer a case to the Panchayat Court, provided of course it is cognizable by that Court under S. 75 of the Act. If, therefore, in the present case, the Magistrate instead of transferring the case to the Panchayat Court, tried it himself and found the applicants guilty under S. 323, I.P.C., it cannot be held that the trial and conviction of the applicants are illegal.

(6) For these reasons I reject the reference. B/V.B.B. Reference rejected.

**A. I. R. 1953 M. B. 90 (Vol. 40, C. N. 42)**

**(GWALIOR BENCH)**

**DIXIT AND CHATURVEDI JJ.**

Jeevan Lal, Appellant v. Central Bank of India, Shivpuri, Respondent.

Civil Misc. Appeal No. 4 of 2005, D/- 30-7-1952.

**(a) Civil P.C. (1908), O. 38 R. 5 — Applicability — Intention to obstruct or delay execution not proved — Attachment cannot be ordered.**

Where the evidence adduced by the plaintiff shows that at the time of the institution of the suit the defendant had already left the place where his property was situated and he was thinking of disposing of the property, but there is no evidence to establish that the defendant was doing so with the intent to delay or obstruct the execution of the decree that might be passed in that suit, no order for attachment before judgment can be granted.

(Para 3)

Anno: Civil P. C., O. 38 R. 5 N. 2 Pt. 3; N. 13 Pt. 1.

**(b) Civil P.C. (1908), S. 95 — Insufficient grounds — Meaning — Onus on the applicant — (Gwalior Civil P.C., (Smt. 1966), S. 439) — Words and Phrases — Insufficient grounds).**

For awarding compensation whether under S. 439, Gwalior Civil P. C., or under S. 95, Civil P. C., 1908, the question to be

decided is whether there were in fact no sufficient grounds for applying for attachment before judgment and not whether there were no sufficient grounds stated in the application. The words 'insufficient grounds' mean without reasonable or probable cause. It is incumbent on the applicant applying for compensation to prove affirmatively that the attachment was applied for without reasonable or probable cause. 18 Bom 717, Rel. on.

(Para 4)

Anno: Civil P. C., S. 95 N. 4.

Shiv Dayal, for Appellant; Arora, for Respondent.

REFERENCE.....

(94) 18 Bom 717

/Para. 4

**DIXIT J.:** This is an appeal from an order passed by the District Judge of Shivpuri under S. 433, Gwalior C. P. C., Samvat 1966 directing the attachment before judgment of certain properties of the appellant. On 30-1-45 the respondent Central Bank of India Ltd. instituted a suit against the appellant in the Court of District Judge, Shivpuri for the recovery of Rs. 17,407-6-6. On the same date the plaintiff Bank put in an application under S. 433, Gwalior C. P. C., stating that the goods on the security of which the plaintiff had advanced certain monies to the defendant and which the plaintiff was seeking to recover in the suit, had been attached by the District Co-operative Bank of Shivpuri and that, therefore, the security given to the plaintiff had become insufficient. Further that the plaintiff had learned that the defendant was thinking of selling his property and leaving the State territory. On these grounds the plaintiff prayed that an order of attachment before judgment be granted of a house of the defendant. The attachment was effected on 2-2-45. On the next day the defendant-appellant presented an application objecting to the attachment and praying to the Court that the attachment be set aside and he be awarded compensation in the sum of Rs. 1000 for the wrongful attachment. The learned District Judge, therefore, heard both the parties, recorded their evidence and confirmed the order of attachment before judgment.

(2) In this appeal, Mr. Shiv Dayal for the appellant, contends that the order of attachment passed by the learned District Judge was not legal, because the plaintiff had not stated in his application under S. 433, Gwalior C.P.C. whether the defendant was about to dispose of any part of his property or about to leave the local limits of the jurisdiction of the Court with the intention of obstructing or delaying the execution of any decree that might be passed against him. It was said that on the evidence led by the plaintiff, it is not established that the defendant was going to make alienations of his property after the filing of the suit, with intent to delay or obstruct the execution. Learned Counsel for the appellant further said that as the plaintiff had applied for an order of attachment on insufficient grounds, the appellant was entitled to compensation.

(3) The contention of the learned counsel for the appellant that the learned District Judge was not justified in confirming the order of attachment is, in my view, sound and must prevail. Under S. 433, Gwalior C. P. C., an order of attachment before judgment could be made only if the Court was satisfied that the



defendant with intent to obstruct or delay the execution of any decree that might be passed against him, (a) was about to dispose of the whole or any part of his property; (b) or was about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court; (c) or had left the local limits of the jurisdiction of that Court wherein his property was situated. The evidence led by the parties is to the effect that the District Co-operative Bank secured an order of attachment against the goods which had been previously pledged by the appellant with the respondent; that for some time before and after the institution of the plaintiff's suit, the defendant was absconding from Shivpuri as a case about a contravention of the Petrol Rationing was pending against him in Shivpuri; that after the institution of the suit, the defendant-appellant was in Gwalior; and that during his stay at Gwalior he met Mr. Khanna the Manager of the plaintiff Bank and told him that in case he was allowed bail he would return to Shivpuri and dispose of his property. The defendant Jeewan Lal did not enter into the witness-box to contradict the statement of Mr. Khanna, that the defendant had met him and told Mr. Khanna of his intention to dispose of the property. The defendant's witnesses tried to show that the properties which the defendant possessed were greater in value than the amount at stake in the suit. From this evidence, the facts that the defendant-appellant at the time of the institution of the suit and after had left Shivpuri where his property was situated, and was also thinking of disposing of the property, are no doubt established. But the evidence does not establish the important fact that the appellant left Shivpuri and intended to dispose of any part of his property with intent to delay or obstruct the execution of the decree that might be passed against him. In the absence of the proof of this intention the learned District Judge was not justified in confirming the order of attachment. The order was, in my opinion, not legal. The question of setting aside the order of attachment is now of academic interest only as the plaintiff's suit has been decreed and in the execution proceedings of the decree in his favour, the plaintiff has already secured a fresh order of attachment of the property.

(4) As to the contention of the appellant that he is entitled to compensation for this wrongful attachment, I think it must be rejected. It is quite true that the plaintiff did not state in his application for attachment before judgment the intent with which the defendant contemplated to leave Shivpuri or dispose of his property. But for awarding compensation whether under S. 439, Gwalior C. P. C., or under S. 95, C. P. C., 1908, the question to be decided is whether there were in fact no sufficient grounds for applying for attachment before judgment and not whether there were no sufficient grounds stated in the application. The words 'insufficient grounds' mean without reasonable or probable cause. See — '*Roulet v. Fetterle*', 18 Bom 717 at p. 720. Now it has been found here that the goods pledged with the plaintiff were attached by the District Co-operative Bank; that the defendant had left Shivpuri and that he had told Mr. Khanna, the Manager of the plaintiff Bank, that in case he was allowed bail he would return to Shivpuri and would dispose of his property. From these

facts, it is clear that the Bank had reason to suspect that the defendant intended to dispose of his property with a view to delay or obstruct the execution of the decree that the Bank might obtain against him. The plaintiff Bank, however, did not succeed at the hearing in establishing this intention of the appellant. But this in itself does not entitle the appellant to claim compensation from the plaintiff. The appellant must show that the plaintiff was unjustified in suggesting to the Court on 30-1-45 when he procured the order of attachment that he was about to defeat the object of the suit in making alienations or by leaving Shivpuri.

The appellant has not proved this fact at all. All that he did was to show that he had properties of greater value than the amount involved in the suit and that he left Shivpuri on account of Petrol Rationing Contravention case. The appellant made no attempt whatsoever, to challenge the statement of Mr. Khanna that the appellant had told him that he would return to Shivpuri and dispose of his property. It was incumbent on the appellant to prove affirmatively that the attachment was applied for without reasonable or probable cause. On the facts established I am of the opinion that the appellant had failed to make out the case which was necessary for him to establish that the Bank had no sufficient reason on 30-1-45 to suspect that the appellant would dispose of his property to defeat the plaintiff's claim. The appellant's contention that he is entitled to compensation must, therefore, be rejected.

(5) In the result, the order of attachment passed by the District Judge on 13-1-45 and confirmed on 29-7-1948 is set aside. To this extent this appeal is allowed. In the circumstances of the case, there will be no order as to costs of this appeal.

(6) CHATURVEDI J.: I agree.

B/D.R.R.

Order accordingly.

**A. I. R. 1953 M. B. 91 (Vol. 40, C. N. 43)**  
**(GWALIOR BENCH)**

**SHINDE AND DIXIT JJ.**

Khubchand S/o. Nandram, Appellant v. Maniklal S/o. Pyarechand, Respondent.

Appeals Nos. 85 and 88 of 2004, D/- 7-3-1952.

**(a) Limitation Act (1908), Arts. 49, 113 and 115 — Gwalior Limitation Act, Arts. 5, 11 and 13 — Applicability — Suit for damages for breach of contract of marriage.**

A suit for damages for breach of contract of marriage is not governed either by Art. 5 or by Art. 11, Gwalior Limitation Act (corresponding to Arts. 49 and 113 of Indian Act). Such a suit is no doubt governed by Art. 115 of the Indian Act but there being no corresponding Article in the Gwalior Limitation Act, the omnibus Article 13 would apply to it. (Paras 4, 5, 6)  
Anno: Lim. Act, Art. 49 N. 2; Art. 113 N. 2; Art. 115 N. 3.

**(b) Contract Act (1872), S. 73 — Breach of promise of marriage — Damages — Suit for return of ornaments or their value given at time of betrothal — Maintainability — (Hindu Law — Marriage).**

Under the Hindu Law, betrothal is in the nature of a contract to which the Contract Act applies. A suit for damages for breach of promise of marriage is therefore entertainable: Case law ref. (Para 7)



A agreed to marry his son with B's daughter, B refused to perform the marriage of his daughter on ground that she had not attained the requisite age of 16. A then married his son to another girl but in spite of this marriage he was willing to perform second marriage of his son with B's daughter. B then married his daughter to another person. A sued B for damages for breach of contract of marriage claiming inter alia a specific sum of money as value of ornaments and clothes given to B's daughter at the time of betrothal. B counter claimed certain expenses.

Held that (i) under the Hindu Law, there is no restriction on a husband to marry more than one wife. As A was willing to marry his son with B's daughter in spite of the first marriage and there being no contract that B's daughter was to be the first wife of A's son, there was no breach of contract on the part of A but on the other hand B was guilty of the breach. (Para 8)

(ii) That the gifts of ornaments and clothes made by A at the time of betrothal or ceremony preceding the marriage were not absolute gifts and could be claimed back in case of breach of contract of the proposed marriage: AIR 1950 All 592; 11 Bom 412, Rel. on. (Para 9)

(iii) That the defendant B himself being guilty of breach he was not entitled to any general damages for expenses incurred by him at the time of betrothal. (Para 11)

(iv) That the plaintiff having obtained a decree for a specific sum of money as value of the ornaments as claimed by him could not claim in appeal the return of the ornaments in specie or their value at the time of decree. (Para 12)

Anno: Contract Act, S. 73, N. 12.

Bhagwanswaroop and Premnarayan, for Appellant; Bhagwandas and Motilal Gupta, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras  
(50) AIR 1950 All 592: (1950 All LJ 419) 7, 9  
(70) 7 Bom HC (OC) 122 7, 9  
(87) 11 Bom 412 7, 9  
(92) 16 Bom 673 9  
(97) 21 Bom 23 7  
(41) ILR (1941) Bom 211: (AIR 1941 Bom 129) 7

SHINDE J: These two appeals arise out of the suit filed by Pyarchand against Khubchand for damages. The plaintiff alleges in his plaint that the defendant entered into a contract with him to give his daughter Mulibai in marriage to the plaintiff's son Manaklal on 5-2-1932: that the defendant married his daughter to one Chothmal on 17-1-1939 and thus broke the contract; that in pursuance of the contract, the plaintiff on the occasion of betrothal, spent Rs. 860/- in giving presents of ornaments and clothes to the daughter of the defendant; that he, as a result of the defendant's action, sustained mental hardship and loss of reputation. On these allegations, the plaintiff claimed Rs. 860/- as special damages and Rs. 1200/- general damages from the defendant. The defendant admitted the contract of marriage and also the fact of marrying his daughter to Chothmal on 17-1-1939, but pleaded that the contract was broken by the plaintiff. He stated in his written statement that the contract between the parties was that Mulibai was to be married to the son of the plaintiff as his first wife.

But the plaintiff in breach of this contract married his son to the daughter of Kauram in May, 1935. He further stated that he incurred an expenditure of Rs. 700/- at the time of betrothal and also suffered mental worry which he estimated at Rs. 1000/-. On these allegations he prayed that the plaintiff's suit be dismissed and the claim for Rs. 1700/- for damages be decreed against the plaintiff. The City Sub-Judge, Ujjain, dismissed both the plaintiff's suit and the defendant's counter claim. The plaintiff filed an appeal and the defendant filed cross-objections. The learned District Judge, Ujjain, decreed the plaintiff's suit to the extent of Rs. 800/- and dismissed the cross-objections of the defendant. Against this judgment and decree both the parties have filed these appeals.

(2) The plaintiff's appeal is confined only to the return of the ornaments or their market price at the time of the decree. The defendant's appeal on the other hand, is for reversing the decree of the District Court for Rs. 800/- passed in favour of the plaintiff and for decreeing the claim of the defendant for Rs. 1700/-.

(3) A preliminary objection has been raised by Mr. Bhagwandas Gupta counsel for the plaintiff that the counter claim of the defendant is time barred. He contends that if plaintiff broke the contract, cause of action accrued to the defendant in May, 1935. The counter claim was filed on 1-5-39. As the Article 5 or 11 of the Gwalior Limitation Act equivalent to Article 49 or 113 of the Indian Limitation Act applies, the period of limitation being 3 years, the claim is time barred.

(4) Conceding for the sake of argument that the cause of action accrued to the defendant in May 1935 we have to consider whether Article 5 or 11 of the Gwalior Limitation Act, which is equivalent to Article 49 or 113 of the Indian Limitation Act, covers this case or not. (After quoting Art. 5, Gwalior Limitation Act in Hindi, the judgment proceeds:)

Article 49 of the Indian Limitation Act reads as follows:

<p>"For other specific moveable property or for compensation for wrongfully taking or injuring or wrongfully detaining the same.</p>	<p>Three years. When the pro- perty is wrongfully taken or injured or when the de- tainer's possession becomes unlawful."</p>
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The wording of Article 49 clearly indicates that the Article is attracted only when specific moveable property or compensation is asked for. The suit as it is framed is not for return of ornaments. The plaint clearly states that the suit is for damages for breach of contract. The written statement filed by the defendant clearly states in para No. 13 that the breach of contract by the plaintiff caused the defendant Rs. 700/- special damages and Rs. 1000/- general damages. The statements made both in the plaint and in the written statement make it abundantly clear that the suit is not for the return of the ornaments but for damages caused by the breach of the contract. In these circumstances Article 49 is not attracted in this case.

(5) The learned counsel for the plaintiff further contends that if Article 5 of the Gwalior Limitation Act is not attracted, Article 11 of the Gwalior Limitation Act is applicable to this case. Article 11 of the Gwalior Limitation Act is as follows: (After quoting Art. 11 in Hindi, the judgment proceeds:) The parallel Article in Indian Limitation Act is Article 113 which reads as follows:

<p>"For specific perform- ance of a contract.</p>	<p>Three years. The date fixed for the perform- ance, or if no such date is fixed, when</p>
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the plaintiff has notice that performance is refused."

As already stated the suit is for damages for breach of contract. Hence Article 11, which covers a suit brought for specific performance, cannot be made applicable to the case under consideration. Hence even this Article is not applicable to the present case.

(6) The suit as it is framed no doubt attracts Article 115, Indian Limitation Act. This Article reads as follows:

"For compensation Three years. for the breach of any contract express or implied, not in writing registered and not here-in specially provided for.

When the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases."

There is no need, however, to enter into a further discussion as to whether Article 115, Indian Limitation Act, is applicable to the present suit or not. There is no Article in Gwalior Limitation Act analogous to Article 115, Indian Limitation Act. Consequently, the omnibus Article 13, Gwalior Limitation Act, has to be applied to this case. As this Article prescribes six years as the period of limitation, the suit is clearly within time. The preliminary objection, therefore, has no force.

(7) Turning now to the consideration of the main points raised in the case the first point to consider is who broke the contract. Before proceeding to consider that question, it may be mentioned that it is now well established that the suit for damages for breach of promise of marriage is entertainable. In —'Rajendra Bahadur Singh v. Roshan Singh', A. I. R. 1950 All. 592, their Lordships of the Allahabad High Court held that in a Hindu family betrothal is in the nature of a contract to which the Contract Act is applicable. In Mayne's Hindu Law, it is stated that where the marriage contract is entered into on behalf of the minors, courts have generally awarded damages for breach of contract. (Vide Mayne's Hindu Law and Usage 1950 Edn. p. 137). In —'Khimji Kuverji v. Lalji Karamsi ILR (1941) Bom. 211 their Lordships of the Bombay High Court held that a suit for damages for breach of promise of marriage is entertainable. In—'Umed Kika v. Nagindas Narotamdas', their Lordships of the Bombay High Court allowed damages to the bridegroom against the father of the bride for breach of promise. Vide 7 Bom. H. C. (O. C.) 122. In —'Mulji Thakarsey v. Gomti', 11 Bom 412 their Lordships of the Bombay High Court gave damages to the bridegroom for breach of promise of marriage. The same view was followed in —'Purshotamdas Tribhovandas v. Purshotamdas Mangaldas', 21 Bom 23. It is, therefore, now well settled that a suit for damages for breach of promise of marriage is entertainable.

(8) That brings us to the consideration of the breach of promise. The learned counsel for the defendant contends that the contract was broken by the plaintiff when he married his son to the daughter of Kaluram in May 1935. That Manaklal married the daughter of Kaluram in May, 1935 is admitted by both the parties. The plaintiff, however, states that his wife having been burnt she was unable to attend to household work and hence he needed a daughter-in-law, to look after his house.

When he approached the defendant he refused to marry his daughter until she was 16 years old. Hence he married his son to the daughter of Kaluram. Mangilal, who is the son of the plaintiff Pyrachand, also, testifies to this fact. This fact is also mentioned in the reply dated 19-12-1938 to the notice dated 7-12-1938. It also appears from the notice given by Khubchand to the plaintiff dated 18-12-1938, that Mulibai was on that date about 14 years old. The plaintiff applied for permission as both his son and Kaluram's daughter had not attained the requisite age. At that time, Khubchand defendant objected to the permission being given to the plaintiff. If he wanted to marry his daughter, there is no reason why permission may not have been sought for Mulibai as she could not have been less than 10 at that time. This fact goes to prove plaintiff's allegation that in 1935 the defendant was not willing to marry his daughter to the plaintiff's son. There is no evidence to show that the contract between the parties was that Mulibai was to be married at a particular age. Consequently, if the defendant had been willing to marry his daughter in 1935 he would have applied for permission for his daughter. In any case, there is no evidence on record to show that the contract between the parties was that Mulibai was to be Maniklal's first wife and not the second one. Even after Maniklal was married to Kaluram's daughter, the plaintiff sent a telegram on 6-5-36 to the defendant as under:

"Under instructions of Pyarchand of Firm Chhajuram Mangiram you betrothed your daughter Mulibai with Pyarchand's son Maniklal you are going to betrothe her again with Bherubua's son take notice that your action would result in breach of contract for marriage you responsible for damages and consequences".

Ramprasad Bhargava  
Vakil"

This telegram shows that the plaintiff was willing to carry out the contract. But the defendant married Mulibai to Chotumal son of Fattaji resident of Badod on 17-1-1939. In Hindu Law there is no restriction on a husband to marry more than one wife. In the absence of a contract that Mulibai was to be the first wife of Maniklal, it cannot be said that the plaintiff, who was willing to marry his son to Mulibai broke the contract. In these circumstances there is no doubt in my mind that the contract was broken by the defendant.

(9) The next contention raised by the defendant is that the ornaments for which the decree had been given by the lower court were given by the plaintiff as gift and hence neither ornaments nor their price can be claimed by the plaintiff. This contention also cannot be sustained. It has been held in a number of cases that when a contract of marriage is broken a person is entitled to the return of jewellery from the person who breaks the contract. The gifts made on the occasion of the various ceremonies preceding the marriage are not absolute gifts. Such gifts are made in anticipation of & as consideration for the proposed marriage. Vide —'Rajendra Bahadur Singh v. Roshan Singh', A. I. R. 1950 All 592. Gooroo Dass Banerjee in the Hindu Law of Marriage and Stridhan (Tagore Law Lectures, 1878) at page 92 states as follows:

"But though specific performance cannot be enforced the party injured by the breach of a contract of betrothal is entitled to recover compensation for any pecuniary damages that might have been sustained, and also for any injury to character or prospects in life which may naturally arise in the usual course of things from such breach".



In — 'Mulji Thakarsi v. Gomti', 11 Bom 412 it was held that the plaintiff was entitled to the return of the ornaments as the defendant had committed the breach of promise. In — 'Rambhat v. Timmayya', 16 Bom. 673 their Lordships of the Bombay High Court held that the plaintiff is entitled to the return of ornaments. The same view was taken in — 'Umed Kika v. Nagindas', 7 Bom. H. C. (O. C.) 122. In these circumstances there is no force in the contention that ornaments given at the time of betrothal or on the occasion of various ceremonies preceding the marriage are absolute gifts.

(10) The next point raised by the counsel for the defendant is that he has received no benefit from the plaintiff and if any ornaments and clothes were given to Mulibai she has taken them away with her, as she is now out of his control, he is not liable to return them or pay any compensation. This argument though specious is devoid of any force. It is admitted that the ornaments were given when Mulibai was a minor living in the guardianship of the defendant. Teharir dated 6-1-1935 gives the description of the ornaments, given by the plaintiff and states that after the marriage Mulibai will take those ornaments with her to the plaintiff's house. Besides although the weight and price have been disputed by the defendant, he had admitted the receipt of the ornaments in para No. 3 of his written statement. Above all Khubchand in his statement admits that the ornaments given to Mulibai by the plaintiff are with him. Under these circumstances this argument is not tenable.

(11) Turning now to the claim made by the defendant against the plaintiff it may be said at the outset that he is not entitled to get general damages as he himself was responsible for breaking the contract. The question is whether he is entitled to the return of ornaments or their price, under S. 65, Contract Act. The defendant states that he gave the ornaments worth Rs. 600/- at the time of betrothal. The first appellate court held that there is no sufficient evidence to hold that the defendant gave ornaments and clothes worth Rs. 600/- to the plaintiff. We see no reason to differ from the view taken by the lower court. There is no reliable evidence to show that clothes and ornaments worth Rs. 600/- were given by the defendant to the plaintiff. The defendant has also asked to be reimbursed for the expenses incurred for dinner etc. On that count he claims Rs. 100/-. As already stated he is not entitled to damages on that count as he himself is guilty of breaking the contract. The result is that the defendant's claim for Rs. 1700/- cannot be allowed.

(12) The plaintiff has filed an appeal for the return of his ornaments in specie or their market price at the time of the decree. This relief cannot be granted. In his plaint the plaintiff specifically prayed for Rs. 800/- as price of the ornaments and Rs. 60/- as price of clothes and Rs. 1200/- as general damages. In his prayer he states clearly that the decree for Rs. 2060/- be given against the defendant; if the defendant returns the ornaments specified in para 3 of the plaint Rs. 800/- be deducted from the suit claim of Rs. 2060/-. In these circumstances the plaintiff now cannot be allowed to claim either the ornaments in specie or their market price at the time of the decree.

(13) For the reasons given above both the appeals are dismissed with costs.

(14) P. V. DIXIT J.: I agree.

B./K.S.

Appeals dismissed.

A. I. R. 1953 M. B. 94 (Vol. 40, C. N. 44)  
(GWALIOR BENCH)

DIXIT J.

Dhanu Lal, Applicant v. The State.

Criminal Revn. No. 47 of 1952, D/- 6-10-1952.

**Criminal P. C. (1898), S. 514 — Applicability — Surety bond under Opium Act for production of accused before police or Court or Customs Officer — Forfeiture of bond for default to produce them before Customs Officer — Section 514 does not apply.**

Section 514, Criminal P. C. is applicable only to those bonds which are taken under the Code and which are for appearance before a Court.

A bond was taken under the Opium Act and not under the Code and the surety thereby undertook to produce the accused persons before the police or the Customs Department as well as before the Court. The bond was, however, forfeited for the surety's default in producing the accused persons before the Superintendent of Customs:

Held that (1) in these circumstances the bond in question cannot be dealt with under S. 514, Criminal P. C.;

(2) even assuming that a bond taken under the Opium Act, if it be for appearance before a Court, is included in para. 2 of sub-s. (1) of S. 514, a bond not taken under the Code for appearance before the police or the Customs Department or the Court cannot be treated as being within the scope of the section when it is sought to be forfeited on the ground of the failure of the accused persons to appear before the police or the Customs Department; (Para 4)

(3) further, if there was no procedure for enforcing bonds such as the one in question, the remedy was to amend the Criminal Procedure Code so as to give power to Magistrates to deal with such bonds. The difficulty cannot be removed by extending the application of S. 514 to bonds which, in the face of the clear words of the section, are not covered by it. To do so would be to legislate and not to interpret the section. AIR 1918 Bom 226, Rel. on. (Para 5)

Anno: Cr. P. C., S. 514 N. 1.

Anand, for Applicant; Mungre, Government Advocate, for the State.

REFERENCES: Courtwise/Chronological/ Paras  
(18) AIR 1918 Bom 226: (19 Cri LJ 607) 5  
(51) Cri. Revn. No. 239 of 1949: (AIR 1951 Madh-B 102: 52 Cri LJ 625) 2, 4

**ORDER:** This is a revision petition from an order of the District Magistrate of Shivpuri upholding an order of the Sub-Divisional Magistrate Shivpuri by which he directed the forfeiture of a bond furnished by the applicant for the appearance of certain persons who had been implicated for an offence under the Gwalior Opium Act, Smt. 1980. By the bond the applicant undertook to produce the accused persons before the police or the Customs Department or the Court on any day as directed. It appears that on 26-4-49 the applicant, who stood surety for the appearance of the accused persons in the sum of Rs. 4000/- was directed by the Superintendent Customs Department Shivpuri to produce the accused persons before him, on 2-5-1949. The applicant failed to do so. Thereupon, the superintendent Customs Department



made a report to the Magistrate for the forfeiture of the surety bond. The report was purported to be u/s. 58, Excise Act. The learned Magistrate held that the provisions of the Excise Act were not applicable to the forfeiture of a bond taken under the Opium Act. This order of the Magistrate was upheld by the Sessions Judge of Shivpuri. In a revision petition from that order of the Sessions Judge it was held by Shinde J., (as he then was) that as the Opium Act did not prescribe any procedure with regard to the forfeiture of the bond taken under that Act, the provisions of the Criminal Procedure Code "would govern the forfeiture of the security taken under the Opium Act." The learned Judge remitted the case to the lower Court for "being dealt with according to law." When the case went back the Magistrate following the procedure laid down in S. 514, Criminal P. C. found that the bond had been broken and made an order directing the forfeiture of the bond.

(2) In this revision petition Mr. Anand learned counsel for the applicant contends that the Magistrate had no jurisdiction to direct the bond to be forfeited under S. 514, Criminal P. C. as the bond in question was not taken under the Code and was not forfeited for appearance before a Court. On the other hand Mr. Mungre the learned Government Advocate for the State maintained that this question was concluded by the decision of Shinde J., in—'State v. Darshan Lal', Criminal Revn. No. 239 of 1949 when he held that the provisions of the Criminal Procedure Code would apply to the forfeiture of the bond and directed the Magistrate to dispose of the case according to law.

(3) In my opinion, the contention of the learned counsel for the applicant is well-founded and must be accepted. It is conceded that S. 514 is the only section in the Code under which, if at all the Magistrate would have jurisdiction to forfeit the bond. Sub-section (1) of this section provides:

"Whenever it is proved to the satisfaction of the Court by which a bond under this Code has been taken, or of the Court of a Presidency Magistrate or Magistrate of the First Class, or, when the bond is for appearance before a Court to the satisfaction of such Court, that such bond has been forfeited, the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof, or to show cause why it should not be paid."

(4) It is clear from this section that it is applicable only to those bonds which are taken under the Code and which are for appearance before a Court. It is not disputed that the bond taken in this case was not under the Code and though by that bond the applicant undertook to produce the accused persons before the police or the Customs Department as well as before the Court, the bond was forfeited for the applicant's default in producing the accused persons before the Superintendent of Customs. I fail to see how in these circumstances the bond in question can be dealt with under S. 514 on any straining of the language of the section. I do not think the decision of Shinde J., in—'State v. Darshan Lal', Cri. Rev. No. 239 of 1949 (Madh B) can be taken as deciding the question that the bond in the present case falls under S. 514 of the Code. It is obvious from the order passed in the Criminal Revi-

sion that the question whether the bond in this case fell within the scope of S. 514 was not considered in the revision petition, and no arguments were addressed on the question by the counsel then appearing in the case. The question which was considered in the former revision petition was a general question as to the applicability of the Code to the forfeiture of the bond taken under the Opium Act. The question whether a bond taken under the Opium Act not for appearance before a Court or forfeited for default in appearance not before a Court but before any other authority was not decided in that revision petition. I am quite prepared to assume on the basis of the decision of my lord the Chief Justice and for the purposes of this case that a bond taken under the Opium Act, if it be for appearance before a Court is included in para 2 of sub-s. (1) of S. 514. But even on this assumption I do not see how a bond not taken under the Code for appearance before the police or the Customs Department or the Court could be treated as being within the scope of S. 514 when it is sought to be forfeited on the ground of the failure of the accused persons to appear before the police or the Customs Department.

(5) Learned Government Advocate contended that if such bonds are not included in S. 514 then there would be no procedure for enforcing such bonds and that therefore, S. 514 should be liberally construed and applied 'mutatis mutandis' to bonds such as the one we have under consideration here. As to this argument it is sufficient to say that if there is no procedure for enforcing bonds such as the one we have here, the remedy is to amend the Criminal Procedure Code so as to give power to Magistrates to deal with such bonds. The difficulty cannot be removed by extending the application of S. 514 to bonds which in the face of the clear words of the section, are not covered by it. To do so would be to legislate and not to interpret the section. I am, therefore, of the view that the Magistrate had no jurisdiction to direct the forfeiture of the bond. I am fortified in the view I have taken by the decision of the Bombay High Court in the case of—'In re Hubart Crawford', AIR 1918 Bom 226.

(6) For the above reasons I accept this revision petition and set aside the order of the Magistrate directing the forfeiture of the bond. The amount of the bond if already realised from the applicant must be refunded to him.

B/D.R.R.

Revision allowed.

A. I. R. 1953 M. B. 95 (Vol. 40, C. N. 45)  
(GWALIOR BENCH)

DIXIT J.

Ram Charan, Applicant v. Bakhtawar Singh,  
Non-applicant.

Criminal Revn. No. 199 of 1951, D/- 22-7-1952.

(a) Criminal P. C. (1898), S. 146 — Attachment — Possessor dispossessed — Possession given to non-applicant — No power.

While attaching the property a Magistrate has no power to order the party who is in possession at the time of the application to hand over the possession of the property to the non-applicant pending the final decision in the proceedings. He can,



after attachment, manage the property subject to his control and supervision. But it is highly undesirable for him to appoint a party to the dispute to manage the property on his behalf. (Para 3)

Anno. Cr. P. C., S. 146 N. 4.

**(b) Criminal P. C. (1898), S. 145 — Second Class Magistrate — Jurisdiction.**

A Magistrate who is only a Magistrate of the Second Class, is not competent to entertain an application under S. 145.

(Para 4)

Anno. Cr. P. C., S. 145 N. 6.

Abdul Hafiz, for Applicant; Mungre, Government-Advocate, for the State, Gokhale, for Complainant, Bakhtawar Singh.

ORDER: This revision petition arises out of proceedings under S. 145, Criminal P. C. instituted in the Court of Mr. Bhargava, Second Class Magistrate Shajapur, on a complaint dated 24-7-51 of the non-applicant Bakhtawar Singh. The learned Magistrate after coming to the conclusion that a dispute likely to cause the breach of the peace existed and there was a likelihood of the breach of peace, passed an order attaching the disputed property, pending his decision under S. 145. The learned Magistrate also directed the applicant who was in possession of the property at the time of the presentation of the application to hand over the possession of the property to the non-applicant pending the final decision in the case. The applicant objected to the disturbance of his possession and also raised the objection that Mr. Bhargava being a Magistrate of the Second Class was not competent to entertain the application under S. 145, Criminal P. C. The learned Magistrate overruled both these objections. The applicant then approached the Sessions Judge of Shajapur for a revision of the order of the Magistrate. The learned Sessions Judge rejected the revision petition. The applicant has now preferred this revision petition against the decisions of the Courts below.

(2) Mr. Abdul Hafiz, the counsel for the applicant pressed before me both the objections raised by the applicant in the lower Court. In my opinion, the objections must be upheld, and this petition must be accepted.

(3) As regards the disturbance of the applicant's possession pending the final disposal of the application under S. 145, Criminal P. C., it is clear that the learned Magistrate was in error. Under S. 145, the Magistrate has no jurisdiction to pass any temporary order other than an order of attachment of the property in urgent cases pending inquiry into the question of possession. He has thus no power to order the party who was in possession at the time of the application to hand over the possession of the property to the non-applicant pending the final decision in the proceedings. The Magistrate can, no doubt, in execution of the order of attachment take possession of the property and manage it during the pendency of the proceedings and for this purpose it is open to him to appoint some person to manage the property subject to his control and supervision. Apart from the fact that it is highly undesirable for a Magistrate to appoint a party to the dispute to manage the property on his behalf, it does not appear from the record in the present case that the learned Magistrate in directing the applicant to hand over the possession of the property to the non-

applicant intended to appoint the non-applicant as a person to manage the property on his behalf and subject to his control and supervision. That being so, the direction of the Magistrate disturbing the possession of the applicant pending the final decision in the proceedings cannot be maintained. Mr. Mungre the learned Government Advocate for the State frankly and rightly conceded that he could not support this direction of the Magistrate.

(4) The objection that Mr. Bhargava being a Second Class Magistrate was not competent to entertain the application under S. 145, Criminal P. C., is also well founded. Learned Counsel for the applicant says that there is no notification or order of the Government appointing Mr. Bhargava as a Sub-Divisional Magistrate. The learned Government Advocate on the other hand relies on notification No. 258 of the Law Department published at page 6 of the Gazette dated 2-4-49 to show that Mr. Bhargava was a Sub-Divisional Magistrate. Mr. Mungre admits that there is no other notification or order of the Government with regard to the appointment of Mr. Bhargava as a Sub-Divisional Magistrate. In my opinion, the notification relied on by the learned Government Advocate does not in any way help him. This notification was only with regard to the posting at various places of the Second Class Magistrate mentioned in the notification. The notification nowhere mentions that these Second Class Magistrates would be in the charge of sub-divisions at the places of their posting. It is also worthy of note that in the notification the place of posting is stated to be "the Court" of a particular place. Under S. 13, Criminal P. C., a Sub-Divisional Magistrate is a Magistrate of the First or Second Class who has been placed in charge of a sub-division by an order of the Government. No such order of the Government appointing Mr. Bhargava, Second Class Magistrate, as a Sub-Divisional Magistrate is before me and none is stated to exist. Mr. Mungre relied also on an order of this Court passed some time in December 1950 with regard to the transfer of Mr. Bhargava from Bamori to Shajapur as Munsif Magistrate. I do not see how this order shows that Mr. Bhargava was a Sub-Divisional Magistrate at Shajapur. The order of the High Court transferring Mr. Bhargava from Bamori to Shajapur is not an order of the Government placing Mr. Bhargava in charge of a sub-division. There is also nothing in the order to show that Mr. Bhargava was a Sub-Divisional Magistrate at Bamori and was transferred to Shajapur in that capacity. In my opinion, Mr. Bhargava had, therefore, no jurisdiction to entertain the application under S. 145, Criminal P. C.

(5) For the above reasons, I hold that the proceedings conducted in this case by Mr. Bhargava were without jurisdiction. The proceedings are, therefore, quashed. The possession of the property must be restored to the applicant who was in possession at the date of the application filed by the non-applicant before Mr. Bhargava. The petition is accordingly accepted.

B/V.S.B.

Revision allowed.



\* A.I.R. 1953 M.B. 97 (Vol. 40, C.N. 46)  
(Gwalior Bench)

**FULL BENCH**

SHINDE C. J., DIXIT AND CHATURVEDI JJ.

Raj Rajendra Malojirao Shitole and others,  
Petitioners v. The State of Madhya Bharat,  
Opponent.

Civil Misc. Cases Nos. 614 to 629 and 631 to 638 of 1951; 1 to 4 and 7 of 1952; 102, 106 to 119 of 1951, D/- 4-12-1952.

†\*(a) **M.B. Abolition of Jagirs Act (28 of 1951), S. 4(1)(g), Sch. I, Cl. 4(iv) and 4(v) — Validity of Act — (Constitution of India, Arts. 13, 14, 31, 226, Sch. 7, List 2, Entry 36, List 3, Entry 42).**

Per Full Bench: The Madhya Bharat Abolition of Jagirs Act No. 28 of 1951 is declared to be valid except as regards S. 4(1)(g) and sub-cl. (iv) and (v) of cl. 4 of Sch. 1 which are declared to be illegal and inoperative and a writ of mandamus is issued to the State Government directing not to give effect to the above provisions of the impugned Act: AIR 1952 SC 252, Rel. on. (Para 127)

Per Shinde C. J. and Dixit J., Chaturvedi J. contra: Section 4(1)(g) is bad both for want of public purpose and for perpetrating a fraud on the Constitution. It is also void as it contravenes the provisions of Art. 14 of the Constitution. (Paras 8, 69, 119)

Per Shinde C. J. and Dixit J., Chaturvedi J. contra: The Jagirdars were under no legal obligation to incur expenditure on account of education, public health and roads or on account of police, revenue and judicial powers. These deductions in sub-cl. (4) and (5) of cl. 4 of Sch. I are obviously a device to reduce net income and to bring it down to as low a level as possible. These deductions, therefore, are of an artificial character whose object is to inflate the deduction and thus bring about either non-payment of compensation or reduction in compensation. This is nothing but a colourable exercise of legislative power under Entry 42. Consequently, sub-cl. (4) and (5) of cl. 4 of Sch. 1 are unconstitutional and inoperative. (Paras 13, 63, 69, 122)

Per Shinde C. J. and Dixit J.: Section 4(1)(g) of the impugned Act and sub-cl. (4) and (5) of cl. 4, Sch. 1 can be separated from the rest of the Act. Consequently the whole of the Act need not be declared ultra vires. (Paras 14, 70)

Per Chaturvedi J.: The Jagir lands including forests, quarries, mines, tanks etc. belong to the State and not to the Jagirdars. The Jagirdars can be regarded only as political vassals under the Suzerain, in possession of the properties with a right to enjoy the income thereof, and, also as administrative functionaries responsible for the administration, and, their position is bound to vary with any change in the political set-up of the State. The Jagirdars are entitled to political pension or to compensation as commutation of pension. Whatever compensation on whatsoever basis may be paid to them by the Suzerain, it cannot be challenged by them as they have no right to demand any compensation. It has always to be borne in mind

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that the power which confers can always take away that which it has granted and the question of compensation does not arise at all. (Para 107)

\*(b) **Constitution of India, Art. 31(4) — Public purpose is not justiciable issue.**

Per Dixit and Chaturvedi JJ., Shinde C. J. dissenting: The existence of a public purpose as a condition precedent to the exercise of the power of compulsory acquisition being a provision of Art. 31(2), an infringement of such a provision cannot, under Art. 31(4), be put forward as a ground for questioning the validity of the Act. AIR 1952 SC 252, Rel. on.

(Note: Shinde C. J. has held that Mukherjea J. has agreed with Mahajan and Aiyar JJ. in AIR 1952 SC 252).

(Paras 44, 98 and 2)

(c) **Constitution of India, Arts. 31(2), 39(b), 39(c) — Public purpose — Test — M.B. Act, 28 of 1951 is for public purpose. (M. B. Act, 28 of 1951, S. 1).**

It is not necessary to specify public purpose in the Act itself. It can be ascertained from the tenor and intendment of the Act. When the object of the Act is to benefit the community at large, it can be said to be for public purpose. (Para 3)

Public purpose is essentially a product of time and circumstances. Time moves on and circumstances change rapidly, and so does the concept of a public purpose. It has to be construed according to the spirit of the times in which the particular legislation is enacted. The concept is not a rigid concept and it has no settled meaning. AIR 1952 SC 252, Rel. on. (Para 45)

Although the purpose of the M. B. Act 28 of 1951 is not specified, there is no doubt that it is inspired and dominated by a public purpose. It is obvious that the object of the Act is to extinguish the interests of the intermediary and to bring the actual cultivators into direct relations with the State Government and thereby to avoid concentration of wealth and means of production to the common detriment as laid down in Arts. 39(b) and (c) of the Constitution. It cannot be denied, therefore, that there is a public purpose for the acquisition of Jagir lands. (Para 4)

From the whole tenor and intendment of the Act, it can fairly be inferred that the amelioration of the peasantry living in jagir areas and the emancipation of this class of sub-human serfs from the medieval and archaic bondage which is non-conducive to the general interests of the community is the main purpose behind the impugned Act. (Para 99)

(d) **Land Acquisition Act (1894), S. 1 — Application to acquisitions under other Statutes.**

Because the provisions as to assessment of compensation enacted in the Land Acquisition Act only apply to acquisitions that are made by notification under that Act, its provisions have no application to acquisitions made under either local or central laws unless they are specifically made applicable by the provisions of these Statutes. AIR 1952 SC 252, Rel. on. (Para 15)

Anno: Land Acq. Act S. 1 N. 2.



(e) **Words and Phrases — Resumption —** Word connotes taking back what is given — What is resumed is not the property of persons from whom it is taken back by the rightful owner. (Paras 16, 75)

(f) **Evidence Act (1872), Ss. 35, 87 — Official publications.**

So long as the opinions expressed in official publications are not treated as conclusive in respect of matters requiring judicial determination, there would appear to be no objection in referring to the report for the purpose of gathering historical facts which are not in issue. AIR 1928 P. C. 10 Ref. (Para 24)

Anno: Evi. Act S. 35 N. 5; S. 87 N. 1.

(g) **M. B. Abolition of Jagirs Act (28 of 1951) S. 4 (1) (a) — Not ultra vires.**

Per Dixit J: It is not correct to regard the acquisition of an estate, as an aggregate of the acquisition of separate parts of or interests in the estate considered independently of each other. The contention that S. 4 (1) (a) is ultra vires, because it vests in the State non-income yielding properties in the Jagir for which no compensation is being paid, is therefore, untenable. AIR 1952 Madh B 57 (FB), Rel. on; AIR 1951 All 674 (FB), Ref. (Para 50)

(h) **M. B. Abolition of Jagirs Act, (28 of 1951) Sch. I, Cl. 4 (iii) — Validity.**

As the deduction under sub-cl. (iii) of cl. 4 of Sch. I is in respect of a legal obligation of the Jagirdars of Madhya Bharat to incur expenditure on account of land records and Choukidari, the sub-clause is valid. (Paras 9, 10, 57)

(i) **M.B. Abolition of Jagirs Act (28 of 1951) S. 2 (1) (vi) — Holder of mediatised estate.**

With the lapse of the British paramountcy over Indian States in 1947, the guarantees given by the British Government to the holders of the 'mediatised' estates also lapsed and since then the holders of these estates are, in their status or rights, no better than the other Jagirdars of Gwalior State. They cannot claim to be independent chiefs or any other higher status. (Para 73)

P. R. Das, Bhagwandas Gupta and Bhagwanswaroop (in No 624/51); Prabhudayal Gupta, (in No. 625/51); P. R. Das, Bhagwandas Gupta and Bhagwanswaroop Counsel, (in No 634/51); Patankar (in No 635/51); Patankar and Misra (in No 637/51); P. R. Das, Bhagwandas Gupta and Bhagwanswaroop (in No 638/51); Engineer, Patankar and Misra, (in No. 1/52); P. R. Das, Bhagwandas Gupta and Bhagwanswaroop (in No 2/52) P. R. Das, Bhagwandas Gupta and Bhagwanswaroop (in No. 4/52); Patankar and Misra, (in No 7/52); M. B. Rege (in No 102/51); Dr. Ambedkar, Engineer, Patankar, Misra (in No. 106/51); M. B. Rege and S. M. Samvatsar (in No. 107/51); Achhruramji, M. B. Rege and S. M. Samvatsar (in No 108/51); M. B. Rege and S. M. Samvatsar (in No 119/51) for Petitioners. Advocate General for the State (in Nos. 624; 625; 634; 635; 637; 638; of 51; and 1; 2; 4; 7 of 52 and 102; 106; 107; 108; 119 of 1951).

#### CASES CITED:

(A) ('52) AIR 1952 Madh B 57: ILR (1952) Madh B 178 FB

(B) ('52) AIR 1952 SC 252:1952 SCJ 354; and 446

(C) ('28) AIR 1928 PC 10:55 Cal. 403

(D) ('23) AIR 1923 PC 6: 47 Bom. 327

(E) ('14) AIR 1914 PC 20:42 Ind App 44

(F) ('51) AIR 1951 SC 41:1950 SCR 869

(G) (1824) 107 ER 520:2 B & C 635

(H) ('51) AIR 1951 All. 674:1951 All LJ 365 FB

(I) ('81) 4 Mad 250.

(J) ('88) 10 All. 272:15 Ind App 51 (PC)

(K) (1863-66) 10 Moo Ind App 16:

1 WR 26 PC

(L) (1940) AC 1014

SHINDE C. J.: These petitions have been filed under Art. 226 of the Constitution of India for the issue of a writ in the nature of Mandamus or alternatively for the issue of suitable directions and orders to restrain the opposite party from giving effect to, or acting in any manner by virtue of, Madhya Bharat Abolition of Jagirs Act No. 28 of 1951. Although several objections have been taken to the validity of the Act Mr. P. R. Das, learned counsel for some of the petitioners, has confined himself to two main contentions. His third contention that the impugned Act was passed by a Legislature not validly constituted, he has reserved for a possible appeal to the Supreme Court, as it has already been repelled by a Full Bench of this Court in — 'Shree Ram Dube v. The State', ILR (1952) Madh B 178 (A). His two main contentions are as follows:

(1) there being no public purpose, the acquisition of Jagir lands is illegal;

(2) some provisions of the impugned Act are ultra vires in so far as they constitute a fraud on the Constitution.

(2) Mr. Das contends that unlike the Bihar and Uttar Pradesh Land Reforms Act, the impugned Act gives no indication as to the land-reforms which are proposed to be undertaken; Ss. 19 and 20 of the impugned Act provide for land tenure but actually the position of the tenants is made worse under S. 20 of the impugned Act and consequently it cannot be said to be a scheme for land-reforms. Mr. Chitale, the learned Advocate General, contends that the bill, which ultimately was passed into the impugned Act, was pending at the commencement of the Constitution and having been reserved for the consideration of the President has received his assent; consequently the inquiry as to whether there is any public purpose or not is barred by Art. 31 (4) of the Constitution. He further argues that the Supreme Court by majority held in the case of — 'The State of Bihar v. Kameshwar Singh of Darbhanga', AIR 1952 S C 252 (B) that inquiry into the question of public purpose is barred by Art. 31 (4) of the Constitution; and hence the question whether there was any public purpose for the acquisition of Jagir lands or not cannot be agitated in this Court. Mr. P. R. Das counters this argument by stating that in the Bihar Case Mahajan, Mukherjea and Aiyar JJ. held that public purpose is a justiciable issue even in a case covered by Article 31(4). Mahajan and Aiyar JJ., clearly stated in their judgments that Art. 31 (4) does not bar an inquiry as to the existence of a public purpose, for the acquisition of land. The opinion of Mukherjea J. can be gathered from the following observations:

"I had the advantage of going carefully through the judgment of my learned brother Mahajan J. and I concur entirely in the



conclusions arrived at by him". (Vide AIR 1952 S C 252, para. 74 (B)."

Another significant passage from which the opinion of his Lordship can be gathered is as follows:

"As regards S. 4(b) it has been held by my learned brother that the provision of this clause is unconstitutional as it does not disclose any public purpose at all. The requirement of public purpose is implicit in compulsory acquisition of property by the State or, what is called, the exercise of its power of 'Eminent Domain'. This condition is implied in the provisions of Art. 31 (2) of the Constitution and although the enactment in the present case fulfills the requirements of Cl. (3) of Article 31 and as such attracts the operation of Cl. (4) of that Article, my learned brother has taken the view that the bar created by Cl. (4) is confined to the question of compensation only and does not extend to the existence or necessity of a public purpose which, though implicit in, has not been expressly provided for, by Cl. (2) of the Article. For my part I would be prepared to assume that Cl. (4) of Art. 31 relates to every thing that is provided for in Cl. (2) either in express terms or even impliedly and consequently the question of the existence of a public purpose does not come within the purview of our enquiry in the present case. Even then I would hold that the same reasons, which have weighed with my learned brother in declaring S. 23 (f) of the impugned Act to be unconstitutional, apply with equal, if not greater, force to S. 4(b) of the Act and I have no hesitation in agreeing with him as regards his decision on the constitutionality of this provision of the Act though I would prefer to adopt a different line of reasoning in support of the same" (Vide para. 76)."

The words 'For my part I would be prepared to assume' etc. and the words 'even then' in the following sentence are particularly significant. These words indicate that his Lordship did agree with Mahajan and Aiyar JJ. in holding that the existence of public purpose is justiciable issue. Mukherjea J. held that even on the ground of colourable legislation, S. 4 (b) was ultra vires. The inference that can be drawn, to my mind, is that according to his Lordship both on the ground of non-existence of public purpose and colourable legislation S. 4 (b) of the Bihar Land Reforms Act was ultra vires. In these circumstances the enquiry as to the existence of a public purpose is not barred by Art. 31 (4) of the Constitution.

(3) It is no doubt true that the Madhya Bharat Abolition of Jagirs Act does not state any definite scheme of land reforms. The title of the Act, however, states that it is an Act to provide for the resumption of all jagir lands in the State and for certain other methods of land reforms in Jagir areas. Mr. Das admits that it is not necessary to specify public purpose and that it can be ascertained from the tenor and intendment of the Act. In — 'AIR 1952 SC 252 (B)', Mahajan J. observed as follows:

"It is a well accepted proposition of law that property of individuals cannot be appropriated by the State under the power of compulsory acquisition for the mere purpose of adding to the revenues of the State.

"The principle of compulsory acquisition of property", says Cooley "is founded on the

superior claims of the whole community over the individual citizen but is applicable only in those cases where private property is wanted for public use, or demanded by the public welfare and that no instance is known in which it has been taken for the mere purpose of raising a revenue by sale or otherwise and the exercise of such a power is utterly destructive of individual right." (Vide para. 54)."

In the same case Mahajan J. observed that the intention must be to benefit the community at large (para 52). From these observations, it is clear that the object of the Act must be to benefit the community at large. Jagir lands were taken in order to avoid concentration of large blocks of lands in a few hands and to follow the directive principle laid down in Art. 39 (b) and (c) of the Constitution. These directive principles are as follows:

"The State shall, in particular, direct its policy towards securing:

- (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
  - (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment."
- (4) Evidently the object of this legislation is to distribute the ownership and the control of the material resources so as to subserve best the common good and to avoid concentration of wealth and means of production to the common detriment. In the case of — 'State of Bihar v. Kameshwarsingh,' (B), Mahajan J. made the following observations with regard to Bihar Land Reforms Act:

"Now it is obvious that concentration of big blocks of land in the hands of a few individuals is contrary to the principle on which the Constitution of India is based. The purpose of the acquisition contemplated by the impugned Act therefore is to do away with the concentration of big blocks of land and means of production in the hands of a few individuals and to so distribute the ownership and control of the material resources which come in the hands of the State as to subserve the common good as best as possible. In other words, shortly put, the purpose behind the Act is to bring about a reform in the land distribution system of Bihar for the general benefit of the community as advised. The legislature is the best Judge of what is good for the community, by whose suffrage it comes into existence and it is not possible for this court to say that there was no public purpose behind the acquisition contemplated by the impugned Statute. The purpose of the statute certainly is in accordance with the letter and spirit of the Constitution of India" (Vide para. 52).

On the same subject Chandrasekhara Aiyar J. made the following observations:

"When the legislature declares that there is a public purpose behind the legislation, we have of course to respect its words. The object of the Act in question is to extinguish the interests of intermediaries like Zamindars, proprietors, and estate and tenure-holders etc., and to bring actual cultivators into direct relations with the State Government. To achieve this end, several provisions



have been enacted for the transfer and the vesting of such interests in the State as regards various items of properties. It is impossible to deny that the Act is inspired and dominated by a public purpose..... etc. (Vide para 129)."

These observations apply with equal force to the present case. Although the purpose of the Act is not specified, there is no doubt that it is inspired and dominated by a public purpose. It is obvious that the object of the Act is to extinguish the interests of the intermediary and to bring the actual cultivators into direct relations with the State Government and thereby to avoid concentration of wealth and means of production to the common detriment. It cannot be denied, therefore, that there is a public purpose for the acquisition of Jagir lands.

(5) This, however, does not mean that all the items proposed to be taken over by the impugned Act are for public purpose. As already stated the object of the Act is to do away with the concentration of large blocks of land in a few hands and to bring the actual cultivators into direct relations with the State Government. If this be the object of the Act, one fails to find the object behind the taking over of all buildings on Jagir lands used for schools, offices, hospitals and other purposes. They do not form part of the Jagir lands. Article 31A (2) (a) defines the expression "estate" as follows:

"The expression 'estate' shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area, and shall also include any jagir, Inam or Muafi or other similar grant."

Section 2 of Kanon Mal Gwalior Smt. 1983 defines the word "land". The definition clearly shows that the word "land" does not include buildings. The same Act also defines the expression "Khata" (holding). That definition also does not include buildings in the expression 'holding'. Dhar and Indore Tenancy Acts also define the expression 'holding'. Those definitions also do not cover buildings constructed on the lands. Qawaid-Jagirdaran which governs rights and obligations of Jagirdars in Gwalior State defines the expression 'Jagirdar'. The expression 'Jagirdar' includes twelve different kinds of grantees. All these grantees, they are either holders of cash grant or of villages or part of a village. Similarly, the Manual for Jagirdars of Holkar State also defines the expression 'Jagirdar' and 'Inamdar'. According to the definition they are grantees of one or more villages or part of a village. It is clear from these definitions that the expressions 'estate', 'Jagir' or 'Inam' only refer to the grant of lands. Besides the impugned Act is clearly designed to resume Jagir lands as is clear from the title of the Act. The expression 'Jagir lands' has been defined in the impugned Act as follows:

" 'Jagir land' means any land in which or in relation to which any Jagirdar has rights as such in respect of land revenue or other earnings; "

This makes it quite clear that the impugned Act does not envisage taking over of any thing else except jagir lands over which Jagirdars have rights in respect of land revenue or other earnings. The purpose of taking over the jagir

lands is as stated above to avoid concentration of large blocks of lands in a few hands and to bring the cultivators into direct relations with the State Government. This obviously is not the purpose of taking over the buildings on Jagir lands. Section 4 (1) (g), therefore, has no connection with the scheme of land reforms envisaged by the impugned Act. No doubt the public purpose need not be specified; it can be gathered from the tenor and intendment of a statute. I, however, fail to see from the tenor and intendment of the impugned Act any public purpose behind the taking over of the buildings specified in S. 4 (1) (g). Adding to the resources of the State is not a public purpose. Mahajan J.'s observations and the passage from Cooley cited above fully bear out this proposition.

(6) It has not been proved that the Jagirdars were under any legal obligation to construct schools, hospitals or other buildings for general public use. The Advocate General referred to Darbar Policy of the Gwalior State and argued that it is the duty of the Jagirdars to construct schools and hospitals etc. It may be stated that the Darbar Policy, as its very name suggests, is a policy to be followed. His Highness the Maharaja Madhav Rao Scindia who wrote this policy states in the foreword as follows:

"The energy I have expended and efforts I have put forth in writing this Policy have mainly been inspired with the aim that the work may prove beneficial to the next generation (in which I have meant to include the Ruler as well as the Officers, subjects, etc.) so that for purposes of administering the State and shouldering the grave responsibilities thereof they might discover in this collection a storehouse which may serve to the Ruler, Officers and subjects of the State, as a guide, philosopher and friend."

This makes it quite clear that it is not an Act. It is actually an advice tendered to the Jagirdars. The learned Advocate General also referred to the Education Manual. The Education Manual no doubt lays down that Jagirdars whose gross annual income is Rs. 50,000/- and above will be provided with qualified staff by the Education Department if so desired by the Jagirdars and that their salaries will be paid by the Jagirdars. But it does not lay down that it will be the duty of the Jagirdars to open schools. Besides if there be any duty cast on the Jagirdars having a gross income of Rs. 50,000/- and above, the manual imposes no duty on Jagirdars having less income. The Manual in its preamble states that it lays down the educational policy of the State. Therefore, it is not an Act creating legal rights or obligations. It may also be mentioned here that the impugned Act applies to Jagirdars of all States that comprise Madhya Bharat. Although the expression of a 'pious wish' regarding maintenance of schools and hospitals etc. by some classes of Jagirdars appears in some books on Gwalior State, it has not been shown that any other State imposes any duty on the Jagirdars to open schools and hospitals. The result is that there was no legal obligation placed on the Jagirdars to construct schools, hospitals or other buildings for public use. In these circumstances, by no stretch of reasoning can it be said that these buildings form part of Jagir lands. Consequently public purpose must be separately established for the taking over of the buildings.



(7) Section 4 (1) (g) of the impugned Act which authorises the taking over of all buildings is also inequitable in so far as it does not affect all the Jagirdars equally. Some Jagirdars who were benevolent by nature and who were more public-spirited spent money of their own accord and constructed schools, hospitals and other useful buildings. While others who thought more of their own pockets did not spend any money. The result of S. 4 (1) (g) is to penalise those who were (not?) benevolent and to put a premium on selfishness. The section also hits the provisions of Art. 14 of the Constitution as it accords differential treatment to the members belonging to the same class. By virtue of Art. 13, therefore, it is void. Article 31 (b) cannot be invoked to afford protection as the impugned Act is not mentioned in the ninth schedule. In Uttar Pradesh Act all buildings situate within the limits of an estate and belonging to or held by an intermediary have been acknowledged to be the property of the intermediary.

(8) Section 4 (1) (g) is also bad on the ground of colourable legislation. Schedule 1 of the impugned Act computes income from forest, quarries and also excise income for purposes of calculating gross income. But the value of these buildings does not find place in the calculation of gross income. The result, therefore, is that the taking over of these buildings without any compensation amounts to confiscation. It is no doubt true that Article 31 (4) debars the courts from enquiring into the adequacy of compensation. But the clause presupposes that the enactment is the result of a valid exercise of legislative powers conferred on the legislature. This legislation is obviously made in exercise of the powers conferred on the State legislature under Entry 36 of List 2 and Entry 42 of List 3, Schedule 7 of the Constitution. Entry 36 of List 2 states as follows:

"Acquisition or requisitioning of property, except for the purposes of the Union, subject to the provisions of Entry 42, List III".

Entry 42, List III is as follows:

"Principles on which compensation for property acquired or requisitioned for the purposes of the Union or of a State or for any other public purpose is to be determined, & the form and the manner in which such compensation is to be given."

Although the legislature purported to act under these two Entries, in effect it evaded their provisions altogether. No principle has been formulated on which compensation is to be paid for the acquisition of buildings. In so far as the legislature has laid down no principle for determining compensation for the acquisition of buildings, it is a fraud on the Constitution. Mukherjea J. with regard to S. 4 (b) of the Bihar Land Reforms Act made the following observations:

"The clause presupposes however that the enactment is the result of a valid exercise of a legislative power conferred on the legislature by the appropriate entries in the Legislative Lists and if the legislature acts outside these entries or under the pretence of acting within them does some thing which is in flat contradiction with its contents, Cl. (4) of Art. 31 could not be invoked to afford any protection to such legislation" (Vide para 80, AIR 1952 SC 252 (B)).

These remarks are most apposite in respect of S. 4 (1) (g) of the impugned Act. Mahajan J.

on the same subject made the following observations:

"The power of legislation in Entry 42 is for enacting the principles of determining such compensation and for paying it. The principles to be enacted are for determining the equivalent price of the property taken away. It may be that the determination of the equivalent may be left for ascertainment on the basis of certain uniform rules; for instance it may be laid down that the principles for determining compensation will be the rental basis or the market value of the property etc. But it is difficult to imagine that there can be any principles for non-payment of compensation or for negating the payment of compensation. No principles are required to be stated for non-payment of compensation". (Vide AIR 1952 S C 252, para 60(B)).

In the same paragraph Mahajan J. makes the following observation:

"An entry concerning payment of compensation in no sense includes legislative power of non-payment of compensation. The whole purpose of this head of legislation is to provide payment of compensation and not the confiscation of property."

From these observations, it is clear that under Entry 42, List III of Schedule 7 it is incumbent on the legislature to formulate principles for the payment of compensation and if the legislature fails to do so, it is acting in flat contradiction of these provisions. Article 31 (4) cannot be invoked to afford any protection to such legislation. If legislature intends to acquire buildings it must formulate principles for the payment of compensation. As no principles have been formulated for the payment of compensation for the acquisition of schools, offices, hospitals and other buildings of public utility, the acquisition is ultra vires. The result is S. 4 (1) (g) is bad both for want of public purpose and for perpetrating a fraud on the Constitution. It is also void as it contravenes the provisions of Art. 14 of the Constitution.

(9) Mr. Das and Mr. Engineer contended that Sch. 1, Cl. 4 (2) makes a deduction from the gross income which has no relation to actual facts. The deduction made on account of expenses of collection of rents (including irrecoverable arrears) is actually inflated in order to reduce the amount of compensation. This contention cannot be accepted. Some expenses for the collection of rents were no doubt incurred by the Jagirdars. The question whether these expenses have been unduly inflated or not cannot be gone into as Art. 31 (4) precludes an inquiry into the adequacy of compensation. No further comment is, therefore, needed on the arguments advanced by the learned counsel in this behalf. The contention in respect of Sch. 1, Cl. 4 (3) (4) and (5) however, deserves careful consideration. Clause 4 (3) of the Sch. 1 is as follows:

"The net income of a Jagirdar shall be calculated by deducting from the gross income of the Jagirdar:

(iii) On account of land records and Chowkidari establishment, an amount equal to 12½ per cent. of the gross income."

The first thing that we have to consider is whether the Jagirdars are under any legal obligation to incur any expenditure under the head of land records and Chowkidari establish-



ment. Section 140 of Qawaid-Jagirdaran lays down that there should be a watchman in every Jagir village, if there is no watchman appointed in any Jagir village, attention of the Jagirdar first be drawn to it and if in spite of it no watchman is appointed he should be got appointed through the Muntazim Jagirdaran and the expenses of him shall be recovered from the Jagirdar. The Indore Tenancy Act of 1931 imposes a duty on Jagirdars to appoint a Chowkidar for each village (Vide section 129). Similarly, the Dhar Tenancy Act of 1940-1941 imposes a duty on Jagirdars to appoint a Chowkidar for each village. Both the Indore and Dhar Tenancy Acts have been repealed by the Revenue Administration and Ryotwari Land Revenue and Tenancy Act of 1950. However, the Tenancy Act of 1950 has not repealed the provisions of Qawaid-Jagirdaran Gwalior State. Therefore, as far as S. 140 of Qawaid-Jagirdaran is concerned it is still in force. Consequently the Jagirdars of Gwalior are still under a legal obligation to maintain Chowkidari establishment. Although S. 129 of the Indore Tenancy Act and S. 167 of the Dhar Tenancy Act have been repealed, the Tenancy Act of 1950 imposes a duty to appoint Balais or village servants for each village (Vide Sec. 139). It is not very material for our purpose to enquire whether Balai is the same functionary as the Chowkidar. It is possible that the duties of a Balai and a Chowkidar may differ in some respects. But the fact remains that they are both village servants and that expenses have to be incurred either on account of the appointment of a Balai or a Chowkidar. Deduction on account of Chowkidari establishment, therefore, cannot be said to be illegal.

(10) The position with regard to land records appears to be the same. Under S. 62 (a) of Qawaid-Jagirdaran Gwalior State, it was the duty of every Jagirdar to appoint passed and competent Patwaris and to arrange the papers to be prepared in accordance with the rules of the Darbar. It does not appear, however, that any such duty was cast on Jagirdars in Indore, Dhar, Ratlam, or any other State. However, Jagir Land Records Management Act No. 25 of 1949 was passed in 1949. Section 3 of the said Act lays down as follows:

"Notwithstanding anything contained in any Act, Regulation or Rule in force in any Covenanting State of the United State, the preparation of the papers of Land Records of all the Jagirs within the United State, and the management of establishing an office for it and the appointment of village Patwari shall be done by the Government and the cost, which will be incurred by the Government in all this management shall in proportion to the land revenue of the Jagirs, be realised from them as arrears of Tanka".

From this provision it is clear that at the time of the passing of the impugned Act the Jagirdars were under a legal obligation to incur expenditure for the maintenance of land records. Deduction, therefore, on this count cannot be said to be improper. I am, therefore, of the opinion that deduction both on account of land records and Chowkidari establishment cannot be said to be invalid.

(11) Sub-clause (4) of Cl. (4) of Schedule 1 of the impugned Act runs as follows:

"In the case of a Jagirdar other than one holding a Jadid-Usul Jagir or Devasthani Jagir, on account of education, Public

Health and Roads, an amount equal to 15 per cent. of the gross income, if it exceeds Rs. 2000/- or an amount equal to 10 per cent. of the gross income in other cases;"

It is urged by the learned counsel for the petitioners that these deductions are arbitrary, as the Jagirdars were under no obligation to incur any expenditure on account of education, public health and roads. The learned Advocate General referred us to Education Manual and also Darbar Policy of the Gwalior State. The provisions of Education Manual and Darbar Policy have already been discussed in connection with the maintenance of schools by Jagirdars. I have already held that no duty has been cast on the Jagirdars in Gwalior State to maintain schools. In any case, no duty was imposed on Jagirdars in any other State to incur expenditure on account of education. The learned Advocate General was not able to show that the Jagirdars were under any obligation to incur expenditure on account of public health or roads. In these circumstances I am bound to hold that this deduction is arbitrary.

(12) Sub-clause (5) of Cl. 4 of Sch. 1 is as follows:

"In the case of a Jagirdar who or whose predecessor-in-interest, immediately before the 15th of May 1948 exercised:

- (a) Police powers, an amount equal to 7 per cent. of the gross income;
- (b) Revenue powers, an amount equal to 4 per cent. of the gross income;
- (c) Judicial powers, an amount equal to 2 per cent. of the gross income."

These deductions can be justified if Police, Revenue and Judicial powers were necessary concomitant of a Jagirdar. Section 55 of Qawaid-Jagirdaran Gwalior State clearly states that no judicial powers can be claimed as a matter of right. It also appears from S. 56 of the said Qawaid-Jagirdaran that Judicial powers were not conferred on Jagirdars whose income was less than Rs. 5000/- p. a. Revenue powers were also conferred on Jagirdars on the recommendation of the Muntazim Jagirdaran. With regard to police powers, reference is made to Police Manual of Gwalior State. Section 191 of the Police Manual states that such Jagirdars whom the honour of keeping police has been conferred will follow the instructions given in this Manual. This section does not give any power to Jagirdars to keep police force. On the contrary, the section itself indicates that the honour of keeping the police is conferred by the Darbar in certain cases. The Indore State Manual of Jagirdars states that no judicial powers can be claimed as a matter of right. With regard to revenue powers, S. 65 of the Manual indicates that these powers were conferred on individual Jagirdars. No provision in any Act has been referred to, to show that the Jagirdars in Holkar State enjoyed police powers as of right. We have not been referred to any enactment in Dhar, Ratlam, and other States which enables Jagirdars to exercise these powers by virtue of their position as a Jagirdar. The conclusion is, therefore, inevitable that the deductions on account of police, revenue and judicial powers are artificial and have no relation to facts.

(13) We have now to examine whether the artificial deduction is allowed by Entry 36, List II, and Entry 42 of List III of 7th Schedule of the Constitution. In Bihar Land Reforms Act,



the legislature proposed to deduct from the gross assets, cost of works of benefit to the Rayats by S. 23 (f). This clause was discussed by their Lordships of the Supreme Court and it was held by majority that the clause is a colourable legislation. Mahajan J. made the following observations:

"Section 23(f), however, in my opinion, is a colourable piece of legislation. It has been enacted under power conferred by legislative Entry 42 of List III. It is well-settled that Parliament with limited powers cannot do indirectly what it cannot do directly..... The provision herein impeached has not been arrived at by laying down any principles of paying compensation but in truth, is designed to deprive a number of people of their property without payment of compensation. The State legislature is authorised to pass an Act in the interests of persons deprived of property under Entry 42. They could not be permitted under that power to pass a law that operates to the detriment of those persons and the object of which provision is to deprive them of the right of compensation to a certain extent." (Vide AIR 1952 S C 252 Para 59 (B)).

In the same case his Lordship further observed as follows:

"The provision that four per cent, to twelve and a half per cent has to be deducted out of the net income on account of costs of works for the benefit of raiyats etc. has no relation to real facts. Even the earlier provision in Cl. (d) that costs of management have to be deducted up to twenty per cent, has in its entirety no real relation to actual state of affairs. As already pointed out, it is partially of a confiscatory character in sufficient number of cases. The deduction under Cl. (f) from the gross income is merely a deduction of an artificial character, the whole object being to inflate the deductions and thus bring about non-payment of compensation. Such legislation, in my opinion, is not permitted by Entry 42 of List III. Suppose, for instance, instead of twelve and a half per cent, it declared that a deduction of seventy per cent be made on that account. Could it be said by any reasonable person that such a piece of legislation was legislation on principles of determining compensation or of making payment of compensation. This provision, therefore, in my opinion, has been inserted in the Act as a colourable exercise of legislative power under Entry 42 and is unconstitutional on that ground" (Vide Para 61).

On the same subject Chandrasekhara Aiyar J. observed as follows:

"The provisions in section 23, sub-clause (f) that 4 to 12½ per cent of the gross assets can be deducted from the amount as representing 'costs of works of benefit to the raiyats'. This is an obvious device to reduce the gross assets and bring it down to as low a level as possible. The Act does not say that this charge represents the expenditure on works of benefits or improvements which the Zamin-dars and proprietors were under any legal obligation to carry out and which they failed to discharge. Nor are we told anything about the future destination of this deducted sum. It is an arbitrary figure which the legislature has said must be deducted from the gross assets. The deduction is a mere

contrivance to reduce the compensation and it is a colourable or fraudulent exercise of legislative power to subtract a fanciful sum from the calculation of gross assets.

Stripped of their veils or vestments, the provisions in the Act about 'arrears of rent' and the 'cost of works of benefit' amount to naked confiscation. Where the legislative action is arbitrary in the sense that it has no reasonable relation to the purpose in view, there is a transgression by the legislature of the limits of its power. Under the guise of legislating for acquisition, the legislature cannot enable the State to perpetrate confiscation, and if it does so, the Act to that extent has to be declared unconstitutional and void" (Vide AIR 1952 S C 252 Para 136 (B)).

These observations are most apposite to the present case. The Jagirdars were under no legal obligation to incur expenditure on account of education, public health and roads or on account of police, revenue and judicial powers. These deductions are obviously a device to reduce net income and to bring it down to as low a level as possible. The object of these deductions appears to be to bring about a reduction in the compensation. These deductions, therefore, are of an artificial character whose object is to inflate the deduction and thus bring about either non-payment of compensation or reduction in compensation. This is nothing but a colourable exercise of legislative power under Entry 42. Consequently sub-cl. (4) and (5) of Cl. 4 of Sch. I are unconstitutional and inoperative.

(14) Section 4(1)(g) of the impugned Act and Sub-cl. (4) and (5) of Cl. 4, Sch. I, can be separated from the rest of the Act. Consequently, the whole of the Act need not be declared ultra vires.

(15) Mr. Bhagwandas Gupta contends that Art. 31 (5)(a) protects existing laws and consequently the Land Acquisition Act is still in force; compensation, therefore, must be paid in accordance with the provisions of the Land Acquisition Act. Similar argument was advanced in the case of AIR 1952 S C 252 (B). But that argument was repelled. Mahajan J. observed as follows:

"This argument really has no force. Because the provisions as to assessment of compensation enacted in the Land Acquisition Act only apply to acquisitions that are made by notification under that Act. Its provisions have no application to acquisitions made under either local or Central laws unless they are specifically made applicable by the provisions of these Statutes (Vide AIR 1952 SC 252 para 68 (B)).

Das J. on the same subject observed that the provision for compensation applies only to land acquired under that Act, and that it has no application to lands acquired under other Statute (Vide para 111). This point, therefore, having been finally concluded by the decision of the Supreme Court, cannot be reagitated in this Court.

(16) Mr. Bhagwandas Gupta also contended that the word 'acquisition' does not include the word 'resumption'. It is no doubt true that the impugned Act has used the word 'resumption'. But it is clear from the tenor and intendment of the Act that the legislature has actually treated Jagir lands as the property of the Jagir-



dars and adopted the procedure of acquisition. The position meted out to the Jagirdars, therefore, is better than what it would have been in the case of resumption. The word 'resumption' connotes taking back what was given. As, however, better treatment has been accorded to the Jagirdars the implications of the expression 'resumption' need not be enquired into.

(17) Mr. Engineer contends on behalf of Raja Balbhadrasingh that as the petitioner was a holder of mediatised estate the impugned Act cannot be made applicable to him. This argument can be disposed of on the mere ground that Raja Balbhadrasingh held a sanad granted by the ruler of Gwalior. Besides the petitioner has not been able to show that his position is different from that of a Jagirdar. In these circumstances the contention put forward by Mr. Engineer cannot be accepted.

(18) For the reasons given above, I am of the opinion that S. 4(1)(g) and sub-ss. (4) and (5) of S. 4, Sch. I are not constitutional. The rest of the Act is valid. The petitions are, therefore, allowed only to the extent mentioned above. A writ of mandamus will issue to the State Government not to give effect to the provisions of the impugned Act stated above. In the circumstances of the case parties are directed to bear their own costs.

(19) Mr. P. R. Das has asked for leave to appeal to the Supreme Court from our decision. Having regard to the general importance of the questions raised in these petitions I would certify these cases as fit for appeal to the Supreme Court, and grant requisite leave to the petitioners as well as to the State.

(20) DIXIT J.: In these forty-four applications under Art. 226, Constitution of India, the petitioners who have variously described themselves as Jagirdars or proprietors of alienated villages, each claiming to be the proprietor of the soil in the village or group of villages set out in their applications, challenge the constitutionality of the Madhya Bharat Abolition of Jagir Act, 1951 (Act No. 28 of 1951 hereinafter referred to as the Act) on various grounds. They pray for the issue of a writ in the nature of mandamus or alternatively directions or a writ against the State of Madhya Bharat prohibiting them from giving effect to or acting in any manner by virtue of or under the said Act.

(21) On 30-11-1949, a Bill intituled "the Madhya Bharat Abolition of Jagir" was introduced in the Legislative Assembly of Madhya Bharat and was passed by the Legislature in 1951. The Bill having been reserved for the consideration of the President received his assent on 27-11-51. On 7-12-51, the Act was published in the Government Gazette and on the same day a notification under S. 1(3) of the Act was published bringing into force the Act immediately. On 5-12-51, that is, before the Act came into force, Maloji Rao Shitole and some other petitioners presented some of these applications to this Court for the issue of appropriate writs against the Government prohibiting it from taking possession of their property. On 7-12-51, this Court passed an interim order directing the Government to forbear until the disposal of these petitions from giving effect to or acting in any manner by virtue of or under the Madhya Bharat Abolition of Jagir Act, 1951.

(22) In all these petitions, the validity of the Act is challenged substantially on similar grounds. The common grounds of attack stated in the petitions are:

- (a) The so-called Legislature which passed the Act was not a Legislature within the meaning of the Covenant entered into by the Rulers of Gwalior, Indore and certain other States in Central India for the formation of the United State of Gwalior, Indore and Malwa (Madhya Bharat) or within the meaning of Schedule IV of the said Covenant.
- (b) The Legislature of Madhya Bharat was not competent to enact the said Act by reason of Entry 36, List II, 7th Schedule of the Constitution read with Entry 42, List III of the said Schedule and by reason of the fact that the said acquisition or resumption is not for a public purpose and there is no provision for payment of compensation as understood in law.
- (c) The interference by the said Act is not for a public purpose.
- (d) The said Act does not provide for payment of compensation as understood in law.
- (e) The compensation provided is wholly illusory.
- (f) The Abolition Act is a discriminatory enactment depriving a particular class of ownership of its inherent rights over such properties.
- (g) The said Act constitutes a fraud on power or fraud on the Constitution.
- (h) The power exercised by the President in giving his assent to the said Act is a fraudulent exercise of power.

(23) Not all these grounds require consideration now. The objection as to the validity of the Constitution of the Madhya Bharat Legislative Assembly is now concluded so far as this Court is concerned by a decision of a Full Bench in ILR (1952) Madh B 178 (A). So also as a result of the decision of the Supreme Court in the Bihar, Uttar Pradesh and Madhya Pradesh zamindari cases reported in AIR 1952 S C 252 (B), to which I will refer hereafter as the Bihar Zamindari cases, the applicants are precluded from raising objections as to the extent, adequacy or the illusory nature of the compensation provided by the Act or as to the competency of the Legislature to enact the said Act under Art. 246 of the Constitution read with Entry 36, List II of 7th Schedule of the Constitution read with Entry 42 List III of the said Schedule on the ground that there is no provision for payment of compensation as understood in law. Mr. P. R. Das, the leading Counsel for the petitioners, frankly conceded that by the decision of the Supreme Court in the aforesaid cases, he was debarred from going into the question of the adequacy of compensation or from contending that the State Legislature had no power under Entry 36, List II read with Entry 41, List III to make a law for acquisition of property without providing for payment of just compensation. He reserved the liberty to raise these objections again in the Supreme Court, if need be, and confined his arguments, firstly, to the point that the acquisition of the Jagir Lands not being for a public purpose, the Act was unconstitutional, and secondly, that certain provisions of the Act constitute a fraud on the Constitution in that while they purport to be in conformity



with the Constitution, were in fact, repugnant to the Constitution.

(24) Before examining the provisions of the impugned Act, it is pertinent to state that Madhya Bharat is a composite State comprising of the former Gwalior, Indore and other Indian States of Central India. The entire area of the State of Madhya Bharat is about 46166 sq. miles out of which the area of the jagir lands is 8449 sq. miles. There are nearly 1329 jagirs in Madhya Bharat. All these Jagirs are held under sanads or grants either express or implied. In some of the petitions, copies of the sanads and grants have been appended. The Jagirs in Madhya Bharat can be divided into various distinct groups according to their historical origin. Into the details of this origin, it is unnecessary to enter here. They are given in official publications — too numerous to be cited here — issued before 1947 by the Government of India and the various Indian State Governments. A summary of the history and origin of Jagirs in Madhya Bharat is also given in the report of the Committee set up by the Government of India in 1949 under the chairmanship of Mr. C. S. Venkatachar to examine and report inter alia on the existing structure and the working of the Jagirdari system in Madhya Bharat. Mr. Das learned Counsel for the petitioners, objected to the reception of this report in these proceedings. But I think so long as we keep within the rule laid down by the Privy Council in — 'Martand Rao v. Malhar Rao', AIR 1928 PC 10(C) that opinions expressed in official reports should not be treated as conclusive in respect of matters requiring judicial determination, there would appear to be no objection in referring to the report for the purpose of gathering historical facts which are not in issue here.

To proceed it is sufficient to say that some of the Jagirs consist of estates mediated and guaranteed by Sir John Malcolm and other British Officers at the time of the pacification in 1818. Some 43 of these estates were transferred by the British Government in 1921 to Gwalior Darbar and placed under the suzerainty of the Maharaja Scindia of Gwalior and hold sanads from him. The petitioner Balbhadra Singh of Raghogarh in Civil Miscellaneous No. 41 of 1952 is the holder of one such estate. (See Aitchison's Treatise, Engagements and Sanads, Vol. V, fifth Edition, pages 331, 357 and 517). The second group consists of a number of Rajput Chiefs who existed prior to the advent of the Marathas, and who when subdued by Marathas were allowed to hold a few villages as assignment subject to a payment of tribute. The petitioner Raja Pancham Singh of Pahargarh in Civil Miscellaneous No. 638 of 1951 falls in this group. The third category comprises of jagir assignments made by the Maratha Rulers, to warriors who were instrumental in extending the Maratha conquests north-ward and in consolidating the newly acquired territories. The majority of the petitioners before us belong to this group.

Besides the above groups of these Jagirs, there are also jagirs granted by the Rulers of the various Covenanting States of Madhya Bharat for a variety of purposes, both secular and religious, for services rendered or to be rendered. The rights, and obligations of the holders of jagirs in many of the smaller Indian States of Central India which now form parts of Madhya Bharat were never legally defined, or

demarcated by metes and bounds. In the territories of Madhya Bharat comprising of the former Gwalior State, the rights, obligations and privileges of the Jagirdars of Gwalior State, are regulated by 'Kawayad Jagirdaran', Samvat 1970 (Manual for Jagirdars) which was promulgated by the Gwalior Darbar in Samvat 1970 and which is still in force. The rights, obligations and privileges of the Jagirdars of the former Indore State have also been similarly defined in a Manual of Indore State. A few of the petitioners who are Jagirdars of the Gwalior State enjoyed until the end of 1948 revenue and police powers as also the right to levy customs duty and maintain their own excise arrangements. Be that as it may, the holders of these jagirs have to-day only the right to collect revenue from their tenants with an obligation to pay to the State a certain amount generally known as a 'Tanka' fixed in the remote past by the Rulers of the States granting the Jagir. These Jagirs are not transferable. They are impartible and the rule of primogeniture applies to them. The question whether a jagir grant confers on the holder thereof merely the right to collect the Government share of revenue or makes him a grantee of the soil depends as pointed out by the Privy Council in — 'Secretary of State v. Laxmibai', AIR 1928 P. C. 6 (D) on the terms of the particular grant and the whole circumstances connected therewith and there can be no presumption one way or the other. Likewise, the question whether a jagir grant was resumable at the will of the Ruler also depends on the terms of the grant and the law and the rules made by the Ruler granting the Jagir in his State.

The question whether the petitioners are proprietors of the soil is not of much consequence here. For the impugned Act purports to acquire whatever right, title and interest the Jagirdars have in the jagir lands. Even if they are regarded as having absolute rights in the soil, there is no bar under the Constitution to the acquisition of these proprietary rights. The important point to note is that the petitioning Jagirdars destitute of the authority, powers and functions which they exercised at one time, are today only persons holding greater or smaller extent of lands with the power to collect and appropriate the land revenue either conditionally or unconditionally. They are, on a theory that all land belongs to the State and it alone is entitled as of right to take a portion of the produce of the land whether in kind or money, merely intermediaries between the State & the tenants in jagir areas. The impugned Act has been enacted in conformity with this theory and in pursuance of the present-day policy of the State to do away with all intermediaries between the State and the cultivators.

(25) For a proper appreciation of the points raised on behalf of the petitioners, it is necessary to give a short account of the provisions of the impugned Act.

(26) The long title of the Act, is "an Act to provide for the resumption of all Jagir lands in the State and for certain other measures of land reforms in Jagir areas."

(27) Section 1 of the Act provides that it shall extend to the whole of the Madhya Bharat and directs that it shall come into force on and from such date as the Government may by a notification appoint in that behalf.



(28) Section 2 is the definition section. By clause (vi) of this section, it is provided that the term "Jagirdar" means

"any person recognised as a Jagirdar under any law, rules, regulations or orders governing Jagirs in force in any part of the State."

The next clause defines "Jagir land" as

"any land in which or in relation to which any Jagirdar has rights as such in respect of land revenue or other earnings."

(29) Chapter II deals with the resumption of Jagir lands, and the consequences of the resumption. Section 3 says that the Government may by a notification appoint a date for the resumption of all Jagir lands in the State. Section 4 enacts that as from the date of resumption, the rights, title and interest of every Jagirdar and of every other persons claiming through him (including a Zamindar) in his Jagir lands including forests, trees, fisheries, well, tanks, ponds, water channels, ferries, pathways, village sites, huts, Bazar and Mela grounds, and mines and minerals whether being worked or not, shall stand resumed to the State free from all encumbrances and further all rights, titles and interests created by the Jagirdar or his predecessor-in-interest in and over the Jagir lands shall, as against the Government cease and determine. Clause (g) of S. 4 further lays down that the rights, title and interest of the Jagirdar in all buildings on Jagir lands used for schools, offices, hospital & other public purposes shall stand extinguished and such buildings shall be deemed to have been transferred to the Government.

(30) Chapter III provides for the assessment of compensation and the procedure for the determination of the amount of compensation. A jagirdar on the resumption of his Jagir lands, becomes entitled to receive compensation at seven times the net income determined in accordance with Schedule 1 to the Act. Chapter IV contains provisions for the management and tenure of lands and includes incidental provisions dealing with the consequential changes on the resumption of Jagir lands.

(31) Chapter V contains sections providing for miscellaneous matters and for appeals against the decisions of Tahsildar under S. 23 in proceedings for the issue of certificates of Pacca tenancy and against the decisions of the Jagir Commissioner under Ss. 4, 10, 11, 13, and 14, in the matter of resumption of Jagir lands and determination of compensation. Section 39 which is included in this Chapter empowers the Government to frame Rules for carrying out the purposes of the Act.

(32) Schedule I of the Act is important. It lays down the principles for determining the compensation payable to the Jagirdar whose Jagir land is resumed. Under Cl. 5 of the Schedule, a Jagirdar whose Jagir land is resumed is entitled to receive and to be paid compensation at seven times the net income of his Jagir-land. The net income is arrived at after deducting certain items from the gross-income. The "gross-income" in the Schedule means the aggregate of the rents which were payable in respect of the land in the Jagir for the agricultural year immediately preceding the agricultural year in which the Jagir-land is resumed, whether payable by a tenant or sub-tenants or the Raiyats and includes income of the previous agricultural year from forests, quarries, excise, giras-tankas, Dami including other amounts payable by the Government and

Sewai Jama for the previous agricultural year. In the computation of the net income, under Cl. 4 of the Schedule, the following items are deducted from the gross income. They are:—

- "(a) tanka due from the Jagirdar to the Government for the previous agricultural year;
- (b) expenses for collection of rents (including irrecoverable arrears) at the rate of ten per cent. of the gross income, if it exceeds Rs. 2000/- or at the rate of 7 per cent. of the gross income, if it is less than Rs. 2000/-;
- (c) a sum equal to 12½ per cent. of the gross income on account of land records and Choukidari establishments;
- (d) an amount at the rate of 15 per cent. of the gross income, where it exceeds Rs. 2000/-, or at the rate of 10 per cent., if it is less than Rs. 2000/- in respect of education, public health, roads, if the Jagir is one other than a Jadid-usul Jagir of Devasthan Jagir;
- (e) an amount equal to seven per cent., four per cent. and two per cent. respectively, in respect of the police, revenue and judicial powers, if the Jagirdar or his predecessor-in-interest exercised those powers immediately before 15-5-48;
- (f) and any sum due from Jagirdar to the Government for the previous agricultural year on any other account."

(33) The proviso to Cl. 4 of the schedule fixes a limit on the total amount of deductions on account of the above heads excluding the sum payable as Tanka. The limit varies from 5 to 50 per cent., according to the amount of the basic income, which has been defined in Cl. 3 of the Schedule as that arrived at by deducting from the gross income, the amount of the tanka payable by the Jagirdar to the Government for the previous agricultural year. It must be noted that Cl. 4 of the Sch. 1 of the Act which deals with the various deductions from the gross income treats all the different kinds of Jagirs in the various Covenanted States of Madhya Bharat on a uniform basis.

(34) The validity of the Act depends on Arts. 31, 31A and Art. 246 read with entry 36 List II of the Seventh Schedule of the Constitution. These provisions have been the subject of a close examination in the Supreme Court in the Zamindari cases from Bihar, Uttar Pradesh and Madhya Pradesh (AIR 1952 SC 252 (B)) and there can no longer be any doubt as to the proper meaning, scope and effect of these Articles. The main enquiry here is therefore, whether on an application of the propositions laid down by the Supreme Court in the case referred to above to the present case, an attack on the validity of the Act founded on the absence of a public purpose and on "fraud on the Constitution" can be entertained; and if it can be, whether on the tests indicated by the Supreme Court of a 'public purpose', the impugned Act has been enacted for a public purpose; and whether the conditions on which the Supreme Court declared certain provisions of the Bihar Land Reforms Act, 1950, as constituting a "fraud on the Constitution" and, unconstitutional, are present here.

(35) I will first deal with the contention put forward on behalf of the petitioners that the proposed resumption is not for any public purpose. On this point the argument of Mr.



Das, which has been adopted by Mr. Engineer also, is that the existence of a public purpose and an obligation to pay compensation are the necessary concomitants of compulsory acquisition of property; that Art. 31 (4) protects the impugned legislation from attack only on the ground that "it contravenes the provisions of Cl. (2)"; that the only provision of Cl. (2) is that the law must provide for compensation for the property taken possession of or acquired and either fix the amount of the compensation or specify the principles which and the manner in which, the compensation is to be determined and given; that Cl. (2) assumes but does not provide that the taking possession of or the acquisition of the property should be only for a public purpose; and that the existence of a public purpose being thus not a provision of Cl. (2), it is a justiciable issue.

Mr. Das said that in the majority decision of the Supreme Court in the 'Bihar zamindari cases' (B), this argument has been accepted and it has been held that the provisions of Art. 31 (4) do not take away the Court's power to see whether the acquisition has been made for a public purpose. Learned Counsel proceeded to say that the Act on the face of it did not show that it was for public purpose. It is conceded that the Act need not expressly state the purpose for which the property is being taken. It is, however, argued that from the whole tenor and intendment of the Act, it cannot be gathered that the Jagirs are being acquired either for the purposes of the Union or for the purposes of the State or for the purposes of the public or for the benefit of the community at large or for some other definite and tangible public purpose. It is said that by the abolition and resumption of Jagirs, the proprietary rights of the holders of Jagir are only affected by the impugned Act; that by the resumption no change and betterment, whatsoever, will occur in the nature of the tenure or the rights of the cultivators; that the Act does no more than intercept the rents payable by the tenants to the Jagirdars and does not affect the blocks of land in Khas possession of the Jagirdar; and that the Act is merely a device to increase the income of the State at the cost of the Jagirdars. Mr. Das referred us to certain passages in Cooley's Constitutional Limitations 8th edition, Volume II, page 1118 (Foot Note) and in Willis' Constitutional Law, page 817 and to the decision of the Privy Council in — 'Hama Bai Framjee Petit v. Secretary of State', AIR 1914 PC 20 (E) and urged that acquisition of property for the mere purpose of augmenting the State revenue is not a public purpose; that the policy of the party in power is not a public purpose; and that public purpose must have as its aim or object the general interest and benefit of the community as distinguished from the private interest of an individual.

It was further said that the provisions contained in Chapter IV of the impugned Act might have been designed to improve the position of the tenants and bring about land reforms, but the improvement and reforms contemplated by Chapter IV could not be regarded as a public purpose for acquisition of property under entry 36, List II, for the reason that Chapter IV of the impugned Act was essentially a legislation falling under Entry 18 in List II under which the State could legislate with respect to rights, in or over land, land tenure and other matters mentioned in the entry

without there being a public purpose and without providing any compensation. Mr. Das suggested that the inclusion in the impugned Act of the provisions contained in Chapter IV for an alteration of land tenures to the benefit of the tenants was a pure accident and there was nothing to show that this improvement could not be affected except by the abolition of Jagirs. According to Mr. Das there was a material difference between the impugned Act and the Bihar, Uttar Pradesh and Madhya Pradesh Acts which were considered by the Supreme Court and the considerations on which the Supreme Court held those Acts as not bad for want of public purpose, did not exist in regard to the local Act, now under examination. It was said that in regard to the Bihar and Uttar Pradesh Acts, the Supreme Court inferred public purpose from the fact that the Bills culminating into those Acts were pending at the commencement of the Constitution in the Legislatures of the States and the Madhya Bharat Abolition of Jagirs Bill was not considered by the Constituent Assembly.

Learned Counsel stressed the fact that the Bihar Act as its very title showed was a Land Reform Act and contemplated the setting up of a land Commission and likewise the Uttar Pradesh Act provided for land reforms; but the impugned Act did not purport to be a Land Reform Act & that there was no land reform scheme within the four corners of the impugned Act. It is further urged that as there is nothing to suggest that large blocks of land are in possession and cultivation of Jagirdars, the directive principle contained in clauses (b) and (c) of Art. 39 cannot be relied upon to say that there is a public purpose behind the impugned Act. Finally, it is said that the abolition of Jagirs does not in its nature import any public purpose; that the recital in the preamble of the impugned Act that it is an Act to provide for "certain other measures of land reform" is not supported by the provisions of the Act and that the impugned Act is not one of those Acts validated under Art. 31-B.

(36) In answer to these contentions, the learned Advocate General read out to us certain passages to which I will refer presently, from the judgments of their Lordships of the Supreme Court in — 'The Bihar Zamindari cases', (B) and said that according to the majority decision, the existence of a public purpose was not open to judicial scrutiny or review; that even if it was, on the tests laid down by this Court in — 'ILR (1952) Madh B 178 (A)' and by the Supreme Court in — 'The Bihar Zamindari cases' (B), the impugned Act fulfilled the requirements of a public purpose. Learned Advocate-General submitted that the transference of Jagir lands to the State being in consonance with Art. 39 (b) and (c) was a public purpose; that the recognition of the rights of actual tillers of soil and the grant of equal status to all tenants envisaged by the provisions contained in Chapter IV of the Act constituted a public purpose and that these provisions could not be put aside lightly by saying that the inclusion of these provisions in the Act was a pure accident. It is said that the abolition of Jagirs is a logical corollary to the extinction of Feudal Order, which is incongruous with the Constitution of India, and the policy of abolition of Jagirs and land reforms adopted by the State to accelerate national economic recovery and lay the foundation of



democratic super-structure is a fulfilment of a public purpose. The learned Advocate General admitted that the impugned Act did not provide for setting up of a land Commission. He however, urged that the absence of such a provision did not negative the existence of a public purpose behind the Act.

He also contended that the Madhya Bharat Abolition of Jagirs Bill which subsequently became the M. B. Abolition of Jagirs Act, 1951, was pending at the commencement of the Constitution in the State Legislature and this fact implied that in giving to the Act the protection of Art. 31 (4), the Constituent Assembly recognised that the legislation was for a public purpose. As to the omission of the Act from the 9th Schedule, it is said that the Madhya Bharat Zamindari Abolition Bill had not become an Act when the Constitution was amended and that the protection given by Art. 31 (4) and Art. 31A is not limited only to the Acts specified in the ninth Schedule.

(37) On a consideration of the above arguments of the learned Counsel for the petitioners, I have arrived at a very definite view that the objection that the impugned Act is unconstitutional for lack of a public purpose must be rejected. The first question that arises for consideration is whether the existence of a public purpose is a justiciable issue, under Arts. 31 (4) and 31A. The impugned Act being a law falling within the description given in these Articles, it is plain that it cannot be called in question on the ground that it contravenes the provisions of Cl. (2) of Art. 31. Now, if as Mr. Das contended before us, as he did before the Supreme Court in the Bihar Zamindari cases (B), the existence of a public purpose is not a 'provision' of Art. 31(2) then clearly this Court has the power to see whether the proposed resumption of Jagirs is for a public purpose. On the other hand, if the existence of a public purpose is a provision of Art. 31 (2), then the attack on the Act based on the lack of a public purpose cannot be entertained. The answer to the contention of Mr. Das, as indeed to his other contentions also, is to be found in the views enunciated by their Lordships of the Supreme Court in the Bihar Zamindari case. His Lordship Patanjali Shastri C. J., rejecting the contention that Art. 31 (2) did not provide for the acquisition of property for a public purpose said:

"In my opinion, the clause seeks also to impose a limitation in regard to public purpose. The clause was evidently worded in that form as it was copied (with minor variations) from S. 299 (2), Government of India Act, 1935, which was undoubtedly designed to give effect to the recommendation of the Joint Parliamentary Committee in para. 369 of their Report that two conditions should be imposed on expropriation of private property. "We think it (the provision proposed) should secure that legislation expropriating or authorising the expropriation of the property of private individuals should be lawful only if confined to expropriation for public purpose and if compensation is determined either in the first instance or in appeal by some independent authority." It is thus clear that S. 299 (2) was intended to secure fulfilment of two conditions subject to which alone legislation authorising expropriation of private property should be lawful, and it seems reasonable to conclude that Art. 31 (2) was

also intended to impose the same two conditions on legislation expropriating private property. In other words, Art. 31 (2) must be understood as also providing that legislation authorising expropriation of private property should be lawful only if it was required for a public purpose and provision was made for payment of compensation. Indeed, if this were not so, there would be nothing in the Constitution to prevent acquisition for a non-public or private purpose and without payment of compensation, an absurd result. It cannot be supposed that the framers of the Constitution while expressly enacting one of the two well-established restriction on the exercise of the right of eminent domain, left the other to be imported from the common law. Article 31 (2) must therefore, be taken to provide for both the limitations in express terms."

(38) His Lordship Das J., observed with regard to Art. 31 (2) as follows:

"The clause makes it clear at once and beyond any shadow of doubt that there are three limitations imposed upon the power of the State, namely, (1) that the taking of possession or acquisition of property must be for a public purpose, (2) that such taking of possession or acquisition must be under a law authorising such taking of possession or acquisition and (3) that the law must provide for compensation for the property so taken or acquired. These three limitations constitute the protection granted to the owner of the property and is the measure of his fundamental right under this clause. Unless these limitations were provisions of the Article, the Article would have afforded no immunity at all. I am, therefore, clearly of opinion that the existence of a public purpose as a prerequisite to the exercise of the power of compulsory acquisition is an essential and integral part of the "provisions" of Cl. (2) ..... The existence of a public purpose as a condition precedent to the exercise of the power of compulsory acquisition being then, as I hold, a "provision" of Art. 31 (2) an infringement of such a provision cannot, under Arts. 31 (4), 31A, and 31B, be put forward as a ground for questioning the validity of the Act."

(39) This view was not accepted by their Lordships Mahajan and Chandrasekhara Aiyar JJ., who held that the existence of a public purpose is not a provision or a condition precedent imposed by Art. 31 (2) as a limitation on the exercise of the power of acquisition. His Lordship Mahajan J., was of the opinion that:

"What Art. 31 (4) really says is that the contravention of the express provisions of Art. 31 (2) relating to payment of compensation will not be a justiciable issue. It has no reference to anything that may be implied within the language of that clause. The existence of a "public purpose" is undoubtedly an implied condition of the exercise of compulsory powers of acquisition by the State, but the language of Art. 31 (2) does not expressly make it a condition precedent to acquisition. It assumes that compulsory acquisition can be for "a public purpose" only, which is thus inherent in such acquisition. Hence Art. 31 (4), in my opinion, does not bar the jurisdiction of the Court from inquiring whether the law relating to compulsory acquisition of property is not valid



because the acquisition is not being made for a public purpose."

(40) His Lordship Chandrasekhara Aiyar stated his view in this way:

"The bar created by sub-cl. (4) of Art. 31 relates to the contravention of the provisions of Cl. (2). The provision of Cl. (2) is only as regards compensation as can be gathered from its latter part....."

It is assumed, rightly, that the existence of a public purpose is part and parcel of the law and is inherent in it. The existence of a public purpose is not a provision or condition imposed by Art. 31 (2) as a limitation on the exercise of the power of acquisition. The condition prescribed is only as regards compensation. Article 31(4) debars the challenge of the constitutionality of an Act on this ground but no other. Whether there is any public purpose at all, or whether the purpose stated is such a purpose is open, in my opinion, to judicial scrutiny or review."

(41) It is upon the observations made by His Lordship Mukherjea J., that the whole controversy whether the existence of a public purpose is or is not open to judicial scrutiny or review turns. After prefacing his judgment with the observation that "I concur entirely in the conclusions arrived at by him" (that is by Mahajan J.) and that

"the Bihar Land Reforms Act, 1950, is not unconstitutional, with the exception of the provisions contained in Ss. 4 (b) and 23 (f) of the Act and these provisions alone must be held to be void and inoperative."

His Lordship proceeded to say:

"As regards S. 4 (b) it has been held by my learned brother that the provision of this clause is unconstitutional as it does not disclose any public purpose at all. The requirement of public purpose is implicit in compulsory acquisition of property by the State or, what is called, the exercise of its power of 'Eminent Domain'. This condition is implied in the provisions of Art. 31 (2) of the Constitution and although the enactment in the present case fulfils the requirements of Cl. (3) of Art. 31 and as such attracts the operation of Cl. (4) of that Article, my learned brother has taken the view that the bar created by Cl. (4) is confined to the question of compensation only and does not extend to the existence or necessity of a public purpose which, though, implicit in, has not been expressly provided for by Cl. (2) of the Article. For my part, I would be prepared to assume that Cl. (4) of Art. 31 relates to everything that is provided for in Cl. (2) either in express terms or even impliedly & consequently the question of the existence of a public purpose does not come within the purview of our enquiry in the present case. Even then I would hold that the same reasons which have weighed with my learned brother in declaring S. 23(f) of the impugned Act to be unconstitutional, apply with equal, if not greater, force to S. 4 (b) of the Act and I have no hesitation in agreeing with him as regards the decision on the constitutionality of this provision of the Act though I would prefer to adopt a different line of reasoning in support of the same."

(42) We were pressed by Mr. Das to hold that when His Lordship Mukherjea J., said that he concurred entirely in the conclusions arrived at by His Lordship Mahajan J., it

meant that he also agreed with the conclusion of His Lordship Mahajan J., that the existence of a public purpose was not a provision of Cl. (2) and that Art. 31 (4) did not in any way touch the powers of the Court to see whether the acquisition was for a public purpose. I can find nothing in the judgment of His Lordship Mukherjea J., to justify me in holding that according to him also the existence of a public purpose as a condition precedent for exercising the powers of compulsory acquisition is not a provision of Art. 31 (2) and that therefore, Art. 31 (4) does not prevent the Court from enquiring whether there is a public purpose at all, or whether the purpose stated is a public purpose. As I read the observations of His Lordship Mukherjea J., it appears to me that the conclusions of His Lordship Mahajan J., with which he expressed his concurrence are the conclusions that Ss. 4 (b) and 23 (f) of the Bihar Land Reforms Act of 1950 are unconstitutional and that the rest of that Act is good. That the existence of a public purpose as an essential condition for the acquisition of the property is not a provision of Art. 31 (2) and that therefore, Art. 31 (4) does not bar the jurisdiction of the Court from examining whether the law authorising the compulsory acquisition of the property was made for a public purpose, is the process of reasoning by which His Lordship Mahajan J., after examining the law and after finding that S. 4 (b) alone was not enacted for a public purpose came to the conclusion that the section was not constitutional and that the rest of the Act with the exception of S. 23 (f) was good. To my mind, His Lordship Mukherjea J., while considering the question of the validity of S. 4 (b) did not accept the reasoning of His Lordship Mahajan J., as to the illegality of that provision. While agreeing with the conclusion that S. 4 (b) was not constitutional, His Lordship Mukherjea J., preferred to adopt a different line of reasoning. For the purposes of his judgment, he assumed that Cl. (4) of Art. 31 related to everything that was provided for in Cl. (2) either in express terms or even impliedly and consequently the question of the existence of a public purpose did not come within the purview of the enquiry by the Court. The suggestion of the learned Counsel for the petitioners that in making this assumption, His Lordship Mukherjea J., expressed his final opinion that the existence of a public purpose was not a provision of Art. 31 (2), I believe is completely mistaken. That assumption, it will be found, is preceded by a recital of His Lordship Mahajan J.'s reasoning and not by an expression of His Lordship's own final opinion contrary to the assumption. It is also followed by the declaration that the same reasons which weighed with His Lordship Mahajan J., in declaring S. 23 (f) of the Bihar Land Reforms Act to be constitutional applied with equal, if not greater, force to S. 4 (b) of the Act and the concluding words of that declaration that

"I have no hesitation in agreeing with him as regards his decision of the constitutionality of this provision of the Act, though I would prefer to adopt a different line of reasoning in support of the same,"

being added because of his difference with His Lordship Mahajan J.'s reasoning for the conclusion that S. 4 (b) was unconstitutional. That reasoning was that the existence of a public purpose was not a provision of Art. 31; that



therefore Art. 31 (4) did not prevent the Court from enquiring as to the existence of a public purpose and that on an examination of S. 4 (b), it did not disclose any public purpose at all. His Lordship Mukherjea J., declared S. 4 (b) as unconstitutional not on this reasoning but on the ground that it constituted a fraud on the Constitution and was a colourable piece of legislation. In my opinion, when the judgment of His Lordship Mukherjea J., is carefully examined, it affords no ground for the contention that according to him the existence of a public purpose is a justiciable issue. It must be noted that this reading of the passage quoted above from the judgment of His Lordship Mukherjea J., accords with his observations in the case of — *Chiranjit Lal v. Union of India*, AIR 1951 SC 41 (F). In that case His Lordship Mukherjea J., observed:

"Article 31 (2) of the Constitution prescribes a two-fold limit within which such superior right of the State should be exercised. One limitation imposed on the acquisition or taking possession of private property which is implied in the clause is that such taking away must be for public purpose. The other condition is that no property can be taken unless the law which authorises such appropriation contains a provision for payment of compensation in the manner laid down in the clause."

(43) As to the meaning of these observations I can do no better than quote what His Lordship Das J., himself has said in his judgment in the Bihar Zamindari cases. He said:

"I do not, however, see how the above observations of Mukherjea J., in any way support the arguments of Mr. P. R. Das that the existence of a public purpose is not a provision of Art. 31 (2) but is an inherent condition of any legislation for compulsory acquisition of private property. It is significant that Mukherjea J. recognises that Art. 31 (2) prescribes a two-fold limit. Surely a limit which is prescribed by the Article must be a provision thereof. In any case, what is implied in the clause must, nevertheless, be a provision of the clause, for the expression "provision" is certainly wide enough to include an implied as well as an express provision."

(44) If this is the true meaning of the observations of His Lordship Mukherjea J., in the case of — *Chiranjit Lal* (F) and it must be so regarded in the absence of any qualification with regard to these observations from any other Judge of the Supreme Court, then consistent with those observations, there can be no basis for the implication that His Lordship Mukherjea J., in the passage reproduced above from his judgment in 'the Bihar Zamindari cases' (B) intended to hold that the existence of a public purpose was not a provision of Art. 31 (2) and, therefore, in cases to which Cl. (4) of Art. 31 applied, it could be called in question in any Court. I have made quotations from the views expressed by their Lordships of the Supreme Court in — 'the Bihar Zamindari cases' (B) copious in order to show by their own inherent strength that the contention of the learned Counsel for the petitioners that according to the majority of the Supreme Court the existence of a public purpose in cases to which Art. 31 (4) applies is a justiciable issue is not correct. On a careful reading of the judgment of His Lordship Mukherjea J., on which learned Counsel rests his contention,

there cannot be any serious misapprehension as to the conclusion actually reached by him and his reasons therefor. In view of the pronouncement of their Lordships in the Bihar Zamindari case (B), I am not disposed to accept the argument of Mr. Das that the existence of a public purpose being not a provision of Art. 31 (2) the bar imposed by Art. 31 (4) does not preclude this Court from enquiring whether the impugned Act postulates a public purpose.

(45) Even assuming that the question of the existence of a public purpose is at large, I am further of the opinion that the statute before us is definitely for a public purpose. The term 'public purpose' is not a new term. Its meaning and import in relation to different statutes passed in different times has been examined in a number of decisions. But I do not think much assistance can be derived from those decisions. For, as I indicated in the case of — *ILR (1952) Madh B 178*, (A) public purpose is an indeterminate concept which varies according to the zeitgeist, i.e., according to the drift of thought and feeling in a period. To me it appears that public purpose is essentially a product of time and circumstances. Time moves on and circumstances change rapidly, and so does the concept of a public purpose. For our purposes, it is sufficient to seek the meaning and test of a public purpose from the decision of the Supreme Court in — *'Bihar, Uttar Pradesh and Madhya Pradesh Zamindari cases'* (B). That decision deals with Acts passed after the commencement of the Constitution and which are in principle analogous to the impugned Act. In those cases, His Lordship Mahajan J., has observed that the phrase "public purpose" has to be construed according to the spirit of the times in which the particular legislation is enacted and that the concept of a public purpose is not a rigid concept and it has no settled meaning. He has also pointed out that the precise purpose for which property is being acquired need not be stated in express terms in the statute itself and if from the whole tenor and intentment of the Act, it can be gathered that the property was being acquired either for the purposes of the State or for purposes of the public and that the intention was to benefit the community at large then the statute must be held to have been enacted for a public purpose, and that the point to be determined in each case is whether the acquisition is in the general interest of the community, as distinguished from the private interest of an individual. His Lordship has also taken the view that a law made for the purpose of securing an end stated in Art. 39 of the Constitution & which aims at

"destroying the inferiority complex in a large number of citizens of the State and giving them a status of equality with their former Lords and prevents the accumulation of big tracts of land in the hands of a few individuals which is contrary to the expressed intentions of the Constitution" would be for a public purpose.

To the same effect are the observations of his Lordship Chandrasekhara Aiyar J., who has said that if the object of the Act is to extinguish

"the interests of intermediaries like zamindars, proprietors, and estate and tenure holders etc. and to bring the actual culti-



vators into direct relations with the Government",

then there is a public purpose behind the Act. Learned Counsel for the petitioners while accepting these tests of a public purpose, sought to distinguish the local Act from the Acts considered by the Supreme Court and attempted to demonstrate on the grounds already summarised that the impugned Act is wanting in public purpose. I am unable to see any essential difference in the principle behind the impugned Act, and that behind the Acts examined by the Supreme Court, and I do not think that on any of the grounds urged by the learned Counsel, the impugned Act can be pronounced as unconstitutional for lack of a public purpose.

The impugned Act, no doubt, does not bear the title of a Land Reforms Act. There is however, nothing in a name. It is to the provisions of the Act that we must look for determining whether it has been enacted for a public purpose. Section 4 of the impugned Act vests in the State all Jagir lands resumed. The provisions contained in Chapter IV of the Act aim at elevating the status of tenants and bringing the actual cultivators into direct relations with the State. Under these provisions the Jagirdar is reduced to a Pacca tenant and his tenants are elevated to the Status of a pacca tenant and thus equality of status is sought to be achieved. It is clear from S. 4 and the provisions contained in Chapters II and IV that the object of the Act is to eliminate the interests of Jagirdars in their lands as intermediaries, to recognise the rights of the actual tillers of the soil and to bring about a reform in the land tenure system for the general benefit of the community. The vesting of the land in the State, the extinguishment of the rights of the Jagirdars as intermediaries, the conferment of equal status on all holders of the land and the consequential reforms that may take place in the land system are all purposes which accord with the letter and spirit of the Constitution.

(46) It is not denied on behalf of the petitioners that the resumption contemplated by the Act is for the State purpose and that Chapter IV of the Act does envisage some land reform. It is, however, urged that the policy of the abolition of proprietary interests of the Jagirdars is a policy of the party in power; that the impugned Act only aims at abolition of proprietary rights of Jagirdars and at intercepting the rents payable by the tenants to the Jagirdars; that by the provisions contained in Chapter IV of the Act, the status of the tenants would in no way be improved and that in some cases it would actually be worsened and that in any case the alteration in the land tenure can be brought about without resuming the Jagirs. All these objections seem to me to be futile. The vesting in the State of all Jagir lands regarded by the State as the first essential step—and of this fact *prima facie* the State is the best judge—for securing the objects specified in Art. 39 (b) and (c) is clearly a public purpose and not a policy of the party in power. One may accuse the framers of the Constitution of writing in the Constitution the policy of a particular party, but nonetheless, the policy having been embodied as a principle fundamental in the governance of the Country, it is a State policy irrespective of the character of the party in power. The policy embodied in Art. 39 may appear to some as revolutionary.

To others, it may appear progressive. It may again become out-moded some years hence and come to be regarded as reactionary. But so long as the policy is a part of the Constitution, the States have to follow it in the governance of the Country. The vesting in the State of all resumed Jagir lands being thus in itself a public purpose, the assertion that the impugned Act merely extinguishes the proprietary interests of Jagirdars and intercepts the rents payable by the tenants to them or that the provisions of Chapter IV do not really confer any benefit on the tenants, or again that the alteration in the land-tenures contemplated by these provisions can be secured without abolishing the Jagirs, cannot in my view, be accepted as indicative of the non-existence of a public purpose behind the Act. The fact that the alteration in the land tenure contemplated by Chapter IV could have been the subject of an independent legislation under Entry 18 in List II, in no way destroys the nexus, that is apparent, between the provisions contained in Chapter IV and the other parts of Act, which in "pith and substance" is a legislation falling under Entry 36 of List II. The provisions contained in Chapter IV of the impugned Act may operate to the detriment of a few individual tenants, but from this circumstance, it does not follow that the primary object of the provisions is not to benefit the tenants as a class. A public purpose has for its primary object the general interest of the community and not the direct benefit of any individual or individuals. It is worthy of note that his Lordship Mahajan J., held that the Bihar Land Reforms Act, 1950, was enacted for a public purpose after observing that

"there is no scheme of land-reforms within the frame-work of the Statute except that a pious hope is expressed that the Commission may produce one."

Later on he has said

"it may be conceded that the present statute does not disclose the Legislature's mind as to what it would ultimately do after the estates are vested in the State Government."

In view of these observations, I think, it is impossible to contend successfully that the proposed resumption is not for a public purpose because the impugned Act gives no indication whatsoever as to what the Government proposes to do after the Jagirs are vested in the State or that it does not contain any scheme of land-reform. On the principles laid down by the Supreme Court in 'the Bihar Zamindari cases (B)', in my opinion, there can be no escape from the conclusion that there is a public purpose for the impugned Act. Indeed, Mr. Das himself felt a little unhappy in this branch of his arguments and during the course of his reply, he was constrained to say that he would not be surprised if by force of the decision of the Supreme Court, we came to the conclusion that the impugned Act postulated a public purpose.

(47) Mr. Das next challenged the validity of cls. (a) and (g) of sub-s. (1) of S. 4 and sub-cl. (ii) to (v) of Cl. 4 of Sch. I to the Act on the ground that they constituted a fraud on the Constitution. On this head learned Counsel appearing on behalf of the petitioners and the learned Advocate-General addressed to us elaborate arguments and placed before us all the material they would get hold of both as to the facts and the law which could assist us in



our responsible task. I propose to state in some detail their contentions later when considering each of the provisions of the Act which are said to be invalid. Briefly stated, the argument of Mr. Das is this: that the impugned Act in providing compensation on the basis of net income fails to pay any compensation for the non-income fetching properties such as wells, tanks, ponds, water-channels, open lands, un-worked mines, buildings used for schools, hospitals, offices and other public purposes, which under Cls. (a) and (g) of S. 4(1) vest in the State on the resumption of the Jagirs; that the deduction under Sub-cl. (ii) of Cl. 4 of the Schedule on account of expenses of collection of rents is arbitrary and has no relation to the actual costs of collection; that the deductions from the gross income under sub-cl. (iii) to (v) besides being arbitrary and artificial, are about matters in respect of which the Jagirdars are under no legal obligation to defray any expenditure; that as each of these sub-clauses fixes a consolidated deduction at a certain percentage of the gross income in respect of the various items grouped together in the sub-clause, it follows that if the deduction in respect of any item in the sub-clause is unjustified, then the whole of the sub-clause must be held to be invalid; that in that event it would not be open to this Court to apportion the percentage of deduction between other items, for so to do would be to amend the legislation. Mr. Das using the words of Abbott C. J., in — *Fox v. Bishop of Chester*, (1824) 107 ER 520 (G) said that by these “shifts or contrivances” the legislature has produced a scheme denying payment of compensation to the Jagirdars and thus while pretending to legislate in conformity with Entry 42 of List III and to lay down certain principles on which compensation is to be determined has really done something prohibited by the Constitution, namely the taking of private property without payment of compensation. On the authority of the decision of the Supreme Court in ‘the Bihar Zamindari cases (B)’, and the cases referred to therein for explaining the meaning of the term “fraud on the Constitution”, it is maintained that Cls. (a) and (g) of S. 4(1), and sub-cl. (ii) to (v) of cl. 4 of the Schedule being colourable in character are ultra vires.

Mr. Engineer in supplementing the arguments of Mr. Das pointed out that whereas S. 4(1)(d) provided for deduction of the expenses of collection of rents at the rate of 7 per cent, Cl. 4(ii) of the Schedule fixed the amount of deduction as regards these expenses at 10 p.c. of the gross income & that these provisions were contradictory and that therefore, it was obvious that the deduction under cl. 4(ii) was not on a rational basis. Mr. Engineer also added that in considering the question whether the deductions contemplated by sub-cl. (iii) to (v) of Cl. 4 of the Schedule were on account of items which the Jagirdars were under a legal obligation to bear it was necessary to bear in mind the constitution of Jagirs prior to the formation of Madhya Bharat; that there were different types of Jagirs in different Covenanted States of Madhya Bharat regulated by different laws and that what might have been an obligation of a Jagirdar in one Covenanted State could not be regarded as an obligation of a Jagirdar of another covenanted State but the impugned provisions overlooking this fact treated all Jagirdars on uniform basis. Mr. Samvatsar ap-

pearing on behalf of some of the petitioning Jagirdars of the former Indian States of Indore and Dhar, argued that under the laws of those States, the Jagirdars were under no legal obligation to incur any expenditure on account of any of the heads dealt with in sub-cl. (iii) to (v) of cl. 4 of the Schedule.

(48) The learned Advocate-General does not dispute the proposition that the competency of the State Legislature being limited under the Constitution, it cannot do indirectly what, it cannot do directly and that if the impugned Act and any provisions thereof are colourable in character in that under the guise or pretence of doing something permitted, they are in reality doing something prohibited by the constitution, then the Act or the provisions cannot be justified as valid. He, however, argues that having regard to Arts. 31(4) and 31(A) it is not open to the petitioners to urge objections as to the quantum of compensation arrived at by a certain process of evaluating the gross income and determining therefrom after certain deductions, the net income; that for purposes of compensation the Jagirs are regarded as a whole and that cl. (a) and (g) of S. 4(1) are not unconstitutional on the ground that no compensation is provided for some items of properties which are to vest in the State under those provisions; that the amount of deduction mentioned in sub-cl. (ii) of cl. (4) of the Schedule has been evolved objectively and all the deductions in the subsequent sub-clauses are related to the obligations of the Jagirdars. It is also contended that even if there was no legal obligation on the Jagirdars at the time of the passing of the impugned Act to incur any expenditure with respect to any item mentioned in sub-cl. (iii) to (v) of clause 4 of the Schedule, the fact that in the historical setting, all Jagirs sprang out of a feudal order and it was within the power of the Ruler of the State to call upon any Jagirdar in his State to shoulder any responsibility of administration that the Ruler thought fit, is in itself sufficient for regarding the deductions challenged as valid.

(49) I now proceed to consider those provisions of the Act, the constitutionality of which is challenged by the petitioners. Taking S. 4(1), (a) first, the argument of the learned Counsel for the petitioner is that this sub-section is invalid because it vests in the State many items of properties which are not producing any income and for which under the scheme of compensation provided by the Act, no compensation is being paid to the Jagirdars. On this point it becomes unnecessary to do more than to refer to the decision of the Supreme Court in the ‘Bihar and U. P. Zamindari cases (B)’, where a similar argument advanced on behalf of the petitioners in those cases, was rejected by the Supreme Court. In the case of — *Raja Suryopal Singh v. The State of U. P. (B)*, His Lordship Mahajan J., while repelling the contention said,

“It is true that the principles of payment of compensation stated in the Act do not give anything like an equivalent or ‘quid pro quo’ for the property acquired and provide only for payment of what is euphemistically described in the resolution of the U. P. Legislature as “equitable compensation”. Properties fetching no income pass to the State without payment of any separate compensation and as comprising part of an estate



which yields some net income to the proprietor....."

"In none of the cases could it be said that the provisions of the impugned Act would result in non-payment of compensation. Great emphasis was laid on the circumstance that nothing was being paid for non-income fetching properties. It has, however, to be observed that these non-income fetching properties are integral parts of an estate as defined in Art. 31A and it cannot be said when payment of compensation is provided for on the basis of the net income of the whole of the estate, that the legislation is of a confiscatory character. Different considerations might have prevailed if the estates as a whole were not being acquired but different pieces of property were made the subject-matter of acquisition. Properties comprised in an estate may be income-fetching and non-income fetching, the value of these to the owner in the market may well be on the basis of income and if the Act has laid down the principle of payment of compensation on the foot of net income, it cannot be said that the legislation is outside the ambit of Entry 42 of List 3."

(50) To the same effect are the observations of this Court in ILR (1952) Madh B 178 (A) in which it was argued with reference to the Madhya Bharat Zamindari Abolition Act, 1951 that it did not provide any compensation for non-income yielding properties, as the compensation under the Act was being determined on the basis of the net income of properties. Rejecting this argument, Kaul C. J., agreed with the view taken by the learned Chief Justice of the Allahabad High Court in — 'Suryapal Singh v. State of U. P.', AIR 1951 All 674 (H) that it was not correct to regard the acquisition of an estate, as an aggregate of the acquisition of separate parts of or interest in the estate considered independently of each other. There is thus no substance in the contention of the learned counsel for the applicants that S. 4(1)(a) is ultra vires, because it vests in the State non-income yielding properties in the Jagir for which no compensation is being paid.

(51) The validity of S. 4(1)(g) is attacked mainly on the ground that if there was no legal obligation on the Jagirdars to maintain schools, hospitals and offices in their Jagirs, the buildings belonging to the Jagirdars which were being used in Jagir lands for these purposes cannot be acquired by the State without paying any compensation to the Jagirdars. The learned Advocate-General sought to justify the validity of these provisions by saying that there was a legal obligation on the Jagirdars to maintain schools, hospitals, etc. It would be convenient to consider this clause at a later stage along with sub-cl. (iv) of cl. 4 of the Schedule, as its validity on the arguments addressed before us, depends solely on the existence of a legal obligation on the Jagirdars to open and maintain schools and hospitals in their Jagirs.

(52) In regard to sub-cl. (ii) of cl. 4 of the Schedule, which provides for a deduction of an amount at rates stated therein on account of expenses of collection of rents (including irrecoverable arrears), the objection advanced on behalf of the petitioners is not as to the principle of deduction, but it is as to the percentage of deduction. It is said that this clause in fixing the amount of deduction at 10 per cent,

of the gross income, where it exceeds Rs. 2000/- and an amount equal to 7 per cent. of the gross income, where it is less than Rs. 2000/- ignores the elementary rule of economics that costs of collection of revenue decrease as the gross income increases; that according to R. 9 of the rules made by the Government under the Madhya Bharat Zamindari Abolition Act, 1951 (published at page 424 of Madhya Bharat Government Gazette dated 28-7-1951) the remuneration of Patels in Raiyatwari villages has been fixed at 3½ per cent of the land revenue realised by them; that in S. 4(1)(d) of the impugned Act itself the expenses of collection of rents and revenue have been fixed at 7 per cent, & that having regard to these facts, the percentage of deduction fixed in sub-cl. (ii) of cl. 4 of the Schedule must be regarded as arbitrary, artificial, having no relation, whatsoever to the actual costs of realisation of the rents and having no other object than that of inflating of the deduction for the purpose of nullifying the provisions of the Act regarding the payments of compensation. To support his contention that if the deduction on account of expenses for collection of rents prescribed in the sub-clause has no relation to real facts, then the enactment of the provision must be declared as a "fraud on the Constitution" and therefore ultra vires, Mr. Das pressed into service certain observations of His Lordship Mahajan J., in 'the Bihar Zamindari cases (B)' with regard to S. 23(1)(e), Bihar Land Reforms Act, 1950, which provides for a deduction on a percentage basis out of the gross assets as costs of management. With regard to this provision of the Bihar Act, His Lordship has observed that the rates of deduction "have been fixed in an arbitrary manner bearing no relation, whatsoever, to the actual costs of management." At another place in the judgment, His Lordship has again said

"the provision in cl. (e) that costs of management have to be deducted up to twenty per cent has in its entirety no real relation to actual state of affairs."

On the strength of these observations of His Lordship Mahajan J., Mr. Das sought to argue that in the judgment of His Lordship Mahajan J., with whom their Lordships Mukherjea and Aiyer JJ., concurred, not only cl. (f) of S. 23(1) of the Bihar Act but also cl. (e) thereof has been held to be unconstitutional on the ground that the deductions provided by these clauses were of artificial nature & had no relation to any actual expenses. Mr. Das suggested that the omission of any reference to S. 23(1)(e) of the Bihar Act in the order of the Supreme Court was obviously due to oversight. He also stated that a petition for a review of the judgment of the Supreme Court on this point was pending in that Court.

(53) The reply of the learned Advocate-General is that as stated in the affidavits filed on behalf of the Government, 10 per cent is the normal cost of collection of rents inclusive of irrecoverable arrears; that the rate fixed by the Rules issued in 1951 under the Madhya Bharat Zamindari Abolition Act is as Rule 9 shows a temporary measure and only relates to the remuneration of Patels and not to all the costs of collection of rents; that the rate for the deduction on account of collection of rents in sub-cl. (ii) of S. 4 of the Schedule is higher than that provided in S. 4(1)(d) because the former includes the costs of collection of ir-



recoverable arrears of rents also, whereas the latter does not include this cost; that the rate of deduction specified in the sub-clause conforms to the rates prescribed in S. 21 of Kanoon Raiyatwari of Gwalior State Samvat 1994 and S. 509 Kanoon Mal Gwalior Samvat 1983 and other local Acts of the various Covenanted States. It was further said by the learned Advocate-General that the contention of the learned counsel for the petitioners that according to the majority of the Supreme Court, S. 23(1)(e) of the Bihar Act, was unconstitutional on the ground that it provided for a deduction having no relation to the actual expenses of costs of management, was based on a misreading of the judgment of His Lordship Mahajan J.

(54) The contention of the learned counsel for the applicant that sub-cl. (ii) of cl. 4 of the Schedule is unconstitutional, is in my opinion, untenable. While there does not appear to me any logical basis for the variation in the rates of deduction according as the gross income is less than or exceeds Rs. 2000/- I do not think the percentage of deduction provided in the sub-clause can be called as palpably unreasonable and arbitrary. It is for the petitioners who are challenging the validity of the sub-clause to show that the ten per cent deduction on account of costs of collections of rents is fantastic and arbitrary. It is worthy of note that in the various affidavits filed by the petitioners, though they have stated that the Government has by rules recently issued fixed the remuneration of Patels in Raiyatwari Villages at 3½ per cent and that the deduction provided by sub-cl. (ii) is arbitrary, nowhere in those affidavits have they said anything about the actual costs of collection in their Jagirs. I do not see how from the fact that the Government has fixed the remuneration of the Patels at 3½ per cent of the rent recovered by them, it can be inferred that the costs of collection provided in the sub-clause is arbitrary. Costs of collection of rents include many items of expenditure besides the remuneration payable to a Patel. Again as R. 9 of the Rules published on 28-7-1951 shows it is open to the Government to increase the remuneration of 3½ per cent of the Patels if it is found not conforming to the actual existing condition. In the affidavit filed on behalf of the Government in 'Civil. Misc. No. 106 of 1951, Chandroji Rao Angre v. the State', it has been stated that the said rate of remuneration of the Patels is low and that it is the intention of the Government to revise and increase those rates.

As to the alleged inconsistency between S. 4(1)(d) and the sub-clause under consideration, I do not think there is any. It will be noted that S. 4(1)(d) and the impugned sub-clause deal with different matters. Section 4(1)(d) relates to the apportionment between the Jagirdar and the Government of all rents, revenue, cesses for the agricultural year in which Jagir is to be resumed, and recovered by the Jagirdars before the date of resumption and by the Government after that date. It is in connection with this matter that expenses of collection in that section have been fixed at 7 per cent of the rents and revenue actually recovered. The rates of deduction specified in sub-cl. (ii) of cl. 4 of the Schedule on the other hand, cover the expenses that might be incurred for the recovery of irrecoverable arrears. The higher rate in the sub-clause is, therefore, clearly justified on account of the trouble and

expense involved in the collection of doubtful and irrecoverable arrears. Even if it is assumed that the percentage of deduction fixed by sub-cl. (ii) is high and does not correspond to the actual costs of collection of rents, I do not think it can be held that the provision having been enacted in colourable exercise of legislative power under entry 42 List 3 is unconstitutional. The argument of Mr. Das founded on certain observations of His Lordship Mahajan J., as regards S. 23(1)(e), Bihar Land Reforms Act and on the fact of pendency in the Supreme Court of a petition for a review of the judgment in the Bihar Zamindari cases, must now be rejected for the simple reason that the said review petition has been summarily dismissed by the Supreme Court. This fact has been stated in an affidavit dated 30-10-52 filed on behalf of the Government—and accepted by Messrs. Gupta and Patankar Junior counsel for the petitioners—on the basis of information received from the Deputy Registrar Supreme Court. The assistance or comfort which the learned counsel sought to derive from the observations of His Lordship Mahajan J., and the review petition is, therefore, not now available to him.

I, however, venture to add that when His Lordship Mahajan J., observed that the rates of deduction fixed in S. 23(1)(e) of the Bihar Act on account of costs of management bore no "relation to actual state of affairs", he was obviously referring to the percentage of deduction and not to the principle involved in the deduction. While when he said in regard to S. 23(1)(f) of that Act that the deduction thereunder on account of costs of works for the benefit of raiyats had "no relation to real facts", he questioned the principle itself of the deduction. This is made clear by the observation in the judgment of His Lordship Chandra Sekhar Aiyer J., that

"the Act does not say that this charge represents the expenditure on works of benefit or improvements which the Zamindars and proprietors were under any legal obligation to carry out and which they failed to discharge."

It is important to remember that according to the majority of the Supreme Court S. 23(1)(f) of the Bihar Act was held unconstitutional on the ground that the deduction sought to be made by that provision was about a matter in regard to which there was no legal obligation on the zamindars and proprietors to incur any expenditure, and not on the ground that the rate of deduction fixed therein had no relation to the actual expenses incurred by the zamindars or proprietors. In fact, as is evident from the arguments of Mr. Das noted in the judgment of His Lordship Patanjali Sastri C. J., in the Supreme Court Mr. Das attacked the validity of S. 23(1)(f) by saying that

"there was no evidence to show that it was usual for the zamindars to incur such expenditure, and that the deduction was a mere contrivance to reduce the compensation payable for the acquisition of their estates."

It is thus clear that there is no basis for the suggestion that inasmuch as His Lordship Mahajan J., while saying that the deduction in section 23(1)(f) of the Bihar Act had no relation to real facts held the provision unconstitutional on that ground, he also intended to hold S. 23(1)(e) of the Bihar Act unconstitutional



when he said that the rates of deduction fixed in that provision bore "no relation, whatsoever, to the actual costs of management." For these reasons I think the contention of Mr. Das that sub-cl. (ii) of cl. 4 of Sch. 1 is unconstitutional, must fail.

(55) Coming now to the other sub-clauses of cl. 4 of the Schedule, it must first be stated that the challenge to the validity of these sub-clauses rests on the decision of the Supreme Court as to the unconstitutionality of S. 23(1) (f), Bihar Land Reforms Act of 1950. Section 23(1)(f) of the Bihar Act provided for a deduction on a percentage basis out of the gross assets as costs of works of benefit to the raiyats of an estate or tenure in ascertaining the net assets on which compensation is based. The principle on which the majority of the Supreme Court held this section unconstitutional was that there was no legal obligation on the zamindars or proprietors to incur any expenditure on works of benefit or improvements in their estates or tenure and that therefore the legislature could not purporting to exercise the legislative power under entry 42 of List 3 insert the provision in the Act for the purpose of "negating partially the provisions of the Act regarding the payment of compensation". From what I have stated in the previous paragraph, there can be no room for thinking that His Lordship Mahajan J., held this provision unconstitutional on a ground other than that stated by His Lordship Chandra Sekhar Aiyer J. There can also be no room for the suggestion that such a deduction would be valid if it is in respect of an imperfect obligation or in respect of an obligation which though not in existence at the time of the passing of the impugned Act could have been imposed on proprietors, zamindars or Jagirdars. In applying these principles, as I propose to do, to the present case, the main inquiry must, therefore, be whether the Jagirdars are under a legal obligation to incur expenditure on account of the various items specified in sub-cl. (iii) to (v) of cl. 4 of the Schedule. I now address myself to that inquiry.

(56) Sub-clause (iii) of cl. 4 of Sch. 1 provides for a deduction on account of land records of choukidari establishments at the rate of 12½ per cent of the gross income. The validity of this sub-clause was challenged before us solely with reference to the liability of the Jagirdars from the former Indian States of Gwalior, Indore and Dhar. I am, therefore, bound to presume that the sub-clause is valid in relation to the liability of the Jagirdars from other Covenanted States of Madhya Bharat to bear these charges. As a matter of fact in 'Civil Misc. Petn. No. 113 of 1951 (Indore Bench)' the petitioner Thakur Uday Singh, who is a Jagirdar of the former Ratlam State, nowhere in his affidavit disputes his liability to bear these charges. All he says is that the 12½ per cent deduction in respect of these items is "a very exaggerated figure which has no relation to actual existing condition". Similarly in 'Civil Misc. Petn. No. 109 of 1951 (Indore Bench)', the petitioner Thakur Pratap Singh, who is a Jagirdar of the former Sittamu State, also does not dispute his liability as regards these charges. Mr. Das appearing for Sardar Shitole and some other Jagirdars of Gwalior State while conceding in reply that the Jagirdars of Gwalior State were under a legal obligation to incur expenditure

on account of Choukidari establishment said that no such liability was thrown on them under the Kawayad Jagirdaran Gwalior State, Samvat 1970 (Manual for Jagirdars) with regard to land records, and that in any case if any such liability existed, it ceased after the enactment in 1949 of Jagir Land Records Management Act (Act No. 25 of 1949) under which the Madhya Bharat Government took over the management of land records in all Jagirs.

Mr. Engineer on behalf of the petitioners Sardar Angre and Balbhadra Singh, who are also Jagirdars of Gwalior State, on the other hand admitted that there was a legal liability on these Jagirdars to pay charges on account of land records establishment but said that they were under no legal obligation to defray any expenditure as regards choukidari. It was further said that the obligation to keep choukidars under the Kawayad Jagirdaran existed so long as the Jagirdars were allowed by the Government to levy a cess of 2 per cent of land revenue on the tenants for the purpose of meeting the expenses of keeping choukidars and that as the Government abolished this cess by a notification dated 24-11-51 (published at page 1008 of the Gazette dated 1-12-51) the Jagirdars were relieved of the responsibility of appointing choukidars at their own cost.

On behalf of the Jagirdars of the former Indore and Dhar States, Mr. Samvatsar argued that a Jagirdar of Indore State was no doubt, required under S. 129, Indore Land Revenue and Tenancy Act, 1931 and the rules framed under that Act to keep a choukidar at his own expense in his Jagir and that under S. 167, Dhar State Land Revenue and Tenancy Act, 1940, a Jagirdar in Dhar State was also similarly liable to keep a choukidar, but that inasmuch as these provisions were repealed by S. 3, Madhya Bharat Revenue Administration and Ryotwari Land Revenue and Tenancy Act (Act No. 66 of 1950), the Jagirdars of these two States were no longer under any obligation to keep choukidars at their own expense. To controvert these contentions, the learned Advocate-General relied on the provisions of the Jagir Land Records Management Act, 1949, Ss. 62A and 140, Gwalior State Kawayad Jagirdaran and S. 139, Madhya Bharat Revenue Administration Act, 1950 (Act No. 66 of 1950) and said that these provisions unmistakably showed that all the Jagirdars in Madhya Bharat were under a legal obligation to incur expenditure on account of choukidari and land records establishments.

(57) I do not think there is any force in any of these contentions put forward on behalf of the petitioners. The liability of the Jagirdars in Madhya Bharat to bear expenditure on account of management of the land records is plain enough from the provisions of the Jagir Land Record Management Act of 1949 which replaced the Land Records Management Ordinance of Samvat 2005. Sections 3 and 4 of this Act distinctly say that "notwithstanding anything contained in any Act, Regulation or Rule in force in any Covenanted State," the management of the land records and the appointment of village Patwaris in Jagirs shall be done by the Government and the costs thereof shall be realised by the Government from the Jagirdars as arrears of Tanka in a proportion to be determined under S. 4 of the Act. Under S. 4 of the Act, power is given to the Government to determine "the amount



and the proportion of the cost to be realised" from Jagirdars for the maintenance of land records. In view of these clear provisions, there cannot be any doubt as to the liability of the Jagirdars in Madhya Bharat to pay land records management charges. Mr. Das said that if a liability in respect of the charges for the management of land records existed under this Act, it could be separately enforced against the Jagirdars. I do not see the point in this criticism. When the Jagirs are to be resumed and the Jagirdars are to be paid some compensation for the resumption, how else is the liability to be enforced except by making a deduction from the gross income while computing the amount of compensation payable on the basis of net income.

As regards choukidars, it is clear from S. 140 of Kawayad Jagirdars that the Jagirdars of the Gwalior State are under an obligation to appoint choukidars at their own expense in their Jagirs. This liability is, in no way, dependent on a supposed right of the Jagirdars to levy and collect a cess from their tenants for meeting the choukidari charges. The Jagirdars of Gwalior were no doubt levying this cess for some time in their Jagirs but as this cess was *prima facie* illegal, it was abolished along with other illegal cesses by the notification referred to by Mr. Engineer. The notification in no way affected the liability of the Jagirdars of Gwalior State to bear choukidari charges.

The position of the Jagirdars of Indore and Dhar States in this respect is that under S. 129, Indore Tenancy Act, 1931 and S. 167, Dhar Tenancy Act, they had also to appoint choukidars in their Jagirs at their own expense. These provisions have, no doubt, been repealed by the Madhya Bharat Revenue Administration and Ryotwari Land Revenue and Tenancy Act, 1950. But then S. 139 of this Act provides that for each village or a group of villages to which the Act applies there shall be village servants appointed in accordance with rules made under the Act and that the rules may also prescribe *inter alia* the remuneration and the duties of these village servants. Our attention has not been drawn to any rules framed under the Act regulating the duties and the remuneration of these village servants. But it appears to me that the expression "village servants" is wide enough to include a choukidar and as the Madhya Bharat Revenue Administration and Raiyatwari Land Revenue and Tenancy Act, re-enacts with some modifications the provisions contained in the Indore and Dhar State Tenancy Acts, the rules framed under those Acts with regard to the duties and remuneration of choukidars must be deemed to have been issued under the Madhya Bharat Ryotwari Land Revenue and Tenancy Act, 1950 and continuing in force by virtue of S. 23, Madhya Bharat General Clauses Act, 1950 (Act No. 84 of 1950). The contention, therefore, of Mr. Samvatsar that the Jagirdars of Indore and Dhar States were, at the time of the passing of the impugned Act, under no obligation to keep choukidars at their own expense cannot be accepted.

During the course of his arguments, Mr. Das also said that the deduction from the gross income of only those expenses could be regarded as legitimate which had to be incurred for earning the gross income and that as expenditure on land records and choukidari was not of such a nature, the deduction on that account was not legal. The short answer to this argu-

ment is this that 'net income' has been specifically defined in Cl. 4 of the Schedule and has not been left to be determined by other tests. Even on the test propounded by the learned Counsel, I do not think it can be said that expenditure incurred on land records and choukidars is not a necessary expenditure for earning the gross income. A Jagirdar cannot clearly know the amount due from his tenants, if he does not maintain land records. He also cannot collect with ease the rents due if he does not keep a choukidar one of whose well-known duties is to take the tenants to the officer entrusted with the duty of collecting rents for paying the rents due from them. It was then said that the deduction at the rate of 12½ per cent. of the gross income was exorbitant. There is nothing to show that these charges are unreasonably high. Even if they are to a certain extent higher than the actual expenses, the sub-clause cannot, for the reasons which I have already stated in connection with the earlier sub-clause be declared invalid. For all these reasons, I am of the opinion that the deduction under sub-cl. (iii) is in respect of a legal obligation of the Jagirdars of Madhya Bharat to incur expenditure on account of land records and choukidari. The sub-clause must, therefore, be held as valid.

(58) The next sub-clause provides for a deduction from the gross income in the case of Jagirs other than a Jadid usul Jagir or a Devasthanani Jagir of an amount equal to 15 per cent. of the gross income, if it exceeds Rs. 2000/- or of an amount equal to 10 per cent. of the gross income if it is less than Rs. 2,000/- on account of education, public health and roads. On the question of this deduction the case for the petitioners, as put by their learned Counsel Mr. Das, is that the Jagirdars of Gwalior State are under no legal obligation to incur any expenditure in their Jagirs for education, public health or roads and that those Jagirdars who have so far defrayed expenditure on these items have done so voluntarily. It is also added that Jagirdars whose income exceeded Rs. 5000/- made some contribution to the Gwalior Government for education and roads but never on account of public health; that by circular No. 2 of Samvat 1980 of Gwalior Darbar, the Jagirdars were authorised to levy and recover a cess at the rate of one anna per rupee of land revenue from their tenants for the purpose of meeting the expenses of schools, dispensaries, roads and sanitation; that it was out of this 'cess-fund' known as 'Anni fund' that the Jagirdars maintained schools, dispensaries and roads in their Jagirs and that with the abolition of this cess by a notification of the Gwalior Government (published at p. 543 of Gwalior Government Gazette, 16-6-1945) the responsibility of the Jagirdars to establish and maintain schools, dispensaries and roads ceased.

Mr. Samvatsar learned counsel for the petitioning Jagirdars from the erstwhile Indore & Dhar States also said that Jagirdars of those States were under no legal obligation to spend any money for education, roads and public health. The learned Advocate-General admitted that in Indore State, education and public health in jagir villages was looked after by the State itself at its own cost. In regard to the Jagirdars of Gwalior State, he, however, contended that their liability to incur expenditure on account of the above items arose under the



Darbar Policy enunciated by His Late Highness Maharaja Madhav Rao Scindia of Gwalior and under S. 2 of Part A of Chap. IV of the Education Manual of Gwalior State. As to the cess of one anna per rupee of the land revenue, the learned Advocate-General pointed out that the receipts from this cess accumulated into a fund known as "Anni fund," which was meant to be administered by a committee of the tenants & villagers for their own welfare; that this fund was abolished because it was found that a number of Jagirdars prevented such public bodies from administering the fund for the intended purpose; and that the abolition of the cess in 1945 did not, in any way, relieve the Jagirdars of their obligation to provide at their own expense educational, public health and road facilities in their Jagirs.

(59) In my view, sub-cl. (iv) of cl. 4 of Sch. I is clearly ultra vires. That the Jagirdars of Indore State were under no legal obligation to defray expenditure on account of education, public health and roads is not in dispute. That the Jagirdars of Gwalior State were also under no such legal obligation cannot, as I will show in a moment, be doubted. Nowhere in the Gwalior State Manual for Jagirdars, is there any provision casting any obligation on the Jagirdars to expend money for the establishment, construction and maintenance of schools, hospitals and roads in their Jagirs. Nor is such obligation imposed on any Jagirdar by the terms of his Sanad. True, in Volume XI of the publication well-known as "Darbar Policy (Gwalior State)," there are passages reminding the Jagirdars of their duties to their tenants and exhorting them to spend money in their Jagirs for the welfare of their tenantry. For instance in para. 10 at page 7 of Volume XI of Darbar Policy, which has been relied on by the learned Advocate-General it is stated:

"Besides fidelity and loyalty to their Suzerain, there are other obligations incumbent on the Jagirdars. They must treat such of their subjects as are entrusted to their charge with justice, sympathy & humanity, endeavour to better their condition and carefully consider their education, sanitary condition and general welfare."

But at page 37 of this Volume, it has been observed that:

"Every one will admit that Public Works of utility such as the opening of hospitals and schools, the construction of roads and railways and the sinking of wells, building of tanks etc.. are essential for the prosperity and well-being of the State. But together with the opportunity and necessity of carrying out such works, there arises the question of money generally. Where money is available an estate just like the State, can undertake works of this nature to its advantage. The difference in the position of an estate and the State in such cases lies in the fact that if the estate is unable to bear the expenditure necessary for a road or a school, which is essential for it, in view of the mutual advantages to be derived, the Darbar itself provides the funds required."

Again, in volume IV of the publication at p. 68, His Late Highness remarked:

"It is not compulsory on the Jagirdars that each one of them should have a separate hospital in his Jagir, for it depends upon the

financial condition of his estate whether he can afford to have one or not, but where circumstances allow, one should certainly be opened and where a Jagir has not the means to do so, it should join its neighbours in maintaining a travelling dispensary."

(60) Quite apart from these observations which show that the Jagirdars of Gwalior State were under no legal obligation to incur any expenditure on account of education, roads and public health, it is obvious that the 'Darbar Policy' as its very title implies and its content shows is a "Policy" and not a law defining and regulating the rights, duties, privileges and obligations of the Jagirdars of the quondam Gwalior State. It simply enunciates abstract declarations, pious aspirations, moral precepts and principles which His Late Highness desired should be followed in the administration of Gwalior State after his death. This is clear from the foreword in the first volume of the publication in which His Late Highness explained the aim and object with which he wrote the several volumes of 'Darbar Policy' he said:

"The energy I have expended and efforts I have put forth in writing this Policy have mainly been inspired with the aim that the work may prove beneficial to the next generation (in which I have meant to include the Ruler as well as the Officers, subjects etc..) so that for purposes of administering the State and shouldering the grave responsibilities thereof they might discover in this collection a store house which may serve to the Ruler, Officers and subjects of the State, as a guide, philosopher and friend; also the ways and the means for the well-being and prosperity of the subjects and those conducive to the progress and good name of the State may lie clearly chalked out before them and they may not have to wander aimlessly for want of a well-tryed and sympathetic guide."

(61) It is thus clear that no legal efficacy is attached to the Darbar Policy which merely embodies the principles for legislative and executive action. The practical efficacy of the principles enunciated in Darbar Policy was in fact, though not in law, considerable, inasmuch as a disregard of its spirit by any person concerned would have subjected him to strong disapprobation from the higher authorities. But this consideration can have very little weight in considering whether the principles enunciated in 'Darbar Policy' are legal principles enforceable in any Court. As I have said before the Darbar Policy only lays down guides for political and administrative conduct and is not the source of law.

(62) The learned Advocate-General placed some reliance on S. 2 of Part A Chapter 4 of Gwalior State Education Manual to show that the Jagirdars were under a legal obligation to establish schools in their Jagirs. I do not see how this provision helps the State. It only prescribes the conditions under which schools could be opened in Jagir areas by the Gwalior Govt. This section by itself does not cast any obligation on the Jagirdars to establish and maintain schools in their Jagirs. The learned Advocate-General then argued that the obligation of the Jagirdars to establish schools, dispensaries and construct roads in their Jagirs flowed from the historical fact that they con-



stituted an "imperium in imperio" and that under the Jagir Manual of the Gwalior State, the Jagirdars of Gwalior State were bound to comply with the orders of the suzerain power, namely the Ruler of Gwalior State, for the care of the subjects entrusted to their charge. I do not propose to enter into, what seems to me, a profitless discussion of the polemic problem of the position of the Jagirdars of Gwalior State vis-a-vis the Ruler of Gwalior State. It is, however, clear to me that if in the relationship contended by the learned Advocate-General, the obligation of the Jagirdars to incur expenditure on account of education, roads and public health was inherent, it was a political obligation. The obligation, if I may say so, was in no way, different from the obligation, which existed on the administrators of the yore and which exists on the administrators of the present day of promoting the welfare of the people. Such an obligation is enforceable not in law but by political pressure.

(63) Learned counsel for the State felt the force of these considerations and then preferred to contend that the Ruler of Gwalior or Indore or any other State in the exercise of his sovereign authority could have imposed these obligations on his Jagirdars and in the event of their disobeying the orders of the Ruler, the Jagirs could have been also resumed by him. I am not disposed to deny that the Ruler of a former Indian State if he had chosen, could have passed an order calling upon the Jagirdars of his State to establish and maintain schools and hospitals and roads in their Jagirs and could have also taken appropriate measures to enforce his orders. That the Rulers while preserving the rights, privileges and dignities of their Jagirdars did not effectively and legally compel them to ameliorate the condition or relieve the suffering of their tenantry may ever be a matter for disappointment. But the fact remains that no such order of any ruler imposing an obligation on all Jagirdars of his State is shown to exist and produced before us. What we are concerned with, is not the law as it would have been or would be in future, but the law as it is. The truth is that there is really no answer to the contention of the petitioners that the deduction under sub-cl. (iv) is unwarranted. The validity of this sub-clause must be judged on legal considerations and not on political or moral considerations. In my opinion, as the petitioners were under no legal obligation to defray any expenditure for education, roads and public health in their Jagirs, this clause must be held, on the basis of the decision of the Supreme Court in the Bihar Zamindari cases (B), as constituting a fraud on the Constitution and therefore, unconstitutional on that ground.

If, as I think, there was no legal obligation on the petitioners to open schools and hospitals and construct roads in their Jagirs, it must follow that cl. (g) of S. 4 (1) of the Act which vests in the State without any compensation all the buildings belonging to the Jagirdars standing on Jagir lands and being used for schools and hospitals must also be held to have been inserted in the Act "as a colourable exercise of legislative power under entry 42" of Concurrent List and unconstitutional on that ground. If the Jagirdars are under no obligation then clearly the buildings belonging to them and being used for schools and hospitals cannot be regarded as integral parts of a jagir

estate for which no compensation need be paid separately. The learned Advocate-General said, as I understood him, that even if there was no legal obligation on Jagirdars to spend money on education, health etc., the mere circumstance that certain buildings belonging to them were in fact being used for schools and hospitals, would be sufficient to treat such buildings as parts of a Jagir Estate. I do not see how they could be so regarded when there is nothing to suggest that in permitting the user of these buildings for schools and hospitals, the Jagirdars intended to part with their proprietary rights therein.

(64) The next and the last sub-clause which is assailed, is sub-cl. (v) which makes a provision for deduction from the gross income on account of police, revenue and judicial powers exercised by certain Jagirdars. Unlike the preceding sub-clauses, the language of this sub-clause is not general. Its applicability is restricted to those Jagirdars "who themselves or whose predecessors-in-interest immediately before 15-5-1948 exercised these powers." The question of the liability of the Jagirdars to defray the charges of police, judicial and revenue administration in their Jagirs arises with reference to some Jagirdars of the former Gwalior State. It is common ground that of the petitioners before us only some of the Jagirdars of Gwalior exercised before 15-5-1948 police, judicial and revenue powers. The submission of Mr. Das, the learned Counsel for the petitioners, is that no law of Gwalior State placed any obligation on the Jagirdars to exercise police, revenue and judicial powers and to incur expenditure on their account; that when any of these powers was conferred on a Jagirdar, he exercised it and spent money for the police, revenue or judicial establishment as the case may be, not as an obligation but as a privilege "only to satisfy his dignity." Learned counsel further pointed out that by the Jagir Courts, Revenue and Police Powers Abolition Act, 1949 (Act No. 18 of 1949) and by the Ordinances which that Act replaced, the revenue and judicial powers of Jagirdars were withdrawn on 24-5-48, and the police powers were also taken away on 6-11-48; that from those dates, the Jagirdars were not exercising any of these powers or incurring any expenditure on these heads; and that there being thus no legal obligation at the time of passing of the impugned Act on the Jagirdars to exercise these powers or to bear their charges, the deductions provided in sub-clause (v) were illegal. In reply the learned Advocate-General placed reliance on Chaps. 13 and 14 of the Gwalior State Manual for Jagirdars, Samvat 1970 and on S. 191 of the Gwalior State Police Manual, Samvat 1990 and argued that these provisions indicated that when a Jagirdar was invested with any of these powers, he had no option but to exercise the power as an obligation and bear charges for the necessary establishment for the exercise of that power. He also said that though the State of Madhya Bharat took away in 1948 the police, revenue and judicial powers from the Jagirdars, their liability to contribute towards the expenses of the police, revenue and judicial administration in their jagirs continued.

(65) Strictly speaking, the point raised can be disposed of by reference to the provisions of the Jagir Courts, Revenue and Police Power Abolition Act, 1949 (Act No. 18 of 1949) which



relieved the Jagirdars of their police, revenue and judicial powers. But it seems to me desirable to stress the status or title in which the Jagirdars exercised these powers before they were withdrawn in 1948. The relevant provisions bearing on the subject are to be found in Chaps. 13 and 14 of the Gwalior State Manual for Jagirdars. A careful reading of these provisions shows that no Jagirdar could claim to exercise revenue or judicial powers as a matter of right. The power had to be specifically conferred by the Suzerain, namely the Maharaja of Gwalior for the time being, and it was subject to such conditions as the Maharaja imposed. The power could be enlarged, curtailed or taken away at any time. Again, on the death of a Jagirdar invested with these powers his successor or heirs could not exercise those powers without a fresh conferment of the power from the Gwalior Darbar, and the heir or successor could exercise only those powers which had been specifically conferred on him. It must be noted that the rights granted under a Sanad were also subject to the operation of Ss. 56 and 57 of the Manual, which contained *inter alia* the rules stated above. Section 66 of the Manual laid down that the State would be entitled to the whole of the stamp revenue and judicial receipts of every kind as for examples, fines, forfeiture of security bonds etc., and the State would allot the necessary funds for the establishment of the Courts. An exception was, however, made in the case of Jagirdars, in whose Jagir sanads the term "Diwani, Foujdari" occurred. Such Jagirdars retained the entire judicial receipts and income, and were also required to defray the cost of the establishment of the Courts. There is no provision in the Jagir Manual as regards the investment and exercise of police powers. We have not been referred to any other law of Gwalior State regulating the conferment and exercise of police powers. The Advocate-General drew our attention only to S. 191 of the Gwalior State Police Manual. But this section by itself does not deal with the conditions and circumstances in which a Jagirdar could be invested with police powers. It only lays down the directions which a Jagirdar invested with police power was required to follow in the recruitment and establishment of a police force in his Jagir. It may be mentioned that S. 191 of the Police Manual speaks of the exercise of police powers by the Jagirdars as an "Aijaz" (honour). Provisions similar to those contained in Chaps. 13 and 14 of the Gwalior Jagirdar's Manual also exist in the Indore State Manual for Jagirdars.

(66) It is clear from the above brief summary of the material provisions of the Manual for Jagirdars and S. 191 of the police Manual that those provisions exclude the idea of the Jagirdars exercising these powers as a matter of right, independently of the sovereign power. On the other hand the provisions make it amply clear that whatever powers the Jagirdars exercised in police, revenue and judicial administration, they exercised in complete subordination to the Ruler of the State for the time being, from whom such powers were derived by specific conferment and on whose pleasure their continued exercise entirely depended. The provisions proceed on the premise that police, revenue and judicial powers are sovereign rights of the Ruler of the State and are not incidents or attributes of any right,

even proprietary, in the soil granted by the Ruler to the Jagirdar.

If, therefore, these rights could not be exercised without a specific conferment and if they could be withdrawn at any time, and if no Jagirdar could enforce those rights in a Court of law or claim damages from the State for the withdrawal of those rights, I am unable to see, how it can be asserted that in the exercise of police, revenue and judicial powers and in incurring expenditure for these purposes, the Jagirdars were acting not as persons on whom certain privileges had been conferred but were acting in the discharge of a legal obligation imposed on them by law or by the terms of their sanads. The privilege of exercising revenue, judicial or police powers, no doubt, involved some expenditure on the part of the Jagirdars for the establishment of police force and civil and revenue Courts. But those Jagirdars who sought these powers and exercised them, were evidently prepared to pay the price for privileges which many might regard as empty or burdensome. The voluntariness of the Jagirdars to bear the charges on account of police, judicial and revenue administration cannot clearly be regarded as an obligation imposed on them to exercise those powers and incur the necessary expenditure. No instance has, however, been cited before us in which without the conferment of these powers on any Jagirdar, he was asked to contribute towards the expenses of police, judicial and revenue administration by the State in his Jagir or in which on the withdrawal of those powers from him a demand was made on him for such a contribution. To me, it is clear that even before 1948, when the judicial, police and revenue powers were withdrawn from the Jagirdars, there was no legal obligation on the Jagirdars to exercise those powers and to incur any expenditure for police, revenue and judicial administration in their Jagirs.

(67) The matter seems to me to be now concluded by the enactment in 1949 of the Jagir Courts, Revenue and Police Powers Abolition Act. This Act replaced two Ordinances promulgated in the previous year taking away the police, revenue and judicial powers of the Jagirdars. Sections 3 and 5 of the Act abolished all police, judicial and revenue powers of the Jagirdars and prohibited them from exercising those powers. Section 7 of the Act repeals *inter alia*

"all provisions in, and powers under any other enactment, Manual, Circular, Rule or Order whatsoever, which are in force and are being exercised in any part of the United State (i.e., Madhya Bharat) and which are inconsistent with the provisions of the Act."

From what is provided in Jagir Courts Revenue, Police Powers Abolition Act, it is plain that the provisions contained in the Gwalior State Manual for Jagirdars about the conferment & exercise of the revenue and judicial powers stand repealed and that when the impugned Act was enacted, there was no obligation on the Jagirdars to exercise these powers or to meet any expenditure for police, judicial and revenue administration in their Jagirs. It is significant that the Jagir Courts, Revenue and Police Powers Abolition Act, unlike the Jagir Land Records Management Act 1949 (Act No. 25 of 1949) does not contain any provision for the realisation from the Jagirdars of the ex-



penses that might be incurred by the Government for police, revenue and judicial administration in the Jagirs as a result of the withdrawal of the powers exercised by the Jagirdars. To me, the omission is eloquent as emphasising the fact that the Jagirdars were at no time under any legal obligation to defray the costs of police, revenue and judicial administration in their Jagirs. Another section of the Act which deserves to be noted is S. 6 (1) which says that

"When a Jagirdar is unable to collect rent due to him, he may, according to the provisions of law, relating to rents, for the time being in force, in the area concerned apply before a competent Court or authority."

The insertion of this provision in the Jagir Courts, Revenue and Police Powers Abolition Act, can only be explained by the fact that the Act presupposes that the grant of police, revenue and judicial powers to Jagirdars was to enable them to collect the rents due. If this is the real purpose of the grant of these powers, then I think it could be argued with considerable force that expenditure incurred by a Jagirdar for revenue, police and judicial establishments is a part of the costs of collection of rents, for which a provision has already been made in sub-cl. (ii) of cl. 4 of Sch. I.

(68) From what I have said above, it is clear that whatever may have been the position before 1948, since that year there is no legal obligation on the Jagirdars to incur expenditure for revenue, police and judicial administration in their Jagirs. As there was no such obligation at the time of the enactment of the impugned Act, sub-cl. (v) of Cl. 4 of Sch. I, must on the strength of the decision of the Supreme Court in the Bihar Zamindari cases (B), be held as unconstitutional. During the course of his arguments, the learned Advocate-General suggested that it was sufficient to support the validity of the sub-clause if a legal obligation existed not at the time of the passing of the impugned Act but at some time anterior to it. I am unable to accede to this argument. If this test is accepted then one is led to the strange conclusion that if the legislature had chosen to provide for a very high deduction in respect of the legal obligation for which many of the Jagirs were originally granted, to wit, to furnish a certain number of armed followers and cavalry, the deduction would be valid. I have no doubt in my mind that according to the decision of the Supreme Court in the Bihar Zamindari cases (B), the deduction from the gross income in order to be valid must be in respect of a legal obligation existing at the time of the passing of the impugned Act.

(69) I am, therefore, disposed to think that sub-cl. (v) of Cl. 4 of Sch. I is colourable in character in that it provides for something which really cannot be done in the exercise of the legislative power under entry 42 of List III and is, therefore, unconstitutional. If this sub-clause is unconstitutional, it must follow that the buildings standing in Jagir lands and belonging to the Jagirdars which were being used by them for the exercise of police, judicial and revenue powers cannot vest in the State under cl. (g) of S. 4 (1).

(70) It is not suggested that if cl. (g) of S. 4 (1) and sub-cl. (iv) and (v) of Cl. 4 of Sch. I are invalid, then the whole Act is ultra vires. Mr. Das conceded that upon the principles indicated by the Supreme Court in the Bihar

Zamindari cases (B), these provisions must be regarded as severable from the general scheme of the impugned Act of which they form a part, and I think that they are so severable.

(71) It only remains for me to consider the special points urged by Mr. Engineer and Mr. Gupta with regard to some petitions.

(72) Mr. Engineer contended that the Madhya Bharat Jagir Abolition Act, 1951 could not be made applicable to the petitioner Balbhadra Singh in petition No. 1 of 1952 who was a holder of a 'mediatised' estate and not of Jagir granted by the Scindia. It was said that under the sanads given to the ancestors of the petitioner by the British Government, he was an absolute owner of the estate exercising sovereign rights therein. In substance it is claimed that the petitioner Bhalbhadra Singh is an independent chief and the Madhya Bharat Government has no power to acquire compulsorily any part of his estate. The answer I would make to that contention is, that "an Indian State" has been defined in Art. 366 of the Constitution as "any territory which the Government of the Dominion of India recognised as such a State" and it is not the case of the petitioner Balbhadra Singh that his estate was recognised by the Government of the Dominion of India as an 'Indian State'. It is also clear from a copy of the Sanad granted by the Ruler of Gwalior which has been filed with the petition, and from the references, given in the appendices to the petition, to Aitchison's "Treaties, Engagements and Sanads", Vol. V that the petitioner was at no time recognised even by the British Government as an independent Chief. On the other hand, it is plain from the pronouncement dated 14-3-1921 of Lord Chelmsford the then Viceroy of India (given at p. 517 of Aitchison's "Treaties, Engagements and Sanads", Vol. V) that the petitioner's ancestors and other holders of 'mediatised' estates were since the beginning of 19th Century always under the suzerainty of the former Gwalior State and that when in 1921 the British Government modified their practice in relation to the 'mediatised' estates and permitted the Gwalior Darbar to exercise those rights over the estates which belonged to it as a Suzerain, they only assured that the Gwalior Darbar would issue to the holders of these estates fresh sanads and honour the pledges given and the rights 'mediatised' by the British Government. Paragraph 8 of that pronouncement is very significant. It said:

"In view of this settlement, Political Officers will no longer concern themselves with your affairs and you will in future look to your Suzerain, His Highness the Maharaja Scindia for the time being, and his Darbar in all matters connected with your estates and tankas. You will, therefore, henceforth be entitled to the rights and subject to the obligations contained in the Manual of Jagirdars of the Gwalior State Samvat 1970, as in force for the time being."

(73) In the face of this pronouncement, which was later implemented by the Gwalior Darbar, the claim of the petitioner that he is an independent Chief cannot seriously be countenanced. With the lapse of the British paramountcy over Indian States in 1947, the guarantees given by the British Government to the holders of the 'mediatised' estates also lapsed and since then the holders of these estates are in their



status or rights no better than the other Jagirdars of Gwalior State. I do not think it is necessary to say more on this point. For, the question whether any particular estate or village is, or is not a Jagir for the purposes of the impugned Act does not really arise at this stage. It can arise only when Government issues a notification under S. 3 of the Act and claims by virtue of that notification that certain lands being jagir lands have vested in the State.

(74) Mr. Gupta appearing in cases Nos. 628 and 629 of 1951 contended that under Entry 36 List II the State Legislature had the power to legislate with respect to acquisition of property but not with respect to resumption of property; that the impugned Act dealt with the resumption of Jagirs and was, therefore, beyond the competence of the State Legislature and ultra vires. Mr. Gupta also raised the point that the State Legislature could not pass any law with regard to the acquisition of Jagir-properties & the payment of compensation for the acquisition, as the subject-matter of acquisition of land and compensation therefor was already covered by an existing law, merely, the Gwalior Land Acquisition Act. It is also said that the two petitioners are holders of Jagirs in which lands have been settled on the Zamindari system and that under the scheme of compensation provided by the Act, as the zamindars in the Jagirs are to receive compensation out of the compensation payable to the Jagirdars, no compensation would really be received by the Jagirdars, and that on the other hand they would be required to pay from their own pockets substantial amounts for the payment of compensation to the Zamindars.

(75) These contentions are devoid of any substance. I find it difficult to understand how the argument based on the distinction between "acquisition" and 'resumption' really helps the two petitioners on whose behalf Mr. Gupta appeared. To me it appears that by advancing that argument Mr. Gupta is impliedly assenting to the proposition that a 'Jagir' is not the property of the holder thereof and is liable to be resumed. For 'resumption' connotes the idea that the land resumed is not the property of the persons from whom it is taken back by the rightful owner. On this argument it would follow that Jagirs could be resumed without any legislation and the Jagirdars are not entitled to any compensation for the resumption. The argument of Mr. Gupta ignores the fact that the rights of Jagirdars recognised by the impugned Act are actually higher than those claimed by Mr. Gupta on their behalf. It presupposes that the Jagirdars have by usage, prescription and grant acquired in relation to the lands a bundle of rights exercisable with respect to the lands; that this "bundle of rights" is a property which can only be acquired in consonance with the provisions of Art. 31(2) of the Constitution. The impugned Act is, no doubt, described as an Act for the resumption of Jagir lands, but it is in essence an Act for the acquisition of the "bundle of rights exercisable by the Jagirdars with respect to the lands".

The argument that the State Legislature by enacting the impugned Act could not deprive the petitioners of the benefit of the provisions of the Land Acquisition Act, must also be rejected. A similar argument was raised in the Supreme Court in the Bihar Zamindari Case

and was repelled. Rejecting the argument His Lordship Mahajan J., said

"the provisions as to assessment of compensation enacted in the Land Acquisition Act only apply to acquisitions that are made by notification under that Act. Its provisions have no application to acquisitions made under either local or central laws unless they are specifically made applicable by the provisions of these Statutes."

The position here is no different as to the contention that no compensation would really be paid to Jagirdars in whose Jagirs, land is settled on Zamindari system, I must confess I have had small success in appreciating the argument of the learned Counsel. In the affidavit filed by the petitioner Sardar Jadhav in 'Civil. Misc. Case No. 629 of 1951' details of the amount of compensation that would be payable to the petitioner and to his zamindars have been given and an attempt has been made to show that the compensation payable to the Zamindars is actually more than that the Jagirdar himself would get. The mistake in these calculations lies in the fact that the gross income of a Zamindar under cl. (2) of Sch. II has been taken to be the gross income of the Jagirdar under cl. (2) of Sch. I. A perusal of these clauses of the two Schedules will show that the gross income of a Jagirdar in the case of land settled on the Zamindari system, is not the same as the gross income of a zamindar. It includes the land revenue payable to the Jagirdars by the Zamindars and many other items. In the calculation set out in the affidavit of Sardar Jadhav, the land revenue payable by the Zamindar to the Jagirdar or income under other heads has not been included, as it should have been, in the gross income of the Jagirdar. There does not appear to me any force in this contention.

(76) In the result on the arguments addressed before us, I take the view that the Madh. Bharat Abolition of Jagirs Act, 1951, with the exception of the provisions contained in S. 4(1)(g) and sub-cl. (iv) and (v) of cl. 4 of Sch. I is valid. The excepted provisions are, in my opinion, unconstitutional and a writ of mandamus should be issued to the Madhya Bharat State Government not to give effect to the provisions contained in S. 4(1)(g) and sub-cl. (iv) and (v) of cl. 4 of Sch. I. In the circumstances of these petitions, I would make no order as to costs in any of them.

(77) Mr. Das learned Counsel for the petitioners has asked for leave to appeal to the Supreme Court from our decision. In view of the decision of the Supreme Court in the Bihar Zamindari Cases, it cannot clearly be certified that these cases involve a substantial question of law as to the interpretation of the Constitution. I would, however, having regard to the general importance of the questions raised in these petitions certify these cases as fit for appeal to the Supreme Court and grant leave to appeal to the petitioners, as well as to the State.

(78) CHATURVEDI J.: I have had the advantage of going through the draft judgment dictated by my learned brother Dixit. I agree that inasmuch as an estate is being acquired and the non-income fetching properties such as wells, tanks, ponds, water channels, open lands, unworked mines etc., are integral parts of an estate as defined in Art. 31A of the Constitu-



tion the observation of Mahajan J. in — 'Raja Suryapal Singh v. State of U. P.', 1952 S C J 446 (B) are fully applicable to the facts of this case and the contention of Shri P. R. Das that S. (1)(a) is invalid must be rejected. I also agree that the contentions of Sardar Jadhav in 'Civil Misc. Case No. 629 of 1951' have no force and should be rejected. On other questions, I have approached the subject on entirely different lines, and, I feel, I should give my reasons and conclusions in my own words. I also think that some of the observations of the Supreme Court in Bihar Appeals '(1952 S C J 454 (B))' if made applicable to the case of Jagirdars will require suitable modifications as the rights of the Zemindars are altogether different from those of the Jagirdars. During the course of arguments I could see considerable confusion at the Bar as to the exact rights and obligations of a Jagirdar. In my opinion the Jagirdari System as it developed in Central India is something different from that developed in other parts of former British India and the questions argued in this case require adjudication keeping in mind this difference. The material provisions of the impugned legislation as well as the provisions governing the Jagirs. in the Covenanted States of Madhya Bharat, in my opinion, cannot be fully understood independently of the historical evolution of different kinds of Jagirs in Central India. I, therefore, propose to give a very brief description of the evolution of Jagirs in Madhya Bharat and then discuss the various provisions of the Manual for Jagirdars to show that exact nature and rights of the Jagirdars at the formation of Madhya Bharat State. I would then discuss the development since 1948, and would also briefly refer to the legislation coming in its wake that affected the interests of Jagirdars. It is in the light of these facts that I think it proper to consider the two main contentions raised on behalf of the petitioners.

(79) The Jagirdari system had its origin in the military-cum-political contracts, or what could be regarded as such, within whose scope a large part of North and Central India during the Mohammadan period had been brought. The Moghuls apportioned their territory into Khalsa and Jagir lands. The former was divided into charges and managed by State officials. The rest was divided out into blocks or estates which were made over to military commanders or courtiers who took the revenues for their own support, or that of a military force which they were bound to maintain. At first Jagirs were granted only for life time (Baden Power: Land Systems in British India, Vol. I, page 257) and, only by the Emperor, or, on the recommendation of the Governors of the most important of the distant provinces, as Kabul, Bengal and the Dakhan. In the times of the decline, however, all sorts of local governors granted them, the precautions and rules fell into abeyance, and the grant became hereditary (ibid, page 530). In its inception causes were at work which were trying military service to the tenure of the land and so the Jagir grants were connected with military or State service of some kind. Jagir is a Persian word (from 'Jai' — place, and Gir — holder) meaning an assignment of the land revenue of a territory to a chief or noble to support troops, etc. (ibid page 189). There were other grants which involved the remission of the revenue and in time came to constitute actual estates

in land. One such revenue — free grant was called 'altamgha', i.e., grant by the royal seal or stamp (tamgha). The grant of the Dewani to the East India Company was an 'altamgha' (ibid page 530). The system of assigning the revenues of a tract as a reward for good service, or for the support of troops was continued by the Marathas and also by the British. The Mahratta leaders granted Jagirs in Central India to their warriors in the Camps, to cadet members of the chief's families for their support and maintenance, to temples (Devasthanis), or, to sacred institutions (Dharmadaya), and to several Rajput Chiefs who had helped them and whom they recognised as their Jagirdars.

Several independent small Rajput Chiefs who had fought against them and who had been defeated & driven from their possessions found refuge in the hills and jungles and avenged themselves by levying contributions from the detached villages which had been usurped by the stronger powers. The larger States were compelled to purchase immunity from their raids by paying them blackmail money, known as Girasia. The districts in Malwa and in Central India were in so disorganised a state as to be unsafe even for troops to pass through. There were few places that were not subject to murderous 'forays', & few in which the cultivator could safely ply his peaceful calling. All parties at this time solicited the interference of the British Government, and, as it afforded them an opportunity of breaking the continuity of the Mahratta powers, Sir John Malcom, on their behalf, intervened and induced the petty chiefs to desist from the predatory incursions, by asking their superiors to grant them lands under the British guarantee or by guaranteeing to them payments equivalent to the Girasia which they levied. The various engagements were concluded in 1818 and the degree of interference exercised by the British Government in the affairs of the guaranteed estates varied with the nature of the engagements concluded (Aitchison: Treaties, Engagements and Sanads; Vol. IV pages 5 to 7). A hundred years later, the larger states desired that these "guaranteed estates" be handed over to them and as it was proving a matter of much difficulty to the British to manage them they were entrusted to the Suzerainty of their overlords. These Jagirdars, known as "guaranteed Estate-holders" always claimed semi-independent jurisdiction. In March 1921, for the first time, Suzerain rights of Gwalior Durbar were restored over 43 Guaranteed Estates and the announcement was made by the Viceroy at a Darbar held at Delhi on 14th March. The Gwalior Darbar thereafter granted new perpetual Sanads to these 43 holders. I shall deal with this matter later in connection with certain contentions advanced on behalf of the Guaranteed Estates.

(80) The granting of Jagirs had been going on since the Moghul Period and so in Gwalior and other States it was decided to scrutinise each and every Sanad. In case a defect was found in the Sanad the Jagir village was to be surveyed and assessed at the cost of the State and in supersession of the old Tanka (tribute), the amount of the new Tanka was to be fixed at 50 per cent of the Nikasi after setting apart 5 per cent. of the gross Nikasi for expenses on account of Patwari and Chowkidar. In case the old amount exceeded 50 per cent of the Nikasi it was to be reduced to that standard.



These Jagirs were termed as 'Jadid-Usul-Jagirs'. A new Sanad was to be given to the holders in new terms. The amount of Tanka was thus for the first time regularised in terms of land revenue. Formerly there was no rule regulating the Tanka and the amount varied from time to time depending upon political exigencies of the occasion. At least one thing was certain that it was not based upon any system of assessment and had no connection with the crop or with the average harvest price of a series of years and could not be called a "share in the produce". The contention of Shri P. R. Das that, in order to calculate 'net income' only 'tanka' should be deducted from the gross income of a Jagir thus loses its force. From the figures given at page 30 of the Report of the Rajasthan — Madhya Bharat Jagir Enquiry Committee it will be apparent that there are in all 1329 Jagirs in this State having 4,249 villages deriving an annual income of roughly rupees 74 Lakhs out of which the State receives nearly 12 Lakhs of rupees in the form of Tanka, a major portion of the income (nearly 62 Lakhs) remaining in the pockets of Jagirdars benefiting neither the State, nor the tillers of the soil. The Jagirdars contend that according to the terms of their Sanads the Jagirs are their property and they are not bound to spend any portion of their income towards the general welfare of the subjects.

(81) The terms of the earlier Sanads vary from place to place and from time to time. Generally the form is "these villages are given to you for maintenance of your family, from generation to generation". Some times a condition is imposed:

"you or your relation or any other shall not disturb the peace of the Fort and the Pergana. If somebody does mischief due compensation shall be taken and the Sarkar will confiscate the properties" (C. M. Case No. 619 of 1951);

or  
"you will obey the order of the Sarkar, remaining in service. If you cause disturbance of peace in the territories of the Sarkar or of those of the East India Company your Jagir will be confiscated" (C. M. Case No. 4 of 1952);

or,  
"you shall not create disturbances in the territories of the Sarkar, those of the Company or in those of other States. You shall not mix with them, nor shall give shelter to criminals of the Sarkar. You shall keep Chowkies in your territories and protect roads and be responsible for any damage that might occur." (C. M. Case No. 631 of 1951);

or,  
"in all 14 villages yielding thirty thousand rupees as Nankar and cash payment for 100 horsemen (Cavalry) and 200 footmen (infantry) are hereby conferred. Enjoy the same as Nankar year to year plus cash for the expenses of the horsemen and footmen." (C. M. Case No. 3 of 1952)'.  
(82) There is no invariable line of demarcation between one Sanad and another and sometimes a Sanad appears to be an extremely formless document. I have mentioned these things in order to show the complexity of the problem & to bring out the importance of the following two points that should be kept in mind:

(1) First, that the enforcement of obligations laid down in the sanads could have been

dictated by conscience, or by political caprice, or by force of arms, but not by a positive *vinculum juris*;

(2) Secondly, it must be impossible to lay down general principles for payment of compensation to the Jagirdars which would not fail in several cases.

It was not till 1913 when the creative initiative of His late Highness Maharajah Madhav Rao Scindia of Gwalior State brought about rules and regulations for the governance of the Jagirs and reduced the Sanads to a more systematic and standard form. These rules and regulations received recognition from the Viceroy when he told the 43 guarantee-holders:

"In view of this settlement, Political officers will no longer concern themselves with your affairs, and you will in future look to your Suzerain, His Highness the Maharajah Scindia for the time being, and his Darbar in all matters connected with your estates and tankas. You will, therefore, henceforth be entitled to the rights and subject to the obligations contained in the Manual of Jagirdars of the Gwalior State, Sambat 1970, as in force for the time being" (Aitchison, Vol. 5, para 8, page 518).

The contention of the guarantee-holders that the guarantee of continuance of possession should be respected can be disposed on the short ground that political treaties of guarantee do not devolve upon successors, but become void through the extinction of the contracting parties (Oppenheim's International Law, vol. II, chapter XI, page 851; 7th Edn. 1948).

(83) In 1928, the Manual for Jagirdars was, with slight modifications, adopted by the Indore State and since then the Jagirs are being governed by the provisions of these two Manuals in Gwalior and Indore State. The Jagirdars of the Covenanting States other than Gwalior and Indore have not argued that the rules in their States differ in any fundamental manner from the two Manuals and so it will be proper to examine closely the provisions of the two Manuals only to know the exact nature of the rights and obligations of the Jagirdars.

(84) The first provision which attracted comments and lengthy and elaborate arguments is that the Jagir is an indivisible and impartible property, inalienable except under certain conditions, and that the rule of primogeniture has invariable application to it. On behalf of the petitioners, Shri P. R. Das and Shri Samvatsar have contended that there are Zemindaries which are impartible and which descend to a single member and that restriction on alienation can also be imposed on private Zamin-daries by statute. Obviously the Punjab Alienation of Land Act (Act 13 of 1900) was in view. It is true that, in the interest of agriculture and of agriculturists, statute has often imposed restrictions on alienation of land. In order to create a strong-rooted peasantry, in Germany, the Nazi legislation of 1933 had prohibited the alienation or division of farms of medium size. The land descended in toto to one heir and was put beyond the reach of creditors (Paton: A Text Book of Jurisprudence p. 388). So in several places primogeniture, or, in other ultimogeniture was designed to keep the estate of the deceased as a unit whereas division among all the children was considered as leading to difficulties in an agricultural community as the units of land become too small as sub-



sistence. Then alienation of land may also be forbidden by religious scriptures or in the interest of family estate. In Hindu Dharma Shashtra the sale of land is not contemplated. Though a gift of land is extolled, yet the sale of family land is regarded as sacrilegious. Passages pointing to the inalienability and even to the impartibility of ancestral property may be found in the Smriti Chandrika chapter VII para 44. The inseparableness of the family lands from the family to which they belonged was a favourite notion, almost throughout antiquity, both with the populace and with philosophers.

"The difficulty placed in the way of alienation fostered the natural attachment to the soil they had tilled, which the Hindus shared with other races of men, and which still makes them, in general, greatly prefer a mortgage or lease with fine to a sale" (2 Bom. 299 at pages 328-329).

(85) A perusal of the two Jagirdari Manuals will, however, make it clear that the provision of inalienability and impartibility and of the rule of primogeniture in Jagirs had no other motive than a purely political one. In the preamble to both the Manuals it is provided that

"a Jagir is generally conferred as a reward for loyal and meritorious services and the Ruler (or the Government) has a direct interest in the preservation of Jagirs in their integrity and their continuance in their particular families on which they were conferred, and, that it is with that end in view that restrictive regulations against alienations are enforced — restrictions from which private property is generally immune."

As the Jagir was generally conferred on persons, whom we may call officers of State, landless men, and professional careerist in the service of the Ruler, the motive could not have been actuated by a desire to benefit the agriculturist class. As it will be seen hereafter that the Jagir was liable to be resumed and given to another person the motive for making it descend as an integral whole could not have been for safeguarding the family estate. It was always for the Ruler's advantage that he should have but one heir to deal with and one man whom he can hold responsible for production of armed warriors and for maintenance of order in the Jagir. Thus though inalienability, impartibility and rule of primogeniture may have been common to Jagirs and to big Zemindaris, yet their introduction must have been with different motives. Hence the principle enunciated in — '*Naraganti Achammagaru v. Venkatachalapati*', 4 Mad 250 (I) and in — '*Sartaj Kuari v. Deoraj Kuari*', 10 All 272 (J) cited by Shri P. R. Das and the observations at page 635 of Mulla's Hindu Law (10th Edition) relied upon by Shri Samvatsar have no material bearing on the facts of the present case. In fact Jagir rights have never been governed by the Mitakshara School of Hindu Law which governs the property of a Hindu in these parts. Even for adoption of a son by a Jagirdar, the Ruler's consent or permission was necessary. Of course there was nothing which prevented the Ruler to split up one Jagir into two or three Jagirs but that would not make it **partible** property. There have been several cases of splitting up; but that was always the Ruler's choice. Whenever a vassal became strong and

showed signs of insubordination and the ruler was afraid of him, politically, it was to his advantage to split the Jagir amongst the sons of the last Jagirdar. This rule of prudence was acted upon in other countries also. It is said that the King at Paris would not have been sorry to see the great inheritance split amongst co-heirs (Pollock and Maitland: History of English Law, Book 2, page 265). The descent in the feudatory's or Jagirdar's family must be governed by the rules laid down by the Suzerain. This principle was also adopted in S. 8, Punjab Laws Act (Act IV of 1872) and also in Ss. 7 and 8, Punjab Jagirs Act 1941 (No. 5 of 1941). At least it was natural that the Suzerain who looked to one man for a unit of fighting power should refuse to recognise an arrangement which would split that duty into fractional parts; and it is not surprising that the two Manuals adopted the rule of primogeniture which had the great merit of simplicity.

(86) It has also to be borne in mind that before the British era, there was no difference between a Jagirdar and a Zemindar so far as their duties were concerned. Both were responsible for the defence of the territory and the maintenance of peace and tranquillity and with the general administration of the areas under them. The following passage from a judgment of the Privy Council is significant:

"It appears that the Zemindars were entrusted, previously to the British possession of India, as well with the defence of the territory against foreign enemies, as with the administration of law and the maintenance of peace and order within their district; that for this purpose they were accustomed to employ not only armed retainers to guard against hostile inroads, but also a large force of Tannahdars or a general police, and other officers in great numbers, under the name of Chowkidars, Pykes, and other descriptions, as well for the maintenance of order in particular villages and districts as for the protection of the property of the Zemindars, the collection of his revenue, and other services personal to the Zemindar. All these different officers were at that time the servants of the Zemindar, appointed by him and removable by him and they were remunerated in many cases by the enjoyment of land rent free or at a low rent in consideration of their services." (*Joykishen Mookerjee v. Collector of East Burdwan*, 10 Moo Ind App 16 at pages 40-41 (K)).

(87) After the British conquest the "Tannahdary" lands were made resumable by the Government which took upon itself the maintenance of the general Police force and relieved the Zemindar from that expense (section 8(4) Bengal Regulation 1 of 1793). The Zemindar, in 1743, was a Government servant '(page 207 of 6 W R)' and had lands for certain political and governmental purpose but subsequently he lost the political functions along with the lands, thereafter remaining a mere intermediary. The family usage of inalienability, impartibility of estates and the rule of primogeniture which presumably had been introduced for political reasons previously however continued to remain with the new purpose of safeguarding family estate. Historically it may be interesting to note that in other countries also (e.g. in England) family functions of land had commenced only after the decay of its political



functions. The big and old Zemindars, where the rule of primogeniture was in vogue and which by custom were impartible and inalienable, represented the function of land on the basis of family organisation while Jagirs in Madhya Bharat are still the symbol of the political function of land. In order to make my meaning clear and to bring the distinction most forcefully, I think it proper to quote an extract from page 275 of Dr. Julius Stone's "The Province and Function of Law" (1946 Edition) where dealing with "Real Property and Commercial Law" the learned author observes:

"The idea of a man's land as his absolute property, like his watch, is only the latest of three ideas which have successively moulded the land law. In essence, it had begun in the feudal period as an aspect of government service being provided to the King in return for tenure of land, which was thus not property in the modern commercial sense. The three centuries prior to the Statute of Tenures, 1660, saw a transition of the land law to suit a new function of land as a basis of family stability and organisation. From about 1660 to 1883, the land law had been moulded to its new function, on the basis of the system of estates, by the Court of Chancery's invention of the trust and the complex of devices known as the family settlement. This transformation of the nature of land had taken place by devious fiction-ridden procedures, only occasionally aided by statutes to clear away the debris. Most of the debris remained, & a major problem crying out for attention in Bentham's time was the expurgation from the law of the fictions and anomalies used by ingenious lawyers to kill the political idea of land, and realise the family idea. This purging process was only to begin with the Report of the Real Property Commissioners in 1828 and the Fines and Recoveries Act, 1833, and was only virtually completed in England by the property legislation of 1922-25. But this was only a part of the urgent need for reform. The family idea of the function of land was itself out of tune with the developing needs of Bentham's age. The industrial revolution brought to the fore the role of land as a commodity, marked by the retreat of family estates before factory sites, and the rise of the industrial middle class, for whom land was worth its market value, no more, no less."

Again at page 532 the learned author writes:

"The law of feudal tenures dominated medieval English Law; behind it stood, however, not merely claims of substance in the modern sense, but claims for the efficient conduct of governmental institutions. Feudal landed property was in part governmental in function. It was with the decay of tenures and growth of equitable interests in land that the property aspect became dominant. Even then, however, the individual claims of substance were closely allied in their pressure with claims to the stability of the family and the general social structure. It was around the "family settlement" in the seventeenth and eighteenth centuries that legal change was concentrated and that the elaborate apparatus of life estates, legal and equitable contingent remainders, executory interests, rule of remoteness and limitations were clustered, gradually with the sporadic aid of statute moulding the land law from the gov-

ernmental to its familial function..... It was not until the reforms of the nineteenth century that individual claims of substance came to dominate the scene, as land became a vital element in the system of capitalist production and investment."

(88) Though I would not like to pursue the analogy further still it may be observed that from all that has been said above it would appear that like the feudal lord's right one can regard a Jagirdar's rights as bearing a political rather than a proprietary character. At any rate there is a gulf of difference between his rights and the rights of a Zemindar, who had paid valuable consideration for his Zemindari. The unfathomable chasm between the rights of the two will be manifest when other provisions of the two Manuals are considered.

(89) The question relating to succession and adoption in a Zemindar's family could be determined by a Court of law but chapter 22 of the two Manuals clearly laid down that "questions regarding adoption, succession and maintenance shall be outside the jurisdiction of the Civil Courts. Such questions shall be decided departmentally."

Every Jagirdar, in addition to the duties and obligations specified in his Sanad was bound to render any service demanded of him by the Darbar or the Government (S. 117, Gwalior Manual, and S. 120, Indore Manual). A Jagirdar before going to a foreign territory (for longer than one month) — and a foreign territory included at that time even British India and other Indian States — was to apply for leave to the Muntazim Jagirdaran in Gwalior State and to the Government in Indore State stating the place where he intended to go and the period for which leave was required. If he was to leave for a period less than one month no permission was required in Gwalior State; but before his departure he was bound to communicate his address to Muntazim Jagirdaran. In Indore State he was to apply for leave to the Collector of his District (S. 100, Gwalior Manual, and S. 105, Indore Manual). If Jagirdars even moved in their state territory and were to be absent for more than a month from their Jagir timely information of the same was to be given to the Inam Commissioner in Indore State and Muntazim Jagirdaran in Gwalior State (S. 122, Indore Manual, and S. 119, Gwalior Manual). They were also required to send the report of births and deaths and marriages in their houses to Muntazim Jagirdaran of the Gwalior State and Inam Commissioner of the Indore State (S. 120, Gwalior Manual, and S. 123 Indore Manual). Chapter 18 of the two Manuals gave the Jagirdars a privileged position so far as their trial for offences was concerned. They were also in a privileged position in cases of execution of decrees against the Jagir or the Jagirdar.

(90) The most important provision, however, was contained in S. 45 in the Gwalior State Manual and S. 48 in the Indore State Manual which laid down that

"the Jagirs whose holders may be found guilty of disloyalty or criminal offence or disobedience to Darbar's Law and Orders, or are notorious for profligacy and extravagance or, who keep the State dues in arrears from wanton neglect or contumacy shall be resumed subject to the following rule:

"In case of disloyalty towards the Darbar or the British Government, or in case of heinous



offence or offences in respect of coinage or stamps the Jagirdars will be permanently deprived of their status and estate. In the remaining cases, the holders for the time being will be suspended from powers over the estate for a longer or shorter period or will be set aside altogether in favour of any one having the right to succeed, under chapters 2 and 3, according to the degree of the delinquency or dereliction committed."

It was further made clear that holdings of persons answering to this description which had been resumed in the past would remain so, as no consideration of their cases are possible. Section 87, Dhar State Land and Tenancy Act, 1940, is also to the same effect. Resumption of Jagirs had often been ordered and many cases can be cited from the Gwalior Administration Reports which are authorised Government publications. Two examples may be sufficient in this respect. At page 157 of the Administration Report of Gwalior State, 1940-41, we read:

"Nine estates were ordered to be taken under the direct management of the Court of Wards during the year under report. Two of them M and K were taken under direct management on account of oppressive behaviour of the Jagirdars towards the Jagir ryots and wilful disobedience of orders on their part. In the case of M the Jagirdar behaved so badly with the Jagir ryots that the Durbar were obliged to depose him permanently and forbid his entry into the estate." (I have omitted the full names purposely).

Then at page 223 of the Administration Report of Gwalior State for the year 1945-46 it is mentioned that

"Thakur D. S. D. who was deposed and removed from his Jagir in 1937 for ten years was re-instated and permitted to use the title of Raja and enter the Jagir territories."

Some other instances have been mentioned by the Revenue Secretary in his affidavit and I need hardly observe that the provision about resumption of Jagir in the Manual was not an empty threat.

(91) Then provisions were laid down in the two Manuals for investing the Jagirdars with Revenue and Judicial powers. In Revenue matters a Jagirdar could be invested with the power even of a Collector for his Jagir. In civil matters a Jagirdar could be invested with the powers of a Magistrate, Sub-Judge, or even District Judge; and in Criminal matters he could be a Magistrate of any class or even a District Magistrate for his Jagir. Subject to certain conditions the Jagirdar could also delegate these powers either in whole or in part to his Kamasder, Kamdar, or Manager, who was expected to be qualified for the discharge of those duties (chapters XII and XIV of the two Manuals). There is no provision in the Manuals for police powers, but it is a fact that in Gwalior State several big Jagirdars had been invested with Police powers and subject to certain conditions could recruit their own police force. It was contended that in the Covenanted States other than Gwalior, Jagirdars were not invested with Revenue, Judicial or Police powers. It does not appear to be true; for, two petitioners have admitted before us that they had been exercising these powers till 1948. In 'C. M. Case No. 112 of 1951' an affidavit has been sworn by Maharaj Anand Pal Singh of former Ratlam State, para 8 of which runs as follows:

"I did not enjoy Police powers. I enjoyed Judicial powers. I was vested with the powers of Second Class Magistrate. I also enjoyed all Revenue powers. But no extra expenditure was incurred in exercise of these powers. It was a privilege conferred on me and yielded a small income of about Rs. 2500/- (twenty five hundred) per year in the shape of Nazrana."

In 'C. M. Case No. 110 of 1951', paras. 9 and 10 of an affidavit sworn by Thakur Jaswant Singh, Jagirdar of Bidwal, Dhar State run as follows:

"I enjoyed certain judicial and police powers till 1948, but had to incur no extra expenditure in the exercise of these powers. On the contrary there was income about Rs. 2000/- from stamps, Rs. 1000/- from fines, Rs. 1000/- from Lawaris and Rs. 1000/- from cattle pounds."

"I enjoyed all Revenue powers in respect of my villages till the year 1948. In the exercise of Revenue powers I incurred no expenditure. But on the contrary there was an income of Rs. 2000/- in the shape of Nazrana."

So there was an income of Rs. 7,000/- (seven thousand rupees) per year in this Jagir. It is difficult to say whether the temptation to increase the income of the Jagir had not gone so far as to make it an engine for oppression.

(92) The question that now arises is: whether the Jagirdars had acquired any proprietary right in the soil by long possession of their estates? A similar question had confronted the British after their conquest of the Punjab. A large number of Jagirs were handed down to them by the Sikh Rule; some of them had been created by it, and others represented the remains of the chiefships and dignities of that Government. The British told the Jagirdars that they did not require service from them as a condition of tenure; in some cases where such a condition was distinctly existent when the Jagirs came up for confirmation, the British commuted it for a small money payment in reduction of the Jagir allowances. In the settlement arrangements, the original landholding communities or individuals were settled with and retained full proprietary rights. The Jagirdar was made a mere assignee of the revenue, taking part of what would otherwise go to the State. (Baden Powell: Land Systems of British India, Vol. 2, pages 699 and 701). Many rules had been framed in this connection and a great body of orders and circulars on the point were collected in the Financial Commissioner's Consolidated Circular No. 37. This Circular accepted the fact, and this is important, that the assignee's interests may have come to be something different from that of a mere assignee of Government revenue, and may have grown into more or less complete proprietary or sub-proprietary status.

"The grantee may have resided on the land and directly acquired fields; he may have made gardens, erected buildings and tombs, may have sunk wells, or made other improvements. He may be able to show particular facts which connect him with the land and which entitle him to be called proprietor in some sense or to some degree". (ibid page 700).

This will, of course, be a question of fact to be decided by competent authorities, but it appears to me that this principle has been properly considered by the Madhya Bharat State



in the impugned legislation and the Jagirdar has been acknowledged as proprietor of Khud Kasht lands, of open enclosures used for agricultural or domestic purposes which had been in continuous possession for twelve years, of all open house-sites purchased for valuable consideration, of all private buildings and places of worships and wells situated in, and, of trees standing on, such lands—if these are within the limits of a village-site. In addition, all groves wherever situate, all tanks, trees, private wells and buildings in occupied land belonging to or held by the Jagirdar are recognised to be the property of the Jagirdar (S. 5).

(93) As regards the estates themselves the Jagirdars claim to be the owners. I have already discussed the various sections of the Manual of the two States to ascertain their true position; and there is no escape from the conclusion that the Jagirdars were only feudatories or vassals of the Rulers, holding, free of revenue, an assignment from them, consisting of one or more whole villages, enjoying temporarily certain proprietary rights over them; occupying office and entrusted with certain administrative duties subject to such orders of their Suzerain as may be received from time to time. The learned Advocate General urged that this was definitely a feudal order; & there is no doubt that several authors dealing with Indian States have used this term. The Viceroy in his announcement of March 1921 also used the term 'feudatories' for the Jagirdars. Even in the comments of Sir Charles Aitchison upon the treaties this phrase has been used at many places. Even a small state like Dhar claimed to have "twenty-two feudatories" (Dhar State Administration Report, 1941-42, page 2, para 6). After a lengthy discussion of the subject Tupper had come to the conclusions that it was 'inchoate feudalism' in India and that there was "no general system which can properly be termed feudal in the European sense of the word" (Our Indian Protectorate, page 246; and Lee Warner: The Protected Princes of India, pages 376-377).

(94) I feel reluctant to use the term 'feudal order' for several reasons. Institutions, tenures, Government and laws which developed during the feudal period were so widely different from those which developed here in the Covenanted States of Madhya Bharat that we may embarrass ourselves if we make use of arguments drawn from one system for the purpose of inferences as to the other. The word 'feudalism' is extremely vague and represents a very large piece of world history of every century from the eighth or ninth to the fourteenth or fifteenth, the ideal or the principles governing it not remaining the same from place to place and from century to century. "Feudalism is an unfortunate word" observe the authors.

"In the first place, it draws our attention to but one element in a complex state of society and that element is not the most distinctive; it draws our attention only to the prevalence of dependent and derivative land tenure. This however, may well exist in an age which cannot be called feudal in any tolerable sense. What is characteristic of the feudal period is not the relationship between lender and hirer, or lender and borrower of land, but the relationship between lord and vassal or rather it is the union of those two relationships. Were we free to invent new terms, we might

find 'feudo-vassalism' more serviceable than feudalism." (Pullock and Maitland: History of English Law, Book I, chapter III, Second Edition, pages 66-67).

The second reason is that even feudalism, as it was developed in English Law and as we understand it now, was founded upon the notion of contract and not of command (C. H. Allen: Law In the Making, page 10). The vassal and the lord both had clearly definite rights and obligations and the fief could not be resumed unless the act of the vassal came within the four corners of the principles laid down by common law regulating their relations. In India, on the other hand, there was no living sense of the reciprocal services and relations of overlord, lord, and vassal, and, as Lee Warner points out, no constitutional germs emerged from the Indian system which was maintained by force of arms (Protected Princes of India, page 377).

In the Covenanted States of Madhya Bharat, a Jagir could be resumed if there was any disobedience to any order of the Ruler or if the vassal was found to be extravagant. Whether it was merely a suspected case or a proved case was a question of fact to be decided by the Ruler and there could be no appeal from his decision. It was his order that had to be complied with and the system seems to have been based not on the notion of contract but on that of command. The affidavit of the Revenue Secretary giving several instances of recent resumption of Jagirs in Gwalior State is clear on the point. The Jagirdar's property and office and, in fact, his fate, depended upon the Ruler's pleasure. If he was pleased, the Jagirdar could be invested with Judicial, Revenue and Police powers and even become a Minister. If the Ruler was displeased it was difficult for the Jagirdar to retain his Jagir in peace. We, therefore, see that the relics of feudalism along with the distinction between Sovereignty and Suzerainty had been fading out and the Ruler's authority had become paramount. It follows that in the Jagirdari system in the Covenanted States of Madhya Bharat every thing had been organised on a system of perpetual political tutelage. The system derived its life from above, and, its vitality depended not on the roots in the native soil but on the benevolence of a distant despotism and most of the Jagirdars had to depend on political or royal caprice. The Court of an all powerful Suzerain under these circumstances would appear to be more attractive than district life, and though there must be one or two notable exceptions, yet ordinarily the absentee Jagirdar's only interest in his Jagir would remain in the hard-wrung remittances from his Kamdar or manager. The condition of the peasantry can well be realised when we find that a big Jagirdar with his influence at the Court had the power to issue coercive processes for the realisation of the arrears of land revenue from the tenants and he had his own Tehsildars, Kanoongos, Patwaris, Sub Inspectors and Magistrates. In this respect, the Jagirdari system in Madhya Bharat altogether differed from the system prevailing in the Punjab or other States (see S. 5, Punjab Jagirs Act, No. V of 1941). In fact, in the Covenanted States of Madhya Bharat, Jagir remained a political institution till 1948 and the Jagirdars were administrative functionaries, the bigger ones remaining as part and parcel of the Ruling class.



(95) It was this system that continued to exist till 1948, when the bloodless revolution, the most radical in the history of our country, swept the sub-continent. The Rulers of Covenanting States in Madhya Bharat read the writing on the wall and gave their consent to the formation of a single union comprising of 22 States in May 1948. It is difficult to ignore the evolutionary crisis and the transformation that took place immediately after it. The rapid process of integration and democratization that came in its wake changed the map of the former Indian States in Madhya Bharat. With the loss of the powers of the Rulers the Jagirdari system received a severe set back and fell in a heap as ivy does from the uprooted tree that so long gave its support. It was now left as a form without a foundation, and with the onslaught of democratic movement, the whole thing stood discredited and constituted an anachronism. After the formation of the Congress Ministry in the former Gwalior State in Jan. 1948 the Government supported the popular view that the existence of quasi-independent administrative and judicial powers in the hands of jagirdars constituting an "imperium in imperio" must be done away with immediately. On May 24th the Gwalior State Ordinance No. 18 of 1948, was promulgated which deprived the Jagirdars of the judicial and revenue powers. After the coming into being of the State of Madhya Bharat, the Jagir Courts and Revenue Powers Abolition and Police Ordinance (Ordinance No. 19 of 1948) was promulgated on 6-11-1948 and it extended the provisions of the Gwalior Ordinance to the whole of Madhya Bharat. This was followed on 12-2-49 by an Act of the Legislature (Act No. 18 of 1949). All police stations and the Magistrates and Judge's Courts which were under the authority of a Jagirdar came directly under the State of Madhya Bharat. The power of Jagirdars to issue coercive processes for the realisation of arrears and revenue was also done away with.

(96) This was a prelude to several enactments affecting Jagirs which may briefly be referred to here. The Government on 29-1-1949 acquired power to take over the management of a jagir during abnormal times for the maintenance of peace and tranquillity by virtue of Jagir Areas Administrative Ordinance (No. 40 of 1948). On 6-11-48 the Jagir Land Records Management Ordinance (No. 21 of 1948) was promulgated which was on 7-5-1949 followed by an Act of the Legislature (Act No. 25 of 1949). The Patwaris of the jagir villages and the Revenue Officers of Jagir thus came under the jurisdiction of the State Government. On the same date Jagir Tenants Restoration of Land Act (Act No. 26 of 1949) came into force which, notwithstanding a decree for ejectment passed by a Jagir Court, conferred upon the Government and on the Revenue Board power to restore possession to a tenant who after 15-8-1947 had been unjustly dispossessed thereof by a Jagirdar. The Scheduled Areas Jagir Maintenance Ordinance was also passed which was on 28-7-1949 enacted as an Act of the Legislature (Act No. 1 of 1949), conferring on the Government the power of taking over the direct management of jagirs in Scheduled Areas. It was followed by the Jagir Forests (Prevention of Indiscriminate Cutting) Act (Act No. 55 of 1950), which tried to stop indiscriminately cutting of forests by the Jagirdar in

their jagirs. In August 1949 the Government of India had constituted a Committee to examine and report on the Jagirs and land tenure system of Rajasthan and Madhya Bharat. The Committee submitted its report at the end of the year. Meanwhile on 30-11-1949 that is within a short period of passing of the Act (No. 18 of 1949) the Bill for Abolition of Jagirs was introduced in the Legislative Assembly of the State and it was entrusted to a Select Committee on 11-4-1950. The Select Committee's report was published on 15-10-1951, and eleven days after, the Bill was passed by the said Assembly. Then it was reserved by His Highness the Raj Pramukh for the President's assent which it received on 27-11-1951.

(97) I have referred to the various dates not only to show that the impugned legislation was hit by the provisions embodied in Arts. 31 (4) and 31A of the Constitution but also to show that the various enactments coming one after another in rapid succession must be viewed as parts of an organic whole. Through these enactments, the intention of the Legislature was made quite clear that it regarded the Jagir estates as properties not of the Jagirdars, but of the State. Though the Jagirdars were deprived of their powers, still there is nothing in these Acts which could show that these Acts impaired, in any way, the "vassalage" that, in my opinion, remained intact. The Suzerain sometimes invests the vassals with power and sometimes deprives them of it. So the legislation depriving the Jagirdars of their powers could not materially affect their position, though for all practical purposes, they were reduced to the position of assignees of revenue. The compensation to them on the basis of their position just on the formation of the Madhya Bharat State is to be seen in this light and it is against this background that we have to consider the two main contentions advanced on behalf of the petitioners.

(98) The first contention of Shri P. R. Das is that the impugned legislation is without a public purpose. In — 'AIR 1952 S C 252: 1952 SCJ 354' (B) the learned Chief Justice of India was of opinion that the objection based on the lack of a public purpose is barred under Art. 31 (4) of the Constitution. Justice S. R. Das concurred in this view and was of opinion that the existence of a public purpose as a condition precedent to the exercise of the power of compulsory acquisition being a provision of Art. 31 (2), an infringement of such a provision cannot, under Art. 31 (4), be put forward as a ground for questioning the validity of the Act. The contrary view was expressed by Mahajan J. who held that the barring provisions of Art. 31 (4) do not in any way touch the powers of the Court to see whether the acquisition has been made for public purpose. Justice Chandrasekhara Aiyer expressed the same opinion. Shri P. R. Das strenuously argued that Mukherjea J. had concurred in the conclusion arrived at by Mahajan J., but the following words of His Lordship's judgment are quite clear on the point:

"For my part I would be prepared to assume that Cl. (4) of Art. 31 relates to every thing that is provided for in Cl. (2) either in express terms or even impliedly and consequently the question of the existence of a public purpose does not come within the purview of our enquiry in the present case."



(99) From the above words it is apparent that His Lordship (Mukherjea J.) put his weight in favour of the view held by the Chief Justice of India; and the majority judgment of the Supreme Court, in my opinion, is to the effect that the validity of an Act cannot be questioned under Art. 31 (4) on the ground of lack of public purpose. If it be assumed that the question whether there is any public purpose or not is open to judicial scrutiny, even then it will be difficult to deny that the impugned legislation was inspired and dominated by a public purpose. In the words of Mahajan J.

"the legislature is the best judge of what is good for the community, by whose sufferance it comes into existence and it is not possible for the Court to say that there was no public purpose behind the acquisition contemplated by the impugned Statute" (at page 274 in AIR 1952 SC 252 (B).)

It, therefore, follows that the public policy of the State as it has found expression in a legislative enactment is entitled to weighty consideration and all reasonable doubts on the question are to be resolved in favour of a legislative declaration thereon (*Corpus Juris*, Vol. 50, page 361). So a decision of a Legislature is not to be reversed unless it is palpably and manifestly arbitrary and incorrect (*ibid*; footnote 88a). If the abolition of the intermediary between the State and the cultivator in the Khalsa area is for a public purpose as has been held in Bihar Appeals, surely the doing away with the political vassal and administrative functionary and an intermediary — all combined — in Jagir area, must be held to be for a public purpose. The integration between the two areas must be complete; for, how can there be two sets of rights for people living in areas within the same State? The Jagir system, being a creation of the Ruler and an appanage of his rule, the system could not have existed when the rulers had lost their power. I agree with the learned Advocate-General that the abolition of "imperium in imperio" and the abolition of the relics of the feudal order must be held to be for a public purpose. Then, if the demolition of an edifice is considered for a public purpose, can it be contended that the dismantling of the corner towers, the carved balconies, and balustrades of various designs, which either decorated or supported the edifice, is not for a public purpose? Keeping in view the historical background, the socio-economic trends of the present times, the recital in the preamble to the impugned legislation, and Chap. IV of the impugned Act, I have no doubt in my mind that from the whole tenor and intendment of the Act it can fairly be inferred that the amelioration of the peasantry living in jagir areas and the emancipation of this class of sub-human serfs from the medieval and archaic bondage which was non-conducive to the general interests of the community was the main purpose behind the impugned legislation, and, in my judgment, on this ground the first contention of Shri P. R. Das must be rejected.

(100) Next it was contended that the impugned Act is a fraud on the Constitution and therefore void. Mr. P. R. Das strenuously contended that the impugned Act pretended to make elaborate provisions for paying compensation but by shift and contrivance it has provided for the evasion of its payment. The learned counsel took us through various clauses

of Ss. 4 and 5 of the Act and various sub-clauses of Cls. 2 and 4 of Sch. I and argued that the deductions from the gross income under sub-cl. (ii), (iii), (iv) and (v) of Cl. 4, Sch. I, are merely deductions of artificial character, the whole object being to inflate the deductions and thus bring about non-payment of compensation. The learned Advocate-General's main argument was first that the jagir was State property and that Jagirdars had no rights in the Jagirs and that they cannot claim as of right any compensation for the resumption of the jagirs. Secondly, he contended that the compensation has been paid and is not illusory, and, thirdly, that Art. 31 (4) of the Constitution is a complete answer to the contentions advanced by Shri P. R. Das and Shri Engineer.

(101) Now where there is admittedly a scheme of payment of compensation provided under various clauses of various sections it seems to be necessary to treat them together as part of an organic whole and to see how they interact. It will therefore be useful for reference to quote here various sections which are material for the purpose of this case:

(102) (After mentioning the relevant sections of the Act, the judgment proceeds as follows): It will be seen that a sliding scale for assessment of compensation has been laid down and the smaller and the poorer Jagirdar has been dealt with more liberally than the bigger and the wealthy Jagirdar. In Jagir with a basic income of Rs. 5000/- the total deduction that could be made would not exceed Rs. 500/-. In other words, he will get compensation seven times Rs. 4500/- or Rs. 31,500. On the other hand, a Jagirdar with a basic income of one lac will be hit hard but he too cannot get less than 7 x 50,000 or Rs. 3,50,000/-. A Jagirdar with a basic income of 4 lakhs cannot get less than fourteen lakhs. These figures of 31,500/-, 3,50,000 or Rs. 14,00,000 though inadequate or rather grossly inadequate to our sense of justice for persons who had been in possession of their Jagirs for several generations and who had been holding a very high status in society and the State, yet they can by no stretch of imagination be termed as illusory. Howsoever inequitable the compensation may appear to be this Court's hands are tied by the provisions of Art. 31 (4), and, I feel, we have no power to examine the contents of the Act on the question of quantum of compensation. If the quantum cannot be challenged, in my opinion, the process by which the quantum has been arrived at too cannot be challenged. The Supreme Court's judgment in Bihar Appeals has only taken note of a distinction between items reasonably related to real facts and items having no reasonable relation to the purpose in view, a distinction similar to that which is observed between a 'causa causans' and a 'causa sine qua non' (a remote cause and a proximate cause) in assessing damages. It is always a question of degree which is to be decided "according to the ordinary plain common sense of the business". In my opinion the judgment of the Supreme Court lays down that the item which has no reasonable relation to actual facts should not be considered in computing the quantum of compensation. If it is taken as a factor in computing it the deduction should be considered to be a mere contrivance to reduce the compensation so it will amount to a colourable or fraudulent exercise of legislative power if a fanciful sum is subtracted from the calculation



of gross assets. In 'Bihar Appeals' 1952 S C J 354 (B) only two items were, on this basis, eliminated from consideration. The first was the "arrears of rent" due to the landlord for a period before the Zamindari was vested in Bihar State. It was held that such arrears could not vest in the State as a normal result of acquisition of any estate or interest therein, and that giving of 50 per cent. of these arrears was only a mere device or pretence to deprive a Zamindar of his money which was not a subject-matter of acquisition. Then the second item was the provision in sub-clause (f) of S. 23 of the Bihar Act 30 of 1950 laying down that 4 to 12½ per cent. of the gross assets would be deducted from the amount of compensation as representing "costs of works of benefit to the ryots". It was held to be invalid as it had also no reasonable relation to the purpose in view. In this connection again and again Shri P. R. Das drew the attention of this Court to the following observations of Chandrasekhara Aiyar J. in that case:

"The Act does not say that this charge represents the expenditure on works of benefit or improvements which the Zemindars and proprietors were under any legal obligation to carry out and which they failed to discharge."

(103) According to Shri P. R. Das there ought to be a legal obligation on the Jagirdars to carry out certain work of public utility (e.g., in relation to roads, schools and dispensaries) before a certain percentage could be deducted from the gross income.

(104) With very great respect, I feel that the above observations of His Lordship cannot be made applicable to the case of Jagirdars who could not have gone to a Court of law for the enforcement of their rights against the Suzerain. In India a Civil Court can entertain a suit about a Jagir only when a Deputy Commissioner or a Collector gives a certificate that a particular question can be determined by the Courts (see Ss. 4 and 6, Pensions Act, Act 23 of 1871). In the Covenanting States of Madhya Bharat, on the other hand, a Civil Court's jurisdiction was completely barred and a suit against the Suzerain was unthinkable. Considering that the relations of the Jagirdars with the Suzerain were political, there was no possibility of legal rights and legal obligations flowing from this relation. Whatever obligations there were could have been enforced only by the exercise of the Suzerain powers. So the observations of His Lordship Chandrasekhara Aiyar J. do not apply to the facts of this case. It, however, appears to me that His Lordship was using the term 'legal obligation' in a wide and very comprehensive sense and was not confining it merely to contractual obligations. In attempting a classification of "legal obligations" Salmond in his Jurisprudence (Art. 174, p. 473, Edn. 10) says that they are either (1) Contractual, or (2) delictal, or (3) quasi-contractual, or (iv) innominate. Explaining the last term, the learned author observes that:

"It is necessary to recognise a final and residuary class which may be termed as 'innominate' as having no comprehensive and distinctive title. Included in this class are the obligations of trustees towards the beneficiaries."

That the Jagirdars had an obligation towards the ryots admits of no doubt. But these obli-

gations could have only been enforced by the Suzerain, not by the Courts of law. A very broad view is, however, to be taken of these obligations. At the time when the Sanads were drafted, or, when the Manuals were framed, nobody could have dreamt that compensation would have to be paid for resumption of Jagir lands and that such compensation would depend upon specific words by which an obligation for the welfare of the subjects could be created. At that time no Jagirdar could have gone to a Court of law against an order of resumption or could have claimed compensation from the Ruler. So there was no need for creating an obligation for the welfare of the subjects in specified terms. We should not therefore expect any clear-cut form for laying down obligations on a Jagirdar for the general welfare of the subjects. It is true that 'law' comes from the Ruler as the sole proper source of sovereign control; but it has to be borne in mind that at that time it used to come sometimes in the form of 'orders' and sometimes in the form of 'advice' to the Jagirdars. It is too well-known now that an 'advice' emanating from the political Suzerain gives the dependant no option and that it is meant to be accepted in its entirety. Such 'advices' are specially noticeable in the far-reaching formative work done by His Late Highness Maharaja Madhava Rao Scindia of Gwalior State during whose regime, in 1913, (Samvat 1970), the rules and principles for the governance of Jagir had been framed. In the last paragraph of the Preface to this Manual for Jagirdars His Late Highness observed:

"If an aristocracy is to be maintained and is to be worthy of the name, it must be at once an enlightened and a prosperous aristocracy for an impoverished or illiterate aristocracy is worse than useless. Hence the Suzerain must see that the dignitaries of his State maintain themselves in prosperity and 'at the same time enable their ryots to enjoy the same advantages of wise and beneficent management as are enjoyed by the direct subjects of the Suzerain power'."

(105) In para. 10 on p. 7 of the Durbar Policy Vol. 11, His late Highness succinctly stated the duties of the Jagirdars in the following words:

"Besides fidelity and loyalty to their Suzerain there are other obligations incumbent on the Jagirdars. They must treat such of these Ruler's subjects as are entrusted to their charge with justice, sympathy and humanity and endeavour to better their condition and carefully consider their education, sanitary condition and general welfare."

These words could well have been written by other Rulers also in other States on the obligation of a Jagirdar towards his subjects. The obligations there were not different from those in Gwalior State. We have only to see the actual intention behind the words. In my opinion the advice should be viewed not merely as a pious wish but as laying down a foundation for an altogether new and enlightened interpretation of all sanads (old and new). The Durbar Policy had in 1925 acquired the status of a Durbar Circular (see Gwalior Government Gazette Vol. 74 p. 1, dated 21-2-25). The laconic and often obscure terseness of the early Sanads has to be seen in the light of the changed surroundings. There being no necessity of military and political service, the Jagirdars



were asked to devote their time and money towards the general welfare of their subjects. The progressive wants of society imposed new responsibilities on those who were charged with the administration. The cesses that were levied from holders of old grants were increased and money was utilised by the State for the welfare of the subjects. The old Sanads were scrutinised and whenever an opportunity offered itself the sanads were declared defective, the Tanka was revised and was raised to 50 per cent. of the village Nikasi after a survey of the village at the cost of the State (R. 42 of the Gwalior Manual). It was further declared that Road-cess, School-cess, Naksha-Navisi and all other cesses levied on the holders of the grants were to be included in the 'half assets' standard and were not to be realised over and above the 50 per cent. of the Nikasi. Besides paying the new Tanka at 50 per cent. basis the holder was also bound to render services in furtherance of works for the benefit of the public (S. 43 (A), Gwalior Manual).

What, then, does all this indicate? The intention of the ruling authority was nothing but that a large portion of the Nikasi should be spent on the welfare of the subjects. I need hardly observe that the views of Gwalior Durbar worked as a propelling force in other States as well. It is however stated on behalf of the old Jagirdars of Indore State that the principles on which the Gwalior Jagirdars were governed could not be made applicable to them. It appears to me that the Gwalior Ruler's opinion was sufficiently persistent to prevail in the end, when in 1928, the Indore State adopted, with some modification, the same rules and principles which had been governing Jagirs and Jagirdars in Gwalior State since 1913. Chapter 8 of Indore Manual deals with special Tenures for Jagirs resting on defective sanads or titles and lays down in R. III, S. 45 that in supersession of the old Tanka the 'half assets' rule would also apply there; and that if the old Tanka exceeded 50 per cent of the Jama, it would be reduced to that standard. The old sanad was then replaced by a new one in the form given in Appendix B. It meant clearly that the Indore State also adopted the principle that a Jagirdar should spend a portion of his income for the general welfare of his subjects. Since 1928 it is this Sanad that is regarded as the standard sanad and it clearly mentions in cl. (1) of "Terms and Conditions" that there are several cesses which are being levied from holders of old sanads. In the presence of this note I do not understand how it is said that old Jagirdars in Indore State were not paying cesses or had no obligation in this respect. The appointment of Patwaris and Chowkidars being made compulsory by the statute, one is entitled to ask the question: for what purposes these cesses were being levied? Every sanad for grant from Ruler thereafter reminded the grantee of his responsibility for the welfare of his subjects. The following paras from the prescribed form of a sanad at p. 45 of the Indore Manual for Jagirdars are important:

"(4) you should assist according to your capacity in the management and promotion of institutions of public utility; such as village Panchayats, schools etc. (5) you shall serve the State faithfully, shall keep the ryots pleased, and, by extending and developing cultivation, shall improve the village and maintain it in a prosperous condition."

A similar provision in Marathi in a sanad can be seen at p. 13 of the Hindi Gwalior Jagirdar Manual ... ..

"रैयत राजी राखून आणि कास्त वाढवून गाव हरा भर देवावा."

(106) If we come to the conclusion from what I have stated above that all Jagirdars, old and new, were bound to spend some portion of their income for the general welfare of their subjects then, in my opinion, the State should have power to determine, in a general way, the capacity of a Jagirdar for spending money on this account or the extent to which a Jagirdar could be made liable on this account for the purpose of giving him compensation. The State should also have the power to split the obligation towards "the general welfare of the subject" (which is after all a vague term) into suitable Heads e.g. into those "for Education, Public Health and Roads" as has been done in the impugned legislation. A Ruler's doing or not doing anything for the Jagir subjects in this respect has nothing to do with the Jagirdar's liability. It, therefore, comes to this that if a Jagirdar had obligations towards the general welfare of the ryots, though these obligations could be enforced only by the exercise of the Suzerain powers yet they would have to be considered in computing the quantum of compensation. Then comes the element of precariousness in the position of Jagirdars. As stated above the sword of Damocles was always hanging on the head of a Jagirdar. Any displeasure of the Ruler was bound to make the Jagir liable to resumption and the Ruler's decision was not subject to challenge or judicial review. After the formation of Madhya Bharat State, the rights of the Rulers had devolved on the Madhya Bharat Government by virtue of Art. VI (a) of the Covenant. It is the element of precariousness that has also to be taken into consideration while awarding pecuniary compensation to a Jagirdar.

(107) The learned Advocate-General contends that a Jagirdar has no rights in the Jagir and has no property. I am clear in my mind that the Jagir lands including forests, quarries, mines, tanks etc. belong to the State and not to the Jagirdars. The Jagirdars could be regarded only as political vassals under the Suzerain in possession of the properties with a right to enjoy the income thereof, and, also as administrative functionaries responsible for the administration, and, their position was bound to vary with any change in the political set-up of the State. In my opinion, the Jagirdars were entitled to political pension or to compensation as commutation of pension. Whatever compensation on whatsoever basis may be paid to them by the Suzerain cannot be challenged by them as they have no right to demand any compensation. It has always to be borne in mind that the power which confers can always take away that which it has granted and the question of compensation does not arise at all. On this ground I should dismiss these petitions.

(108) There is however another side of the question which should also be considered. Article 31A of the Constitution, contemplates framing of laws by the State for the acquisition of any estate or of any rights therein; and, further lays down that the expression "estate" includes any Jagir, inam, muafi or other similar grant. The impugned legislation seems to have been



prepared on this basis and lays down principles for awarding compensation. The word 'property' has not been defined anywhere in the Constitution; and, though I am not sure, still I am disposed to think that the Jagirdar may be said to have a right, as an occupant of a Jagir, to enjoy many kinds of income therefrom subject to certain restrictions and subject to certain obligations so long as his Jagir was not resumed according to the relevant provisions of the Manual of Jagirdars. It is the loss of this right that may give him a right to compensation. The word 'property' is an ambiguous term in law; for, its meaning varies according to the purpose in hand; and as Lord Porter observed at p. 1051 in (1940) AC 1014:

"The word property is not a term of art, but takes its meaning from the context and from its collocation in the document or Act of Parliament in which it is found and from the mischief with which that Act or document is intended to deal".

To-day many instances can be given which extend the term 'property' to cover whatever has a present or potential material value. In my opinion, the Jagirdar, in this sense, may be said to have 'property'; and this 'property' is to be acquired. This aspect of the question also merits consideration. The correct assessment of the value of that property which is subject to many obligations and restrictions and which has an element of precariousness involved in it must however present an extremely complicated and speculative problem. Under the provisions of our Constitution the law has however to abstract some principles to reduce the right to terms of money "not perhaps on grounds of pure logic but simply for practical reasons". If the State has abstracted some principles on the basis of experience gained in the Jagir Department of Gwalior State which had been dealing with more than 500 Jagirdars and where a high water-mark had been reached in Jagir administration, this Court must hold its hand and leave the principles as they are; for, the Legislature and the executive it controls had the necessary information, the knowledge, and the experience to judge what percentage should be deducted for what item. On this ground, I do not think it proper to embark on detailed and close enquiry into the provisions of various sub-clauses of the clauses of Sch. I. This Court cannot arrogate to itself the powers of an appellate Court in this respect. If the Legislature had merely laid down that the compensation to be paid to a Jagirdar would be three times the gross income surely we could not have set it aside as 'ultra vires' or as a fraud on the Constitution. We should, on the other hand, be satisfied that the Legislature in this case has not attempted to disguise or conceal the process by which the quantum of compensation has been arrived at. I will therefore be satisfied with general observations relating to the practice regarding various sub-clauses of Cl. 4 of Sch. I.

(109) Sub-clause (ii): It was argued on behalf of the petitioners that the percentage on account of expenses of collection of rent is too exorbitant. I do not think it merits any consideration. It is 7 per cent. for Jagirs with a gross income upto Rs. 2,000/- and 10 per cent. for above this amount. In Gwalior Qannon Ryotwari of Samvat 1974 the Patel was allowed one anna per rupee (or 6½ per cent.) on actual realisation of the rent (S. 22). The Gwalior

Revenue Manual of Samvat 1990 (S. 212) allowed 10 per cent. as charges for collection of rent. In my opinion a reasonable percentage has been laid down in the impugned legislation which is the same as in Madhya Bharat Zamin-dari Abolition Act (Act 13 of 1951).

(110) Sub-clause (iii): The next item disputed is on account of land records and Chowkidari establishment on which 12½ p.c. is to be deducted. Shri P. R. Das urged that the two items are lumped up without any reason and 12½ per cent. has no relation to actual facts. In my opinion the village Watchman and the village Patwari are like the acid and the alkali combining to form the salt of village administration. It is difficult to conceive how a village can be managed in the absence of either of them. I can find no fault in 'lumping' them together. Apart from provisions of law, it was incumbent on a Jagirdar to engage a patwari and a chowkidar for discharging his obligations in regard to the Jagir village and for maintaining it. It is not in dispute that every Jagirdar in Gwalior, Indore and Dhar State was bound to maintain a Chowkidar (vide S. 140 of Gwalior Jagir Manual, S. 197 of Gwalior Police Manual, Ss. 129 and 130 of Land Revenue and Tenancy Act of Holkar State; Revenue Circular No. 26 of 2-2-1932 Holkar State and Ss. 167 and 168 of the Dhar State Land Revenue and Tenancy Act (Act 1 of 1940). It is however, urged that the Indore Land Revenue and Tenancy Act, 1931 and the Dhar Land Revenue Tenancy Act, 1940-1941 have been repealed by virtue of S. 2 (3) of Madhya Bharat Revenue Administrative and Ryotwari Land Revenue and Tenancy Act, Samvat 2007 (Act 66 of 1950) and that there is no provision in the new Act for Chowkidars. It is conceded that S. 139 of the said Act 66 of 1950 deals with the appointment of village servants but it is urged that no rules have been formed by the Government for appointment of village servants and therefore the Jagirdars now are not bound to pay the Chowkidars. In my opinion the contention is not well founded. A village watchman is a 'village servant' within the meaning of S. 139 of Act 66 of 1950 and the proviso to S. 2 saves all such Rules, Standing orders and Circulars as are not inconsistent with or contrary to any provision of the new Act until they are superseded or repealed by Rules made under the new Act. So the Rules framed for appointment of Chowkidars in Jagirs made under S. 135 of the Indore Act 1 of 1931 and under S. 173 of the Dhar Act 1 of 1940-41 are still in force.

(111) As the Jagir Manuals have not yet been repealed the Jagirdars of former Gwalior State could not raise this objection; but it was argued on their behalf that Chowkidari cess from tenants having been stopped with effect from 1-11-1951 (vide Vigyapti Revenue Department No. 72332/9B dated 24-11-1951, Madhya Bharat Government Gazette dated 1-12-1951) they are freed from their obligation in this respect. I need hardly observe that the Jagirdars were realising a number of cesses from their tenants and they had to be stopped by an order of the Raj Pramukh; but this in no way affects their liability towards the Chowkidars.

(112) As regards the Patwaris it was laid down in the Jagir Manuals that a Jagirdar had to engage passed and competent Patwaris (S. 62A of Gwalior Manual and proviso to S. 66 of Indore Manual). The Patwaris of Jagirs and



Land records of those areas came under the jurisdiction of State Government by virtue of Ordinance 21 of 1948 which was followed by an Act 25 of 1949. It was laid down in Ordinance and the Act that the appointment of patwaris will be done by the Government and the cost in proportion to the income of the Jagirs to be determined by the Government shall be realised from the Jagirdars as arrears of Tanka. The experience of three years in managing the land records and Patwaris establishment in Jagirs by the State officials has to be given its due weight. It may also be mentioned here that under R. 3 of S. 42 of the Jagirdars Manual of Gwalior State, in Jadid-Usul Jagirs 5 per cent. on the gross Nikasi was to be left to the holder for expenses on account of Patwaris and Chowkidars. This amount was found to be insufficient and had to be raised to ten per cent. on 10-3-1945 by a Durbar Order (vide p. 960 of Gwalior Government Gazette 11-8-1945). In my opinion 12½ per cent. deduction on this account in 1951 cannot be challenged.

(113) 'Sub-clause (iv):' The third deduction is that of 15 per cent. of the gross-income, if it exceeds Rs. 2000/-, otherwise an amount equal to 10 per cent. in other cases, on account of Education, Public Health and Roads. This is in fact for "the general welfare of the ryots", the remarks on which made above in Paras. 28 and 29 will be relevant in this connection also. This deduction is based on the Gwalior practice. Under S. 98 of the Manual for Jagirdars of Gwalior State it was incumbent on all Jagirdars having an annual gross income exceeding Rs. 10,000/- and on those Jagirdars, having less income as the Darbar may specify, to submit an Annual Report in the form given in Appendix C to the Darbar every year in September. According to Chap. VI of Appendix C (see p. 73 of the Manual) information was required in the prescribed form on the following points:

32. Small pox. Vaccination arrangements.
33. Number of Schools and students reading in them.
34. Hospital or Dispensary
35. Sanitation.

(114) It was laid down in Darbar Policy Vol. IV, (p. 68, para. 19) that it is not compulsory for the Jagirdars that each one of them should have a separate hospital in his Jagir

"for it depends upon the financial condition of his estate whether he can afford to have one or not, but where the circumstances allow, one should certainly be opened and where the Jagir has not means to do so, it should join its neighbours in maintaining a travelling dispensary."

(115) As regards Schools, it was laid down in R. 2, Chap. IV of the Education Manual of Gwalior State that in Jagirs having gross income of Rs. 50,000/- or more, no school would be opened by the State. They were to be provided with qualified staff by the State if so desired by the Jagirdars who had to pay the salary of such teachers. In other Jagirs, the Jagirdars had to construct the school buildings at their own costs. If the number of students exceeded 100 then the addition and extension was to be done by the State. If the Jagirs paid school cess then the Education Department would provide teachers for Schools and would pay their salaries and contingent expenses. If however the Jagirs maintained their own schools then it was laid down that they would be entitled to remission of School Cess.

(116) Then, the Road Cess was also being levied on the Jagirdars and with the concurrence of the Government of India it was recovered from the guaranteed Estates as well. The order of Gwalior Darbar dated 5-10-1942 (re. repairs of Neori-Bhonrasa Road in File No. 123/32 of 1997 Department Muntazim Jagirdaran Gwalior State) to recover the outstanding amount of the Road Cess from Sardar Angre who had not paid Road cess for ten years is sufficient to show that the Jagirdars were always held liable for its payment. The policy was to encourage the Jagirdars in building roads in their area. If they built roads in Jagirs they were excused from payment of road cess. "In consideration of the Jagirdar Sahib of Pohri having built many roads in his Jagir and his doing other good work in the interest of the Jagir people he was excused from plying road cess in 1917-18" (Darbar Policy, Vol. IV, p. 27). A general order was issued in 1924 laying down that Jagirdars having a gross income above Rs. 5000/- would not have to pay Road and School Cess provided they constructed Roads and maintained Standard Schools, in their Jagirs (vide Gwalior Government Gazette dated 22-11-1924; Notification of Home Department, Jagir Section). By this Notification the cesses which the Jagirdars realised from their tenants were also stopped.

(117) In Civil Miscellaneous Case No. 1 of 1952 it is admitted by the Raja of Raghogarh that in 1924, during his minority, an Abwab (Road and School Cess) of Rs. 1208/- had been imposed on his estates. The Raja states that he had protested, but this is not material here. The practice of imposing Road-School Cess on the Jagirs in Gwalior State is very well proved. The new perpetual sanads given to the 43 guarantee-holders in 1924 also refer to these cesses in the following terms in Marathi:

"१ सडकाना, मदरसा, व इतर लाग जे गांवाचे उत्पन्नावर चालू कायद्याप्रमाणे लागू आहेत त्याचा आकार सदरहू नक्षांत दर्ज केला आहे तो तुम्ही नेमलेल्या मितोवर भरीत जावा."

(Road and School Cesses and other cesses which have been levied, according to the existing rules, on the income of the villages, and which have been specified in Naksha should be deposited within the specified period). (See the sanad of the Raja of Raghogarh)."

It will thus be seen that the Jagirdars in Gwalior State were considered liable to spend portion of their income for Education, Public Health and Roads.

(118) Considering the duty of the Jagirdars (in paras. 4 and 5 of Indore Form of Sanad quoted above) for assisting, according to capacity, in the management and promotion of the institutions of public utility, for maintaining the village in a prosperous condition and for improving it, in my opinion, according to the well-known rule of 'ejusdem generis', a Jagirdar in Indore State was also liable for expenditure in connection with Education, Public Health and Roads. Para 4 definitely says that a Jagirdar should "assist in promotion of institution of public utility (e.g. Village Panchayat, schools etc.)." Then he was to keep ryots pleased and to improve the village and maintain it in a prosperous condition. Unless there



is sanitation and eradication of disease from the area where tenants and agriculturists reside and unless there are roads or good pathways to and from the village, it is difficult to conceive how it can be improved or how it could be maintained in a prosperous condition. The capacity of a Jagirdar to spend money for these improvements will, of course, be judged by the State while laying down principles for giving him compensation. It is however to be borne in mind that the State has only prepared a working basis of a general system for payment of compensation after establishing approximate uniformity in essentials. If all Sanads (or old Sanads of all Jagirdars) are to be closely scrutinised the result would be bewildering diversity of terms leading to confusion without serving any useful purpose. In my opinion, we should not allow divergences in Sanads to impair the symmetry of the main fabric. The Ruler's intentions about the duties of the Jagirdars had been expressed in new form of sanads which had been the basis of the administration in Jagirs in Holkar State since 1928. Whatever the State may be doing for the Jagir population can in no way affect the Jagirdar's liability for the welfare of his subjects. Sections 109 and 122 of Gwalior State Jagirdars Manual and Ss. 113 and 125 of the Holkar State Manual also lay down that the departmental chief will arrange, if the Jagirdars so desire, for technical advice being given in matters relating to Public Works, Land Records, and other matters in the interest of the Estate. If the Jagirdars had not felt their loyal duty for making general improvement in their estates these provisions would have been unnecessary.

(119) As I hold the deduction valid, it follows that the School buildings and the Dispensary buildings built by the Jagir money should belong to the Jagir villages (i.e., the State) and not be considered as private property of the Jagirdar. In this view I hold that cl. (g) of S. 4(1) of the Act is also valid.

(120) 'Sub-clause (v):' The last deduction is on account of Police, Revenue and Judicial powers. This affects only those Jagirdars who on 15-5-1948 exercised those powers. There is no provision in the two Manuals for investing a Jagirdar with Police powers. The only relevant provision was to be found in S. 191 of Gwalior State Police Manual of Samvat 1999 which has been repealed by the Police Ordinance (Ordinance 30 of 1948) promulgated on 13-11-1948. This Ordinance was followed on 12-5-1949 by the Police Act (Act 32 of 1949) which in its turn was repealed by the Madhya Bharat Police Act (Act 76 of 1950). The management and control of the Jagir Police passed under the Inspector-General of Police by virtue of Ordinance 19 of 1948 (Madhya Bharat Government Gazette dated 6-11-1948).

(121) Chapters 13, 14, 15, 16 and 21 of the Manual for Jagirdars of Gwalior State contained provisions for investing a Jagirdar with Judicial and Revenue powers. The Gwalior Ordinance No. 18 of Samvat 2004 promulgated on 24-5-1948 deprived the Jagirdars of their Judicial and Revenue powers and repealed the aforesaid chapters of the said Gwalior Manual. This had been followed by the Madhya Bharat Ordinance 19 of 1948 (Madhya Bharat Gazette dated 6-11-1948) and the Madhya Bharat Act 18 of 1949 (Madhya Bharat Government Gazette

dated 12-2-1949). Both the Act and the Ordinance had repealed all the provisions in the laws of Covenanted States which related to the investing of Jagirdars with Police, Revenue and Judicial Powers.

(122) It is noteworthy that the provisions repealed do not state anything about the expenditure in connection with Revenue and Police powers. It is conceded that the practice was that the Jagirdars were bearing these charges. A Jagirdar in Gwalior State invested with Police powers had also to submit in his annual administration report an account of the number of Police force in the estate, arms in possession of the above Police force with details, and about expenses on account of the maintenance of the above force (see p. 72 of the Manual). That the Jagirdars were bearing expenses of Revenue and Police staff admits of no doubt. It is contended that the repealing statute should have clarified the matter as to whether the Jagirdars should continue to bear expenses even when they were deprived of their powers. In my opinion, whether the liability is imposed in the repealing statute or in the impugned legislation that should make no difference. As I stated above, the various enactments affecting Jagirs passed one after another in rapid succession from 1948 to 1951 should be viewed as component parts of the same machine; they should have little meaning if each is examined in isolation. It has to be borne in mind that the Jagirdars were permanently deprived of their Judicial, Revenue and Police powers only on 12-2-1949 by Act 18 of 1949. Within few months of the passing of this Act, the Bill for Abolition of Jagirs had been introduced in the State Legislative Assembly. It appears to me that the legislature had at that time made up its mind for resuming the Jagirs and it wanted to keep the liability of Jagirdars for the Police and Revenue powers subsisting only for the purpose of making deduction when laying down principles for payment of compensation to the Jagirdars. The same consideration would apply to the expenditure in connection with Judicial powers. The Jagirdars had lock-ups for prisoners & had to meet expenditure for under-trial prisoners. They had to submit the details of this expenditure in their Administrative Reports (p. 72 of the Gwalior Manual). Sections 66 and 67 of the Manual of Gwalior State do not state anything about this expenditure which the Jagirdars had been meeting from the income of their Jagirs. The presumption is that in laying down the percentage of deduction the State has duly taken into consideration the income, if any, the Jagirdars had been getting from the Judicial and Revenue work. It is not open to us to see whether the deduction is adequate or inadequate. It is difficult to appreciate the argument that the Jagirdars can spend this money for the sake of their 'prestige' but once they have been deprived of their powers they would not be prepared to undertake the expenditure and the liability. This smacks of dictating terms to Suzerain which cannot be allowed. The State has the right to tell the Jagirdars that it was due to their mismanagement that it had to incur expenditure in overhauling the entire system in the Jagir area and also in absorbing the Jagir employees in the service of the State and that the concerned Jagirdars would have to bear proportionate expenses. The intention of the Legislature is clear on this point. I need hardly repeat what



I had observed in the beginning (para 17 above) that the Jagiri system in Madhya Bharat was not based on the notion of contract, but on that of command. There is nothing in these deductions, in my opinion, which may be termed as unrelated to actual facts. I hold these deductions valid.

(123) 'Clause 2, sub-clause (c):' As regards calculation of gross income in cl. 2 Sch. I, it was contended on behalf of the Raja of Raghogarh '(C. M. Case No. 1 of 1952)' that gross income has been reduced deliberately by calculating the Forest Revenue in sub-cl. (c) on the basis of data regarding average yield for 20 years preceding the basic year. It was urged that the price of forest products has only recently gone up, and, that before the war it was very low, so it should be deemed to be a case for reducing artificially the figure of gross-income. It is no doubt true that in case of quarries (sub-cl. d), the average income of ten years is taken as the basis; and in case of forests, the average income of 20 years is taken for the purpose of calculating gross income. The figures speak for themselves; but the petitioner has to overcome the strong presumption which the decision of the Legislature in enacting the Jagir Forests (Prevention of Indiscriminate Cutting) Act (Act 55 of 1950) is calculated to raise against the Jagirdars. The presumption is that the Jagirdars in Madhya Bharat were bent upon frittering away the forest resources of their Jagir by indiscriminate and unplanned cutting of trees. It is possible that what was not done during last twenty years for conserving and developing the resources (S. 118, Gwalior Jagir Manual) was undone during the last two or three years in order to earn as much money as possible. The figures given on behalf of the Raja are to the effect that before 1940, the annual income from the products of his forest was only Rs. 15,299/- but this year it has reached Rs. 2,16,727. Instead of providing a rebuttal, the presumption is re-inforced by the figures, and in these circumstances, the contention must be rejected.

(124) This disposes of all contentions raised.

(125) The result is that, in my judgment, there is no force in any of the contentions and all the petitions must be dismissed. I order accordingly.

(126) I agree that leave to appeal to the Supreme Court be granted to the parties.

#### ORDER OF THE COURT

(127) BY COURT: The result is that the M. B. Abolition of Jagirs Act 28 of 1951 is declared to be valid except as regards S. 4(1) (g) and sub-cl. (iv) and (v) of cl. 4 of Sch. I which are declared to be illegal and inoperative. A writ of mandamus will issue to the State Government directing not to give effect to the provisions of the impugned Act stated above. Parties to bear their own costs. The order of ad interim injunction is vacated. Permission to file an appeal is granted to both the parties. A/D.R.R. Order accordingly.

A.I.R. 1953 M.B. 135 (Vol. 40, C.N. 47)

(INDORE BENCH)

(FULL BENCH)

KAUL C. J., SHINDE AND CHATURVEDI JJ.  
Rajkumar Mills Ltd., Indore, Appellant v.  
State of Madhya Bharat.

Second Appeal No. 13 of 1951, D/- 3-10-1951.

**Industrial Tax Rules (Indore) (1927), R. 3 (2) (IX) — Commission paid to Managing Agents — (Income-tax Act (1922), S. 10 (2)).**

The Company had agreed to pay 16 p. c. on the net profits of the company to the Managing Agents. The amount of the commission was not to be less than Rs. 25000/- in each year. In the return for 1939 Rs. 27537 were shown as paid for commission. The Special Tax Commissioner did not allow Rs. 2537 on the ground that the commission on profits was not an item of expenditure incurred solely for earning the assessable profits within R. 3 (2) (ix) and there was Huzur Shree Shankar Order No. 173 of 29-6-1933 communicated by a Notification No. 13 of 14-7-1933. On appeal against the order of the Special Tax Commissioner:

Held that Huzur Shree Shankar Order No. 173 of 29-6-1933 was conclusive and hence the company was not entitled to deduct the sum of Rs. 2537 from taxable profits. (Paras 6 and 11)

Anno: Income-tax Act, S. 10 N. 13.

S. M. Samvatsar, for Appellant; Advocate-General, for the State.

#### CASES CITED:

- (A) ('31) AIR 1931 PC 165: 54 Mad 691 (PC)
- (B) ('37) AIR 1937 PC 189: ILR (1937) Bom 591 (PC)
- (C) ('37) AIR 1937 PC 139: ILR (1937) Bom 388 (PC)
- (D) ('39) AIR 1939 Bom 283: 183 Ind Cas 780
- (E) ('41) AIR 1941 Rang 145: 1941 Rang LR 181 (SB)
- (F) (1932) 16 Tax Cas 293: 146 LT 172

**JUDGMENT:** This is a second appeal by the Rajkumar Mills Ltd., Indore against the order of the Special Tax Commissioner dated 30-11-1950 under the amended R. 13 of the Indore Industrial Tax Rules of 1927 (Vide Notification No. 562/VII A/49, published in the Madhya Bharat Government Gazette dated 31-12-1949). The only point raised in this appeal is that the Special Tax Commissioner was wrong in disallowing deduction from the assessable profits, a sum of Rs. 2537/- paid as commission to the managing agents out of profits.

(2) Mr. Samvatsar who appears for the appellant contends that the remuneration paid to the managing agents is an item of expenditure solely incurred for the purpose of earning profits and hence under R. 3, sub-r. (2) (IX) of the Indore Industrial Tax Rules of 1927 profits must be computed for the purposes of assessment of Industrial tax after deducting the amount of remuneration paid to the managing agents. Before proceeding to consider whether the above named sum of Rs. 2537/- paid to the managing agents should be deducted from the profits to be assessed to industrial tax, it is necessary to give a few relevant facts of the case.

(3) The Rajkumar Mills Ltd. was incorporated in 1922 under the Indore Companies Act of 1914. Industrial tax rules were promulgated in 1927. Under the rules return of income was submitted for the year 1939 after the general meeting. The total profit was shown as Rs. 1,44,573-0-0. The assessable profit was shown at Rs. 13,023-5-10 and a sum of Rs. 1220/- was paid as industrial tax. The assessment officer



made final assessment on 19-7-1946 and showed Rs. 1,61,263/- as total profits. According to him assessable profits were Rs. 39,893 & demanded Rs. 3739-15-6 as industrial tax. An appeal was preferred to the Commerce Minister. During the pendency of the appeal the rules were amended and hence according to the new rules the appeal was transferred to a Special Tax Commissioner for decision. The Special Tax Commissioner allowed only Rs. 25,000/- out of Rs. 27,537/- paid as commission to the managing agents from the profits. But he refused to allow the deduction of Rs. 2537/-. Hence the Rajkumar Mills Ltd. have filed this appeal.

(4) By Articles of Association of the Rajkumar Mills Ltd., the company entered into an agreement with the firm of Sir Saroopchand Hukumchand and Co. and provided for the appointment of the said firm as the managing agents of the company on the terms contained in the agreement (vide Art. (4) of the Articles of Association of the Rajkumar Mills Ltd.). By the said agreement it was agreed between the company and firm of Sir Saroopchand Hukumchand and Company as follows:

"In consideration of the premises and as remuneration therefor and for the services to be performed by the said firm as such Managing Agents as aforesaid the company shall pay to the said firm the following allowance and commission that is to say:

(a) An allowance of Rs. 1000/- (One thousand) per mensem to commence from the registration of the company until the Mill of the company begins to work and thereafter of Rs. 1500/- (fifteen hundred) per mensem, as office allowance for supervision of, and attention to the Company's business, such allowance to be exclusive of all rents of the office of the company, and salaries, emoluments, and wages payable to the office staff and the clerks, servants and employees of the company, and all other expenses of the office establishment, all of which are to be paid by the company.

(b) A commission at the rate of sixteen per cent. on the net profits made by the company, such profits to be calculated after allowing for all the usual working charges, interest on loans and advances, repairs and outgoings, but without any deduction being made for expenditure on capital account or on account of any sum which may be set aside in each year out of the profits for reserve or any other fund or account, and it is hereby expressly agreed and declared that the amount of such commission payable to the said firm shall not be less than Rs. 25,000/- in each year, and that if in any year no such commission is earned or it falls short of Rs. 25,000/- the company will pay to the said firm a sum sufficient to make up the guaranteed minimum of Rs. 25,000/- on account of such commission.  
&c. &c. &c.

(Vide Cl. (6) of the agreement).

(5) The said agreement also provided that it shall be lawful for the said firm to assign this agreement and the rights of the said firm thereunder and the whole or any portion of their remuneration as aforesaid, without thereby in any way affecting or prejudicing their appointment as such Managing Agents as aforesaid

(vide Cl. (19) of the agreement). Clause (23) of the agreement runs as follows:

"23. In the event of the company being wound up at any time for the purpose and with the object of transferring their business to another company, the company i.e. the said The Rajkumar Mills Ltd., shall make it one of the terms and stipulations of their agreement for the transfer of their property and business to such other company as aforesaid, that such other company shall appoint the said firm, of whatever member or members the same may, at the time of such sale and transfer as aforesaid, consist, to be managing agents of such new company, and with the like powers and authorities to the said firm, and on the same terms and conditions as to remuneration, emoluments, and otherwise as are herein contained, and it is hereby expressly agreed and declared that save and except with such conditions and stipulations as one of the terms of the sale and transfer thereof the company, i.e. The Rajkumar Mills Ltd., will not sell and transfer their business to any other company."

Clause (24) of the agreement reads as follows:

"In the event of the company being wound up at any time, either voluntarily or otherwise, with the object of entirely ceasing to carry on its business any longer, and not with the object of transferring its business to any other company, the said firm shall receive from the company or the liquidators thereof, as compensation for the loss of their employment as such managing agents as aforesaid a sum of money equivalent to five times the average annual commission earned by the said firm during the period of 6 years preceding the resolution or order, as the case may be, for the winding up of the company, if the company shall have so long existed, or ten times the average annual commission earned by the said firm during the year preceding such resolution or order, since the date on which the company was entitled to commence business, if the company shall be wound up within the said period of 6 years".

(6) The point for consideration in this case is whether the sum of Rs. 2537/- should be allowed to be deducted from the taxable profits or not. The sum of Rs. 25,000/- has already been allowed by the Special Tax Commissioner presumably on the ground that the payment of this sum is not dependent on the making of profits. Clause (6) of the agreement reproduced above clearly states that the company will pay to the managing agents the sum of Rs. 25,000/- whether it makes any profits or not. Taking this sum to be an item of expenditure incurred solely for the purposes of earning profits the Special Tax Commissioner deducted this amount in computing the profits for the assessment of industrial tax. The sum of Rs. 2537/- paid in excess of Rs. 25,000/- is clearly a share of profits earned by the company. It has, therefore, to be determined whether this share of profits paid as commission to the managing agents should be regarded as an expenditure incurred solely for the purposes of earning profits or not. In — 'Pondicherry Rly. Co. Ltd. v. Commr. of Income-tax, Madras', reported in AIR 1931 P C 165 (A) Lord Macmillan, who delivered the judgment made the following observations:

"The Pondicherry company is taken bound in the convention with the French Minister to



'make over' to the Colonial Government 'one half of the net profits' of the undertaking arrived at in the manner prescribed in the convention. It is claimed for the company that when it makes over to the Colonial Government their half of the net profits it is making an expenditure incurred solely for the purpose of earning its own profits. The Court below has unanimously negated this contention and in their Lordships' opinion has rightly done so. A payment out of profits and conditional on profits being earned cannot accurately be described as a payment made to earn profits. It assumes that profits have first come into existence. But profits on their coming into existence attract tax at that point and the revenue is not concerned with the subsequent application of the profits."

Rule 3, sub-r. (2) of the Indore Industrial Tax Rules corresponds with S. 10 (2), Indian Income Tax Act of 1922. Acting on the authority of this ruling the Cabinet of Indore State passed a resolution No. 1072 dated 28-8-1931 and ordered that the agent's commission on profits should not be allowed to be deducted from the assessable profits. (Vide Notification No. 1 dated 2nd/3rd February 1932, published in the Holkar Government Gazette dated 8-2-1932). It appears that Mill owner made a representation to His Highness the Maharaja of Indore. His Highness the Maharaja referred the matter to the High Court for opinion, and on receipt of the opinion of the High Court Notification No. 13 dated 14-7-1933 was issued by the Commerce and Industry Department. This Notification reads as follows:

"In continuation of this office Notification No. 1 dated 3-2-1932 it is hereby published for the information of the mills and factories concerned that on submission of the Prime Minister's (Legal Department) report No. 25 dated 11-5-1933 His Highness the Maharaja is pleased to order (Vide Huzur Shree Shankar Order No. 173 dated 29-6-1933) that the opinion of the Full Bench of the High Court being that the managing agent's commission on profits is not an item of expenditure incurred solely for the purpose of earning the said profit within the meaning of R. 3 (2) (IX) of the said Industrial Tax Rules and this being also the view of the Cabinet as expressed in their resolution No. 1072 dated 28-8-1931 the aforesaid cabinet resolution be given effect to and the industrial tax due on the amount of the managing agent's commission on profits be recovered with effect from the date of the said Cabinet resolution."

This Notification makes it abundantly clear that His Highness the Maharaja ordered that the industrial tax due on the amount of the managing agent's commission on profits be recovered. This being an order of the ruler, who enjoyed sovereign powers, that order is not open to challenge. This is a mandate emanating from a sovereign and as such has the force of law. This Court has, therefore, no power to go behind the order and enquire as to whether the managing agent's commission on profits is an item of expenditure solely incurred for the purpose of earning profits or not. In this view of the matter the point at issue is concluded by Huzur Shree Shankar Order No. 173 dated 29-6-1933.

(7) Conceding, however, for the sake of argument, and only for the sake of argument,

the contention of Mr. Samvatsar, the learned counsel for the appellant, that Huzur Shree Shankar Order passed not in the exercise of the ruler's sovereign powers but as a head of the executive to give effect to the opinion of the High Court, which then had no power to decide any matter in respect of industrial tax, I proceed now to examine whether the amount of Rs. 2537/- paid out of the profits to the commission agents is an item of expenditure incurred solely for the purpose of earning profits or not. We have been referred in the course of argument to — AIR 1931 PC 165, (A); — 'Indian Radio & Cable Communications Co. Ltd. v. Commr. of Income-tax, Bombay Presidency and Aden', AIR 1937 PC 189 (B); — 'Tata Hydro-Electric Agencies Ltd., Bombay v. Commr. of Income-tax, Bombay Presidency and Aden', AIR 1937 P C 139 (C); — 'Commr. of Income-tax, Bombay v. Tata Sons Ltd.', AIR 1939 Bom 283 (D) and — 'Commr. of Income-tax v. Bombay Burma Trading Corporation Ltd.', AIR 1941 Rang 145 (SB) (E). I have already referred to AIR 1931 P C 165 (A). Lord Macmillan laid down in that case that a payment out of profits and conditional on profits being earned cannot accurately be described as a payment made to earn profits, and that the profits on their coming into existence attract tax at that point. This statement he explained in a later case reported in — 'Union Coal Storage Co. Ltd. v. Adamson', (1932) 16 Tax Cas 293 (F). In this case he observed as follows:

"I was dealing with a case in which obligation was first of all to ascertain the profits in a prescribed manner after providing for all outlays incurred in earning them and then to decide them."

In this explanation he makes it clear that an outlay incurred in earning the profits has to be deducted in computing profit for assessing tax. AIR 1937 P C 139 (C) is not applicable to this case. The question in that case was whether Tata Hydro-Electric Agencies Ltd. were entitled to deduct 25 per cent. of their commission payable to F. E. Dinshaw Ltd. and Richard Tilden Smith from their taxable income. Their Lordships of the Privy Council held that Tata Hydro-Electric Agencies Ltd. being assignees of the rights and liability of Tata Sons Ltd. were not entitled to deduct the payment made to F. E. Dinshaw Ltd. and Richard Tilden Smith. They however stated that if the question had arisen in respect of Tata Sons Ltd., they would have been entitled to deduct their payment to F. E. Dinshaw Ltd. and Richard Tilden Smith as being expenditure incurred solely for the purpose of earning their profits. Tata Hydro-Electric Agencies Ltd., they observed, incurred an obligation to make payment in consideration of their acquisition of the right and opportunity to conduct the business. On this ground they disallowed the claim of Tata Hydro-Electric Agencies Ltd. This decision has no bearing on the present case. In 'AIR 1937 P C 189 (B)', the facts were as follows. Indian Radio Cable Communication Co. Ltd. entered into an agreement with the Imperial and International Communications Ltd. By the agreement both the businesses were to be combined and it was to be conducted by Indian Radio and Cable Co. Ltd. which was to pay one half of the net profits of the Radio Co., to the Imperial and International Communications Ltd. The question that came up for consideration was whether one half share of the net profits payable by the Indian Radio



and Cable Co. Ltd., is a proper deduction to be allowed for the purpose of arriving at the amount on which Indian Radio and Cable Co. Ltd. should be assessed for the purposes of income-tax and super-tax within the meaning of S. 10(2) (IX). In the course of the judgment Lord Maugham made the following observations:

"Their Lordships have had the advantage of a learned argument on behalf of the appellants; but they have found themselves unable to come to a conclusion different from that of the High Court. It may be admitted that, as Mr. Lister contended it is not universally true to say that a payment the making of which is conditional on profits being earned cannot properly be described as an expenditure incurred for the purpose of earning such profits. The typical exception is that of a payment to a director or a manager of a commission on the profits of a company. It may, however, be worth pointing out that an apparent difficulty here is really caused by using the word 'profits' in more than one sense. If a Company having made an apparent net profit of £10,000 has then to pay £1,000/- to directors or managers as the contractual recompense for their services during the year, it is plain that the real profit is only £9,000. A contract to pay a commission at 10 per cent. on the net profits of the year must necessarily be held to mean on the net profits before the deduction of the commission, that is, in the case supposed, a commission on the £10,000/-."

Their Lordships further observed:

"The sum is in truth made payable as part of the consideration in respect of a number of different advantages which the appellants derive from the agreement and not all of them can be shown to be of a purely temporary character. The agreement as a whole is much more like one for a joint adventure for a term of years between the appellant company and the Communications Company than one for a lease for that period."

His Lordship also made the following observations:

"Their Lordships recognize the difficulty which may often exist in deciding whether expenditure not in the nature of capital expenditure has been incurred solely for the purpose of making or earning income, profits or gains and they agree that it may be impossible to formulate a test which will always suffice to discriminate between the expenditure which is and which is not allowable for the purpose of income-tax."

(8) Holding that the agreement was in the nature of a joint adventure for a term of year their Lordships disallowed the claim of the Indian Radio and Cable Communications Co. Ltd. to deduct the half share of the net profits from the taxable profits.

(9) Next case to which we have been referred is 'AIR 1939 Bom 283 (D)'. In this case the question for consideration was whether Tata Sons Ltd., were entitled to deduct the part of remuneration payable to Mr. Dinshaw from the taxable income. Beaumont C. J. held in that case that the agreement to share their commission with the lender was part of the terms on which they managed to obtain finance and in his opinion, therefore, in commercial sense the payment of this share of the commission was an

expenditure solely for the purpose of earning profits or gains, viz., the remainder of the commission

(10) Next case cited at the bar is 'AIR 1941 Rang. 145 (E)'. The facts of this case are to some extent similar to the facts of the present case. A company known as the Burma Trading Company was formed to carry on & develop the business in Burma of one William Wallace. The agreement between Mr. Wallace and the Company was that Messrs. Wallace and Co., of Bombay should be secretaries, treasurers & managers of the company. The Company changed its name to the Bombay Burma Trading Corporation Ltd. Article 77 of the Memorandum of and Articles of Association was as follows:

"The remuneration of the secretaries, treasurers and managers for the time being shall be and consist of a commission of 5 per centum on the gross proceeds of the business of the company."

Later on it was changed as follows:

"The remuneration of the secretaries, treasurers and managers for the time being shall be a share of the net profits of the company during any official year, such net profits to be ascertained after deducting for depreciation, wear and tear of the moveable and immovable properties, leases, livestock and other assets of the company and after deducting also such sums as the directors may carry to the fire insurance fund, under-writing fund, fixed property fund and suspense account to meet contingent depreciations or losses, equal in amount to the aggregate of the sums applied in payment of dividends to the shareholders both ordinary and preferential and of the sum set aside to the general reserve fund in each year; provided always that the sum to be received by them as remuneration in any one year shall not exceed a sum calculated at 5 p.c. on the gross proceeds of the business of the company for that year."

The question that came up for consideration was whether under S. 10 of the Act the assignee corporation was entitled to claim a deduction from its profits and gains to the extent of Rs. 8,48,235/- paid by it to Messrs. Wallace and Company of Bombay as their remuneration. The Special Bench of the Rangoon High Court held that assessee corporation was entitled to claim a deduction from its profits to the extent of the remuneration paid to Messrs. Wallace and Company of Bombay. Roberts C. J. in his judgment made the following observations:

"It is unfortunate that Art. 77 uses the words 'net profits' because when one looks at the clause which states how they are to be ascertained, one finds that the outlay incurred annually (for the purpose of earning the profits) in remunerating the managing agents is omitted. Various deductions are made from the gross profits and the residue is called net; but it is still not the real net profit or taxable profit. One further deduction has yet to be made, and before this is done, the sum arrived at is only the net sum to be halved for the purpose of the deduction. If it is more than 5 per cent., of the gross proceeds, the latter amount is, by virtue of the agreement, to constitute the remuneration of Messrs. Wallace and Co. Once this deduction has been made the real net profits come into existence and attract tax at that point."



This decision proceeds on the basis that the word 'net profits' used in Art. 77 is used in a special sense. The net profits referred to in Art. 77 are profits only for the purpose of computing share of Messrs. Wallace and Co. But it is not the amount of real net profits, which is taxable. Remuneration to Messrs. Wallace and Co., being an item of expenditure solely incurred for the purpose of earning profits, that must be deducted before the amount of taxable profits is ascertained. This authority no doubt lays down the proposition that remuneration to managing agents is an item of expenditure incurred solely for the purpose of earning profits, but as observed by Lord Maugham in 'AIR 1937 P C 189 (B)' it is impossible to formulate a test which will always suffice to discriminate between the expenditure which is and which is not allowable for the purpose of income-tax. Similar observations were made by Lord Macmillan in 'AIR 1937 P C 139 (C)'. He observed as follows:

"Their Lordships recognize and the decided cases show how difficult it is to discriminate between expenditure which is, and expenditure which is not, incurred solely for the purpose of earning profits or gains."

Each case, therefore, has to be decided on its own facts.

(11) In the present case as the agreement and articles of association show, the firm of Sir Saroopchand Hukumchand and Co. are not ordinary managing agents. They are also promoters of Rajkumar Mills Ltd. The agreement also shows that if the Company is wound up within six years, the managing agents are to be paid ten times the average annual commission earned during the preceding year as compensation and if the company were wound up later the managing agents were to be paid a sum equivalent to five times the average annual commission during the period of six years preceding the resolution. The agreement also lays down that the managing agents were to receive Rs. 1500/- per mensem as office allowance. This allowance although termed as office allowance is only another form of payment. Because all the office expenses were to be paid by the company. Besides the commission agents were entitled to a commission of Rs. 25,000/- per year even if the company did not earn any profits. These facts go to show that the remuneration of the managing agents was Rs. 18,000/- as office allowance and Rs. 25,000/- as commission. The commission was fixed at the rate of 16 per cent. on the net profits. If the share of profits calculated at 16 p.c. exceeded Rs. 25,000/- the managing agents were entitled to the excess amount. Taking into consideration the fact that the managing agents were also promoters of the company and had secured most beneficial terms in the contract of agreement, there is no doubt in my mind that it was a joint adventure between the company and the managing agents in which profits were to be shared in accordance with the scheme laid down in the agreement. The amount paid in excess of Rs. 25,000/- therefore, is a payment out of profits and conditional on profits being earned, and hence it cannot be described as an item of expenditure incurred solely for the purpose of earning profits. I am, therefore, of opinion that the sum of Rs. 2537/- paid to the managing agents is not an item of expenditure incurred solely for the purpose of earning profits, and hence the

company is not entitled to deduct this amount from taxable profits.

(12) For the reasons given above this appeal must fail and is dismissed with costs.

A/R.G.D.

Appeal dismissed.

A.I.R. 1953 M.B. 139 (Vol. 40, C.N. 48)

(GWALIOR BENCH)

DIXIT J.

Madho Prasad, Applicant v. State.  
Criminal Revn. No. 162 of 1952, D/-  
13-1-1953.

(a) Prevention of Corruption Act (1947), S. 5 (1) (c) — Section whether repeals S. 409, Penal Code — (Penal Code (1860), Ss. 5 and 409). AIR 1952 Punj 89, Dissented from.

Section 5 (1) (c), Prevention of Corruption Act, does not create any new offence. Read with sub-s. (2) of S. 5, it only makes an act already punishable under S. 409, I. P. C., punishable as a criminal misconduct under the Act.

The difference in the punishment, the requirement as to sanction and the special rules of evidence cannot make it a new offence. (Para 4)

Section 5 (1) (c), Prevention of Corruption Act, 1947, as it stood prior to the Prevention of Corruption (Second Amendment) Act, 1952, did not pro tanto repeal S. 409, Penal Code, so far as it relates to offences by public servants. Therefore, a public servant could be prosecuted under S. 409, Penal Code, notwithstanding S. 5 (2) of that Act. This is now expressly made clear by S. 5 (4) of that Act. AIR 1952 All 36 and AIR 1953 Mad 137, Rel. on. (Paras 5, 7, 8)

(b) General Clauses Act (1897), S. 26 — Scope.

Where, a new offence is created under any enactment, the accused must be dealt with in accordance with the provisions of that enactment, where on the other hand, a statute makes an act already punishable under some former law, punishable and there is nothing in the later enactment to exclude the operation of the former one, then the accused person can be proceeded against under either of the enactments. (Para 7)

Anno: Gen. Cls. Act, S. 26 N. 1.

Dey, for Applicant; Shiv Dayal, for the State.

CASES CITED:

- (A) ('52) AIR 1952 Punj 89: 1952 Cri LJ 316
- (B) ('52) AIR 1952 All 35: 1952 Cri LJ 236
- (C) (1906) 2 KB 772: 75 LJKB 1019
- (D) (1758) 1 Burr 543: 97 ER 441
- (E) ('53) AIR 1953 Mad 137: 65 Mad LW 1120: 1953 Cri LJ 309

ORDER: This is a petition to quash the proceedings and the charge in the trial of the applicant in respect of offences under Ss. 409, 466 and 477-A, I. P. C. The applicant Madho Prasad was formerly a clerk and accountant in Food Department, Basoda. The prosecution case against him is that on 6-5-1952 and 17-5-1952 the applicant in his capacity as an accountant and clerk received a total amount



of Rs. 250/- from two persons in respect of licences and a deposit, but that he subsequently failed to deposit the amount in the treasury & gave false receipts to the payers showing that amounts paid by them had been credited in the treasury. During the course of the trial, the applicant raised an objection that as he was a public servant, he could be prosecuted for his alleged act of dishonestly misappropriating the amounts paid to him by Bihari Lal and Babu Lal only under S. 5(2), Prevention of Corruption Act, 1947, and not under S. 409, I. P. C., and further that as the required sanction under S. 6 of the Act for his prosecution under S. 5(2) had not been obtained, the Magistrate had no jurisdiction to take cognizance of the case. The trial Magistrate rejected the objection and proceeded to frame charges against the applicant for the offences under Ss. 409, 466, 477-A, I.P.C. The applicant then preferred a revision petition to the Sessions Judge of Guna, which was rejected. He has now come up in revision to this Court.

(2) Mr. Dey learned Counsel for the applicant contended that after the coming into force in Madhya Bharat of the Prevention of Corruption Act, 1947, and so long as it remained in force, S. 409, Penal Code, in so far as it related to offences by public servants stood repealed and that if a public servant was alleged to have committed an offence of criminal breach of trust, he could only be prosecuted for an offence under S. 5(2), Prevention of Corruption Act, 1947, after obtaining the requisite sanction under S. 6 of the Act. In support of this contention, Mr. Dey relied on a decision of the Punjab High Court in — ‘State v. Gurucharan Singh’, AIR 1952 Punj 89 (A). It was said that no such sanction had been obtained for the applicant’s prosecution under S. 5(2) of the Act. The argument of the learned Deputy Government Advocate in reply is that there is nothing in the Prevention of Corruption Act, 1947, to suggest that the provisions of S. 409, I. P. C., have been repealed impliedly by S. 5(1)(c) of the Act & that if a public servant is alleged to have committed an offence which falls either under S. 5(1)(c) of the Act or under S. 409, Penal Code, he is under S. 26, General Clauses Act, liable to be prosecuted and punished under either of these enactments.

It is further argued by the learned Government Advocate that the matter has been now set at rest by the Prevention of Corruption (Second Amendment) Act, 1952, by which sub-s. (4) of S. 5 of the principal Act was amended so as to make it clear that the provisions of S. 5 are in addition to, and not in derogation of, any other law for the time being in force and nothing contained therein exempts any public servant from any proceeding which might, apart from S. 5 be instituted against him. Mr. Shiv Dayal learned Deputy Government further submitted that the view taken by the Punjab High Court that as long as S. 5, Prevention of Corruption Act, 1947, remained in force, the provisions of S. 409, I. P. C., so far as they concern offences by public servants are pro tanto repealed by S. 5(1)(c) of the Act is not correct and commended to me for acceptance of the contrary view taken by the Allahabad High Court in — ‘Bhupnarayan Saxena v. State’, AIR 1952 All 35 (B).

(3) I am unable to accept the contention of the learned Counsel for the applicant and, in my opinion, this petition must be dismissed.

For the purposes of this revision petition it seems to me unnecessary to examine at length and in detail all the provisions of the Prevention of Corruption Act, 1947. It is sufficient to say that the chief object of the Act, which was passed in 1947, is to make more effective provision for the prevention of bribery and corruption by public servants. The Act was amended twice in 1952. By the Amendment Act, II of 1952 (Act No. II of 1952), the duration of the Act was extended to a period of ten years from the commencement of the Act. By the Second Amendment Act No. LIX of 1952 Ss. 3 to 6 of the principal Act were amended in some respects. Section 3 of the Act makes offences under Ss. 161, 165, 165A, Penal Code cognizable offences. Section 4 permits the Court to draw certain presumption against the accused person in any trial of an offence punishable under S. 161 or S. 165 or S. 165A. Section 5 defines the offence of criminal misconduct by a public servant in the discharge of his duties. Section 5A deals with investigation into cases under the Act. Section 6 provides that the previous sanction of the competent authority mentioned therein shall be necessary for the prosecution of a public servant under S. 161, S. 165, Penal Code, or under S. 5(2) of the Act. Section 7 of the Act permits an accused person to give evidence on oath on his own behalf and says that no presumption shall be drawn if the accused declines to go into the witness-box. The provision of the Act, which is very material here, is S. 5. It is as follows:

“5 (1) A public servant is said to commit the offence of criminal misconduct in the discharge of his duty:

(a) if he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person, any gratification (other than legal remuneration) as a motive or reward such as is mentioned in S. 161, Penal Code, or

(b) if he habitually accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable thing without consideration or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, or

(c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do, or

(d) if he, by corrupt or illegal means or by otherwise abusing his position as a public servant obtains for himself or for any other person any valuable thing or pecuniary advantage.”

“(2). Any public servant who commits criminal misconduct in the discharge of his duty shall be punishable with imprisonment for a term which may extend to seven years or with fine or with both.”

“(3) In any trial of an offence punishable under sub-s. (2) the fact that the accused person or any other person on his behalf is



in possession, for which the accused person cannot satisfactorily account of pecuniary resources or property disproportionate to his known sources of income may be proved, and on such proof the Court shall presume, unless the contrary is proved, that the accused person is guilty of criminal misconduct in the discharge of his official duty and his conviction therefor shall not be invalid by reason only that it is based solely on such presumption.

(4) The provisions of this section shall be in addition to, and not in derogation of any other law for the time being in force, and nothing contained herein shall exempt any public servant from any proceeding which might, apart from this section, be instituted against him."

(4) It will be seen from the above provisions of S. 5 of the Act that cls. (a) and (b) of sub-s. (1) have as their basis Ss. 161 and 165, Penal Code, but they cover cases which do not fall under any provision of the Penal Code. These clauses create new offences. So also cl. (d) of S. 5(1) creates a new offence of obtaining any valuable thing or pecuniary advantages by a public servant by corrupt or illegal means or by otherwise abusing his position. Clause (c) of S. 5(1) which makes the act of a public servant of dishonestly or fraudulently misappropriating or otherwise converting for his own use any property entrusted to him or under his control as a public servant or allowing any other person so to do, a criminal misconduct is not different from S. 409, Penal Code, in so far as it relates to an offence by a public servant. This clause does not create any new offence. Read with sub-s. (2) of S. 5, it only makes an act already punishable under S. 409, I. P. C., punishable as a criminal misconduct under the Act with imprisonment for a term which may extend to seven years or with fine or with both. The difference between the offence under S. 5(1)(c) of the Act and the offence under S. 409, I. P. C., so far as it relates to an offence by a public servant lies in the different punishments. The offence under S. 5(2), Prevention of Corruption Act, 1947, as also the offence under S. 409, Penal Code, are both tried in accordance with the Criminal Procedure Code and there is no special procedure prescribed for an offence under S. 5(2) of the Act. It is true that no public servant can be prosecuted for an offence under S. 5(2) of the Act without the previous sanction of the competent authority and in a trial for that offence, the Court is empowered to draw a presumption against the accused under S. 5(3) and further the accused is also at liberty to give evidence on oath. But these special rules of sanction and evidence do not make the act of a public servant described in S. 5(1)(c) of the Act already punishable under S. 409, Penal Code, a new offence.

(5) The question whether S. 5(1)(c) of the Act virtually repeals S. 409, Penal Code in relation to public servants is now concluded by the new sub-s. (4) of S. 5 of the Act which says that the provisions of that section are in addition to, and not in derogation of, any law for the time being in force and that nothing in that section shall exempt any public servant from any proceeding which might be instituted against him. This sub-section makes it amply clear that S. 5(1)(c) in no way prevents the prosecution of any public servant for an offence under S. 409, I. P. C. Even apart from S. 5(4)

and on the language of S. 5, as it stood before it was amended by the Prevention of Corruption (Second Amendment) Act 1952, I do not think it could have been held that S. 409, Penal Code, so far as it related to offences by public servants stood pro tanto repealed by S. 5(1)(c) of the Act. On this point S. 26, General Clauses Act, 1897, is quite express. It says:

"Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished twice for the same offence."

(6) In accordance with this rule where an act is punishable under a special law and also under a general statute, the offender can be proceeded with under either law but cannot be punished twice for the same act. The rule embodied in S. 26 is analogous to the rule contained in S. 36, Interpretation Act, 1889 (52 and 53 Vict C 63) and is in conformity with the principle laid down in *Hawkins Pleas of the Crown* and in numerous English decisions that where the offence was punishable before the enactment of a statute prescribing a particular method of punishing it, then such particular remedy is cumulative and does not take away the former remedy. In — '*Lowe v. Dorling*', (1906) 2 K B 772 (C), *Farwell L. J.*, observed:

"Now, the distinction between a statute creating a new offence with a particular penalty and a statute enlarging the ambit of an existing offence by including new acts within it with a particular penalty is well settled. In the former case the new offence is punishable by the new penalty only; in the latter it is punishable also by all such penalties as were applicable before the act to the offence in which it is included. The rule was recognised by Lord Mansfield in — '*Rex v. Wright*', (1758) 1 Burr 543 (D) and in a note to 2 *Hawkins's Pleas of the Crown* (1824 ed.), page 239, is thus stated: "The true rule seems to be this: where the offence was punishable before the statute prescribing a particular method of punishing it, then such particular remedy is cumulative, and does not take away the former remedy; but where the statute only enacts 'that the doing an act not punishable before, shall for the future be punishable in such a particular manner' there it is necessary to pursue such particular method, and not the common law method of indictment."

(7) Where, therefore, a new offence is created under any enactment, the accused must be dealt with in accordance with the provisions of that enactment. Where on the other hand, a statute makes an act already punishable under some former law, punishable and there is nothing in the later enactment to exclude the operation of the former one, then the accused person can be proceeded against under either of the enactments. The enquiry to which we have to address ourselves is, therefore, whether S. 5(1)(c) makes the act described therein an offence for the first time. Here, the act of a public servant in dishonestly or fraudulently misappropriating or otherwise converting to his own use any property entrusted to him or under his control as a public servant or of allowing any person so to do, is already punishable under S. 409, Penal Code. Even if the Prevention of Corruption Act, 1947, did not exist, a public servant would still be liable to punishment under S. 409, I. P. C., for dishonest or fraudu-



lent misappropriation. No doubt, the punishment prescribed for an offence under S. 5(2) of the Act is different from that prescribed under S. 409, I. P. C. But this difference in the punishment and the special rules of evidence and sanction for prosecution under S. 5(2) of the Act do not make S. 5(1)(c) and S. 409, Penal Code, in relation to public servants so repugnant to each other that effect cannot be given to both the provisions at the same time. It is evident from S. 6 of the Act that a prosecution under S. 5(2) of the Act depends on the previous sanction of the competent authority. Where on the circumstances of a particular case the sanctioning authority has in its discretion refused to sanction the prosecution, the liability of the public servant to punishment under S. 409, I. P. C., still remains. It cannot, therefore, be held that the provisions of S. 5(1)(c) and S. 409, Penal Code, so far as they concern public servants, cannot stand consistently one with the other and, therefore, the provisions of S. 409, I. P. C., so far as they relate to public servants are impliedly repealed.

(8) With great respect to the learned Judges of the Punjab High Court, I do not find myself in agreement with their decision in 'AIR 1952 Punj 89 (A)'. In that case *Falshaw J.*, who delivered the judgment of the Court, regarded the provisions of the Prevention of Corruption Act, 1947, as to previous sanction of the appropriate authority, the right of the accused to give evidence as a witness and the sentence for an offence under S. 5(2) of the Act as indicating that S. 5(1)(c) was intended to supersede S. 409, Penal Code, so far as it relates to offences by public servants. He recognised the fact that if S. 26, General Clauses Act, is taken by itself, then a public servant who has committed an offence falling either under S. 409, Penal Code, or S. 5(1)(c) of the Act can be tried on a charge under either of these sections. But he observed that the provisions in the Act regarding sanction, the right of the accused to give evidence on oath and the sentence complicated the question.

It has not been made clear in that decision how these factors render inoperative the rule laid down in S. 26, General Clauses Act, which expressly provides that where an act or omission constitutes an offence under two or more enactments then the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished twice for the same offence. I do not see how when there is no provision in the Prevention of Corruption Act expressly repealing S. 409 as regards public servants and when there is nothing in that Act to suggest that the continuance of S. 409 in so far as it concerns public servants is inconsistent with S. 5(1)(c) of the Act, it can be inferred that S. 5(1)(c) was intended to supersede S. 409, Penal Code, as regards offences committed by public servants. The fact that the trial of a public servant for an offence under S. 5(2), Prevention of Corruption Act, 1947, the object of which is to prevent effectively bribery and corruption on the part of public servants, can only be with the sanction of the appropriate authority and the sanctioning authority is required to exercise its discretion in giving sanction on the facts and circumstances of each case and the fact that in a trial for that offence the stringent rule laid down in S. 5(3) as to presumption against the accused is to be applied, far from indicating an

implied repeal of S. 409, Penal Code, only emphasises the fact that the operation of the general criminal law is not excluded.

Section 5, Penal Code, also makes it clear that an act which is an offence within its definition does not become unpunishable under the Code if it is also punishable by some special law. In these circumstances, I think it is wrong to infer that an intention should be ascribed to S. 5(1)(c) to repeal the provisions of S. 409, Penal Code, in so far as they affect public servants. The one provision has not the effect of repealing the other. The two co-exist without conflict. I do not think that the passages from Maxwell and Craies relied on in the Punjab decision, contain the whole of the law on the subject. These passages must be read along with what has been said by the learned authors at other places in their books. For instance, with regard to S. 33, Interpretation Act, 1889, which is similar to S. 26, General Clauses Act, it is stated in Craies' "Statute Law" (Fifth Edition at page 343 that

"the intention of the section of the Interpretation Act was by laying down a general rule, to avoid the necessity of inserting a particular provision to take effect in each new statute dealing with offences.....In accordance with this rule penalties imposed by statute for offences already punishable under a prior statute are regarded as cumulative or alternative and not as repealing the penalty to which the offender was previously liable."

Again at page 214, it is observed that by the contrary intention excluding the operation of this rule is meant "some repugnancy between the two or more laws or express repeal of the prior law". In Maxwell's "Interpretation of Statutes" (9th edition) it is stated at page 193 "that an Act which (without altering the nature of the offence, as by making it felony instead of a misdemeanour) imposes a new kind of punishment, or provides a new course of procedure for that which was already an offence, at least at common law, is usually regarded as cumulative and as not superseding the pre-existing law."

From what Craies and Maxwell have said at various places in their publications, it appears to me that in dealing with an enactment imposing penalty for an act already punishable under an earlier statute, the rule laid down in S. 33, Interpretation Act, or S. 26, General Clauses Act, is to be applied unless the intention to repeal the prior law is clear by express provision to that effect or by implication arising out of contrariety and incompatibility between the statutes. There is no express provision in the Prevention of Corruption Act, 1947, abrogating S. 409, Penal Code, as regards public servants and as I have pointed out before S. 5(1)(c) is not such as to make the continuance of S. 409, Penal Code, so far as it relates to public servants inconsistent with it.

(9) The view that S. 5(1)(c), Prevention of Corruption Act, 1947, does not pro tanto repeal S. 409, Penal Code, so far as it relates to offences by public servants is supported by a decision of the Allahabad High Court in 'AIR 1952 All 35 (B)' and of the Madras High Court in the case of — '*Satyanarayan Murti In re*', AIR 1953 Mad 137 (E) and the cases referred to in those decisions.

(10) For these reasons, I am disposed to think that there is no substance in the contention of the applicant that he is not liable to punish-



ment under S. 409, Penal Code, and that the present prosecution against him for that offence is not maintainable. As the applicant has not been charged under S. 5(2), Prevention of Corruption Act, his prayer that he should be examined as a witness on his own behalf must be rejected.

(11) In the result this revision petition is dismissed and the learned Magistrate is directed to proceed with the trial of the applicant for offences under Ss. 409, 466 and 477-A, Penal Code.

A/K.S.

Revision dismissed.

**A.I.R. 1953 M.B. 143 (Vol. 40, C.N. 49)**

**(INDORE BENCH)**

**DIXIT AND MEHTA JJ.**

Sunder Lal, Appellant v. Mohan Lal and others, Respondents.

Second Appeal No. 311 of 1949, D/- 3-12-1951.

**(a) Evidence Act (1872), S. 99 — Gwalior State Pre-emption Act (1922 Smt.), S. 3 — Deed 'ex facie' mortgage — Contemporaneous oral agreement to treat it as sale not proved — Transaction cannot be treated as sale. 33 All 104; AIR 1925 PC 75 and AIR 1927 All 204, Disting. (Para 4)**

Cases of this kind should be decided by the construction of the document, and if it is, on the face of it, a mortgage, it cannot be regarded as a sale merely because the mortgage was executed for defeating the right of pre-emption. AIR 1928 Oudh 103, Rel. on. (Para 4)

Anno: Evi. Act, S. 99 N. 1.

**(b) Deed — Construction — Mortgage or sale — Decided cases — Use of — T. P. Act (1882), S. 54 and S. 58.**

The question whether a deed is mortgage or sale is purely one of fact. In the determination of this question on the construction of the deed, very little assistance can be derived from the construction put on different documents by the Courts in decided cases. (Para 5)

Anno: T. P. Act, S. 54 N. 9.

Sanghi, for Appellant; Hirway, for Respondents.

**CASES CITED :**

- (A) ('11) 33 All 104: 7 Ind Cas 930
- (B) ('25) AIR 1925 PC 75: 3 Rang 106
- (C) ('27) AIR 1927 All 204: 98 Ind Cas 989
- (D) ('28) AIR 1928 Oudh 103: 2 Luck 470

**DIXIT J. :** This is an appeal by the plaintiff in the suit, from the decision of the Additional District Judge, Ujjain, whereby he substantially affirmed the judgment and decree of the City Sub-Judge, Ujjain dismissing the appellant's suit for pre-emption.

(2) It was alleged by the plaintiff that the respondent Javar Chand who was the owner of a house No. 2689 situated in Mohalla Budhwaria, Ujjain, mortgaged the house on 27-10-32 with one Vithal Das for Rs. 800/-; that on 17-7-43 an account of the amount due on this mortgage was taken and Rs. 1394/- were found due from Javar Chand; that as both Vithal Das and Javar Chand were in need of money, Vithal Das sold on 17-7-43 his rights in the mortgage to Mohan Lal for Rs. 900/- and on the same date Javar Chand executed a registered deed in favour of Mohan Lal purport-

ing to borrow Rs. 400/- from Mohan Lal and to mortgage the house in suit with Mohan Lal for this sum of Rs. 400/- and Rs. 1394/- said to be amount due on the mortgage purchased by Mohan Lal from Vithal Das. The plaintiff claimed that the transaction evidenced by the deed of 17-7-1943 executed by Javar Chand in favour of Mohan Lal was one of sale of the property to Mohan Lal for Rs. 1300/- and that he was entitled to pre-empt the property for that amount. In his written statement, Javar Chand admitted the plaintiff's claim. Mohan Lal contested the suit mainly on the ground that the deed of 17-7-43 was on the face of it and in reality a deed of mortgage and that with regard to this mortgage transaction, no pre-emption suit could lie.

The Court of first instance held that the transaction entered into by Javar Chand with Mohan Lal on 17-7-43 was a mortgage for Rs. 1300/- and dismissed the plaintiff's claim. On appeal the learned Additional District Judge of Ujjain agreed with the conclusion of the Sub-Judge that the transaction was a mortgage but found that the consideration for the mortgage was Rs. 1794/- and not Rs. 1300/-. The learned District Judge, therefore, dismissed the plaintiff's appeal and allowed the defendant Mohan Lal's cross-objections in regard to the amount of consideration for the mortgage. It is from this decision of the Additional District Judge Ujjain that the plaintiff has preferred this appeal.

(3) On behalf of the appellant, Mr. Sanghi argues that the Courts below have not given due weight to the fact that in this case it was open to the plaintiff to show from circumstantial or oral evidence that the transaction of 17-7-43 was one of a sale and not a mortgage and accordingly considered the evidence on the record. Learned Counsel for the appellant pointed out that the evidence shows that prior to 17-7-43 the defendant Javar Chand had actually approached the plaintiff and other persons for the sale of the house; that the value of the property did not exceed Rs. 1500/- and that it appears incredible that Mohan Lal agreed to take a mortgage for Rs. 1794/- on a house the value of which did not exceed Rs. 1500/- and in which the mortgage Vithal Das's rights were purchased by Mohan Lal for Rs. 900/- only. Counsel for the appellant stressed the point that the sale by Vithal Das of his rights to Mohan Lal and the alleged mortgage by Javar Chand to Mohan Lal were effected on the same date and that Vithal Das sold his rights to Mohan Lal with the consent of Javar Chand. It was argued that having regard to all these circumstances the Courts below should have held that the transaction of 17-7-43 between Javar Chand and Mohan Lal was one of a sale of the house for Rs. 1300/- being the amount which Mohan Lal himself had paid to Vithal Das for the purchase of his rights as a mortgagee and the sum of Rs. 400/- borrowed by Javar Chand from Mohan Lal.

(4) Mr. Hirway for the respondent Mohan Lal did not dispute that it was open to the pre-emptor to show from circumstantial and oral evidence that the transaction was one of a sale and not a mortgage. He, however, contended that the Courts below did consider the evidence led by the plaintiff as to the nature of the transaction and then came to the conclusion which was justified on that evidence, that the appellant had failed to prove that the transaction was in reality a sale. Having considered



the arguments of the learned Counsel for the parties, I have come to the conclusion that this appeal must be dismissed. That a pre-emptor is not precluded from showing that the deed on which he bases his right to pre-empt and which on the face of it purports to be a mortgage is in reality a sale, is clear enough from the provisions of S. 99, Evidence Act, and of S. 3 of the Gwalior State Pre-emption Act of Samvat 1992. But, in my opinion, this rule of law only permits a pre-emptor to give evidence of any fact to prove a contemporaneous agreement between the parties to the document to the effect that the parties agreed that though the document showed one thing actually, the real transaction between them was to be quite different. I do not think, it enables a pre-emptor to suggest without proving a contemporaneous oral agreement that though a deed is 'ex facie' a mortgage and though according to its plain terms, it must be construed as such between the parties, nevertheless it should be treated as the sale because the intention of the parties was to defeat the right of pre-emption. Learned Counsel for the appellant relied on — 'Lalji Misir v. Jaggu Tewari', 33 All 104 (A); — 'Bajinath Singh v. Hajee Vally Mahomed', AIR 1925 PC 75 (B); and — 'Usan v. Mohammad Shafi Khan', AIR 1927 All 204 (C) and said that a pre-emptor is entitled to ask the Court to treat a deed of mortgage as a deed of sale, if it was executed for the purpose of avoiding the exercise of a right of pre-emption and had the same result as a sale. It seems to me that the none of the cases relied upon by the learned Counsel for the appellant lays down any such proposition.

In 33 All 104 (A), the question that was decided was whether the word "Intiqual" used in the pre-emptive clause of a "Wajibularj" was wide enough to include a perpetual lease. In the Privy Council decision reported in AIR 1925 PC 75 (B), their Lordships of the Privy Council considered the question whether a term in a deed of a transfer of certain shares in a company should be construed in the light of all the circumstances attending the execution of the deed, as a transfer of the shares by way of a security or as a sale with a clause for re-purchase. The decision in AIR 1927 All 204 (C) held a deed purporting to be a mortgage-deed to be a sale deed on the construction of its terms with the help of extrinsic evidence of surrounding circumstances. In all these cases, the question was one of construction of the terms of a deed and not of altering the legal effect of the plain words of an instrument according to the surmised or alleged intention of the parties.

To my mind, the correct rule is as stated in — 'Sarfaraz Singh v. Baleswar Prasad', AIR 1928 Oudh 103 (D), that cases of this kind should be decided by the construction of the document, and if it is, on the face of it, a mortgage, it cannot be regarded as a sale merely because, its terms are onerous so as to render the chance of redemption of the mortgage remote or because the mortgage was executed for defeating the right of pre-emption.

(5) The question for determination in this case is therefore, purely one of fact, namely, whether the deed executed on 17-7-43 by Javar Chand in favour of Mohan Lal was one of mortgage or of sale. In the determination of this question, on the construction of the deed, very little assistance can be derived from the construction put on different documents by the

Courts in decided cases. By the deed executed on 17-7-1943, Javar Chand mortgaged with possession the house in suit with Mohan Lal for Rs. 1794/- and undertook to redeem the mortgage within 5 years. The mortgage debt carried no interest and in lieu of it Mohan Lal was given the right to appropriate the profits of the property. There is no term in the deed in regard to which it could be said that it is so onerous and unconscionable in its nature that it makes the exercise of the right of redemption impracticable or impossible. 'Ex facie' the deed of 17-7-43 on which the plaintiff has sued, is a mortgage. The onus, therefore, lies heavily on the appellant to show that the transaction is in reality a sale. He attempted to discharge this burden by showing certain circumstances, in which, according to him, the document was executed. These circumstances on which the learned counsel for the appellant relied have already been stated above. I do not regard any of these circumstances taken individually or together as conclusive to show that the parties agreed that the transaction should be treated as a sale. It is quite true that it was not necessary for Vithal Das to obtain the consent of Javar Chand for the sale of his rights as mortgagee to Mohan Lal. But if Mohan Lal did obtain the consent of Javar Chand for reasons best known to him, it cannot be said that having given that consent, Javar Chand is debarred from redeeming the mortgage, which he made in favour of Mohan Lal. Again, from the fact that Javar Chand was at one time thinking of selling the property, it does not follow that thereby he precluded himself from mortgaging the property, to any one. The contention that the transaction should be treated as a sale because as a mortgage for Rs. 1794/- of a property of the value of about Rs. 1500/-, it was an unprofitable bargain to Mohan Lal, is equally without any substance. From the evidence of the plaintiff's own witnesses, it appears to me that the value of the house in suit was much above Rs. 1500/- and that in purchasing the mortgagee's rights for Rs. 900/- from Vithal Das and then in taking a mortgage of the house for Rs. 1794/- after advancing Rs. 400/- to Javar Chand, Mohan Lal made for himself a profit of Rs. 494/-. There is, therefore, no ground for suggesting that Mohan Lal could not have entered into such a transaction except as a sale. Learned Counsel for the appellant laid some stress on the fact that in his written statement Javar Chand admitted the claim of the plaintiff saying that he had in fact sold the house to Mohan Lal. Quite apart from the fact that in the deposition given as a witness of the plaintiff, Javar Chand has not adhered to the position he took in his written statement, I think very little value can be attached to this admission of Javar Chand for the simple reason that Javar Chand being a party to the deed, he cannot be heard to say vis-a-vis Mohan Lal that the deed is a sale and not a mortgage.

(6) For the above reasons, I think the Courts below were right in arriving at the finding that the transaction was one of a mortgage and not of a sale and as such not subject to pre-emption. I would, therefore, dismiss this appeal with costs.

(7) MEHTA J.: I agree.

B/V.B.B.

Appeal dismissed.



A.I.R. 1953 M.B. 145 (Vol. 40, C. N. 50)

(INDORE BENCH)

KAUL C. J. AND MEHTA J.

Shrikrishna Shaligram Gupte and others,  
Petitioners v. Municipal Committee, Ujjain,  
Opponent.

Civil Misc. Case No. 27 of 1951, D/-  
27-10-1951.

(a) Municipalities — Gwalior Municipalities Act (Sm. 1993), S. 52 (J) — Entertainment tax and performance tax — (Constitution of India, Arts. 372 and 276 (2) and Sch. VII, List II, Entries 60 and 62).

Gwalior Municipalities Act (1993 Smt.) continued in force under M. B. Regulation of the Government Ordinance (1 of 1950) by S. 4, M. B. Regulation of Government Act. Subsequently it continued in force in territories to which it applied by virtue of Art. 372, Constitution of India.

(Para 7)

Under Entries 60 and 62 of List II of the Seventh Schedule of the Constitution a state Government is authorised to legislate with regard to "taxes on professions, trades, callings and employments and on luxuries including entertainment and amusement" entertainment tax and performance tax in connection with cinema business levied by the Ujjain Municipality fall within these entries.

(Para 8)

According to Art. 276 (1) such a tax would not be invalid on the ground that it related to a tax on income, provided that under cl. (2) the total amount payable in respect of any one person did not exceed Rs. 250/- per annum.

(Para 10)

Consequently the notification of the Ujjain Municipality of 3-1-1950 imposing a performance tax at Rs. 5/- per show was invalid as it exceeded the limits imposed by Art. 276 (2).

(Para 11)

But enhancement of rate of entertainment tax was valid and was not open to any objection. Since Municipal Committee Ujjain could enforce the tax under S. 52, Gwalior Municipal Act, at certain rate before 25-1-1950 there was no valid ground for holding that it could not impose the same tax at a higher rate since the Constitution.

(Para 12)

(b) Municipalities — Gwalior Municipalities Act (1993 Smt.), S. 52(J) — 'Performance.'

Definition of "performance" in M. B. Public Amusement and Entertainment Act does not include cinematograph exhibition and does not affect provisions of S. 52 (j) — (M. B. Public Amusements and Entertainments Act).

(Para 9)

M. B. Rege and K. B. Saksena, for Petitioners; K. A. Chitale, Advocate General, for Opponent.

KAUL C. J.: This is an application made under Art. 226 of the Constitution by six persons

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three of whom are the proprietors and the remaining three partners in six different firms which carry on business of showing cinematograph films for profit within the limits of Ujjain Municipality. It is averred that two taxes imposed recently by Ujjain Municipality are ultra vires of the powers of the Municipal Committee, Ujjain, and the applicants pray that the Committee be restrained by a writ of mandamus from enforcing the orders relating to these taxes.

(2) The material facts which are not disputed are as follows:

Under the law in force in Gwalior State (whereof Ujjain formed part) prior to its integration with Madhya Bharat the Nagar Sabha (Municipal Committee) Ujjain had the power to impose an entertainment tax. This tax could be imposed "on all those public entertainments which are displayed for a fee or on receipt of a payment." Under S. 52, Gwalior Municipalities Act, such a tax could be imposed on "Cinemas". An entertainment tax was levied on all cinema houses under the said Law at the following rates:

(i) For every ticket upto 0.4-0	0 0.6
(ii) " " " from 0.4-0 upto 0.8-0	0 1.0
(iii) " " " from 0.8-0 upto 1.0-0	0 2.0
(iv) " " " above 1.0-0	0 4.0

(3) By an order dated 30-6-1951 issued under the signature of Executive Officer of the Municipality Ujjain purporting to act under an order of the Government conveyed by letter No. 319 of 26-5-1951 the entertainment tax above referred to was enhanced as follows:

1. For every ticket upto 0 4-0	0 0.9
2. " " " from 0.4-0 upto 0.8-0	0 1.6
3. " " " from 0.8-0 upto 1.0-0	0 3.0
4. " " " above 1.0-0	0 6.0

(4) On 4-5-1951 the six firms who are the applicants before us were served with notices by the Nagar Sabha Ujjain intimating the imposition of a performance tax at the rate of Rs. 5/- for each show.

(5) It is contended on behalf of the applicants that both these taxes were ultra vires of the powers of the Municipal Committee. A rule nisi was issued to the Municipal Committee, Ujjain to show cause against the application. By a written reply filed on behalf of the Ujjain Municipality in response to the rule, it was contended "that the enhanced entertainment tax was imposed after full compliance with the formalities of the Law prescribed under the Gwalior Municipalities Act". With regard to the "performance tax", it was urged "that the imposition of a performance tax is also permitted by the provisions of the Constitution. This tax was also imposed in compliance with the formalities of the Law prescribed under the Gwalior Act. The Ujjain Municipality is, however, now advised that the performance tax cannot exceed the limit laid down by Art. 276, Cl. (2) and to that extent the opponent Municipality is ready and willing to grant redress to the petitioners".

(6) I will take up the question relating to what has been referred to in para. (3) of the application as a "performance tax". On 3-1-1950 a notification was issued by the Ujjain Municipal Committee which ran as follows:—

"Ujjain nagar ki sima men pradarshit hone wale khelon per panch rupayya fi khel tax lagayya hai".

(7) Under S. 52, Gwalior Municipalities Act, any Municipal Committee established in the Gwalior



State could with the previous sanction of the Government impose any of the taxes mentioned in that section for the purposes of the said Act. Clause (J) of the Section authorises an imposition of an entertainment tax. This tax could under the Section be imposed on all public entertainments given on receipt of any fee or payment. Among the entertainments mentioned in that clause by way of illustrations we find that there is specific mention of cinemas. It cannot be disputed that the Gwalior Municipalities Act, Samvat 1993, continued in force under the provisions of the Regulation of the Government Ordinance No. 1 promulgated by the Raj Pramukh of Madhya Bharat and later till 25-1-1950 by S. 4 of the Regulation of Government Act. Subsequent to that date it continues in force in the territories to which it applies under the provisions of Art. 372 of the Constitution. It was admitted before us that the previous sanction of the Government had been obtained by the Ujjain Municipal Committee for levying this tax. Thus on the face of it there is nothing which would show that the tax was illegally imposed.

(8) It was contended, however, by the learned counsel for the petitioners that it was not a tax on a "profession" nor one on 'a trade' but a tax on income which could be imposed only by the Parliament and hence it was illegal. I am clear that the argument is without substance. Under entry 60 of List II of the Seventh Schedule of the Constitution of India a State Government is authorised to legislate with regard to "Taxes on professions, trades, callings and employments". Under Entry 62 it can legislate with regard to "Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling". Even though the tax in question be not a tax on profession or trade it is a tax on a calling. "Calling" according to Oxford Dictionary signifies persons 'following a particular business'. This is a tax payable by a person who follows the business of showing cinematograph films for profits. As such it was permissible for the State to legislate with regard to such a tax. This was done by the Gwalior Municipalities Act under which (see S. 52 (j)) such a tax could be imposed on all public entertainments displayed for a fee or on receipt of some payment. The argument that it was a tax on income is met by Art. 276 of the Constitution which lays down that:

"Notwithstanding anything in Art. 246, no Law of the Legislature of the State relating to taxes for the benefit of the State or of a Municipality, District Board, Local Board or other local authority therein in respect of professions, trades, callings or employments shall be invalid on the ground that it relates to tax on income."

(9) Reference was made in the course of argument to the definition of the expression 'performance' found in the Madhya Bharat Public Amusements and Entertainments Act. According to that definition, the expression 'performance' as used in the said Act does not include cinematograph exhibition. It is difficult to follow the relevancy of the definition given in the said Act to the matter before us. The definition of the expression 'performance' as given in that Act is as expressly stated therein for the purposes of that Act and cannot legitimately be referred to in determining the question of the validity of a tax imposed by the Ujjain Municipality levying a sum by way of performance tax on every show within the limits of the said Municipality. That a tax on a cinema show can be imposed under the provisions of S. 52 (j) Gwalior Municipalities Act, can on the language of the section

admit of no doubt. Any reference to the definition of the term 'performance' in any other Act is irrelevant.

(10) Reference has been made earlier to Art. 276 of the Constitution. Clause (2) of the said Article runs as follows:—

"The total amount payable in respect of any one person to the State or to any one Municipality, district Board, local board or other local authority in the State by way of taxes on professions, trades, callings and employments shall not exceed two hundred and fifty rupees per annum..."

(11) It is clear, therefore, that though Art. 276 lays down a tax imposed by a State for the purpose of a Municipality on a calling shall not be invalid on the ground that it relates to a tax on income, every Legislation relating to such a tax cannot ignore the provisions of Cl. (2) of the said Article. There must be something either in the language of such Legislation or in the circumstances or manner of the imposition of the tax which makes it clear that the liability of one person to pay taxes on professions, trades and callings to any one Municipality shall not exceed the sum of rupees two hundred and fifty per annum. It was frankly conceded by the learned Advocate General who appeared for the Ujjain Municipality that the imposition of the said performance tax under consideration was open to this criticism. In the absence of any such restriction as is contemplated by Art. 276, Cl. (2), the Notification under which the tax in question has been imposed makes a person liable to pay sums far exceeding Rs. 250/- per annum. To take a concrete illustration, if any one of the applicants before us displays in his cinema house one or more shows for one hundred days in a year he will be liable to pay Rs. 500/- under the said Notification. That the tax in question was open to this criticism was further admitted in the return filed on behalf of the Ujjain Municipality. I hold therefore that the Notification by which the performance tax in question was imposed invalid.

(12) I will next turn to the other tax the validity of which was challenged by the present petitioners. It was admitted that under the Law in force in Gwalior State prior to its integration with Madhya Bharat the Municipal Committee of Ujjain was authorised to impose a tax on entertainments and that it had imposed a tax on entertainments given in cinema houses at the rates mentioned in para 3 of this judgment. By an order dated 30-6-1951 issued over the signature of the Executive officer of Ujjain Municipality the said entertainment tax was enhanced as stated in para 4 of this judgment. It is contended that the enhancement was illegal. I have found it somewhat difficult to follow the argument advanced on this part of the case. It is not disputed that the Ujjain Municipality had the authority to impose a tax on entertainments under S. 52, Gwalior Municipalities Act. On 25-1-1950 this was an existing Law as defined in Art. 366(10) of the Constitution. All existing Laws have as already stated been continued in force under Art. 372 of the Constitution. Clearly therefore if the Municipal Committee could impose a tax at the rate mentioned in para 3 of this judgment before 25-1-1950. If this was so, there appears to be no valid ground for holding that it could not impose the same tax at a higher rate since the Constitution came into force.

(13) It was faintly argued that the Act (Gwalior Municipalities Act) "could not apply to future taxation after the Constitution came into force". I frankly confess that I am unable



to appreciate the force of this contention. If the said Act was an existing Law on 25-1-1950 and has continued to be in force since, it cannot be contended with any show of reason that though it could validly impose a tax before 26-1-1950 it cannot do so under the same provisions since that date.

(14) Another argument advanced before us in connection with these taxes was that the scheme of S. 52, Gwalior Municipalities Act contemplates delegated Legislation which is not permitted under the Constitution. I am clear that s. 52, Gwalior Municipalities Act, is not an instance of delegated Legislation. It lays down clearly that with the previous sanction of the Government a Municipal Committee can impose an entertainment tax. Thus the legislation to impose a tax was enacted by the proper law making authority. What was left to the Municipality was only the determination of the conditions and the circumstances in which the tax could be imposed. Even this was made subject to the previous approval of the Government. This may be an instance of "conditional legislation" but is not one of delegated legislation. Apart from that it would appear that this was an existing law which has continued in force by virtue of Art. 372 of the Constitution, and its validity cannot be challenged on such a ground as put forward by the learned counsel. I am of opinion, therefore, that the enhancement of the rate of the tax referred to in paras. 2 and 4 of the application is valid and its legality is not open to any objection.

(15) With regard to the performance tax as already stated this tax is not valid inasmuch as it ignores the provisions of Art. 276(2) of the Constitution and I would accordingly direct the Municipal Committee to refrain from levying the said performance tax.

(16) V. M. MEHTA J.: I agree.

A/R.G.D.

Order accordingly.

**A.I.R. 1953 M.B. 147 (Vol. 40, C. N. 51)**

**DIXIT J.**

Girdhar Gopal, Applicant v. State.

Criminal Revn. No. 133 of 1952, D/- 18-12-1952.

**(a) Penal Code (1860), Ss. 354, 342 — Essentials under S. 354.**

It is not the act of outraging the modesty that is made an offence under S. 354, Penal Code. In order to constitute an offence under S. 354, Penal Code there must be an assault or use of criminal force to any woman with the intention or knowledge that the woman's modesty will be outraged. The offence under S. 354, Penal Code can therefore be committed by any man or a woman with the necessary intent or knowledge.

(Para 2)

The act of an accused in confining a girl of 9 years in a room, in making her lie on a bed and then sitting on her and becoming naked is clearly one amounting to use of criminal force with the intention or knowledge that the girl's modesty will be outraged and the accused is rightly convicted under Ss. 354 and 342, Penal Code.

(Para 6)

Anno: Penal Code, S. 354 N. 1; S. 342 N. 1.

**†(b) Penal Code (1860), Ss. 354, 8 — S. 354 does not offend against Art. 14 of the**

**Constitution — (Constitution of India, Art. 14).**

The pronoun "he" used in the expression "that he will thereby outrage her modesty" must be taken under S. 8, Penal Code as importing a male or a female. It is thus clear that under S. 354, Penal Code a man as well as a woman can be held guilty of the offence and be punished for it. The section, therefore, operates equally upon all persons whether males or females and as women are not exempt from any punishment under the section, it does not offend against the provisions of Art. 14 of the Constitution. (Para 2)

That the Penal Code gives no protection to man against "assault or criminal force with intent to outrage his modesty" is really an objection as to the policy of law in not creating a particular offence. It is not an objection as to the infringement of Art. 14 of the Constitution.

(Para 3)

**(c) Constitution of India, Art. 14 — Classification under — (Penal Code (1860), S. 354).**

Article 14 in effect means that every law that the State makes shall operate alike upon all persons and property under the same conditions and circumstances. It does not mean that all persons, property or occupation must be treated alike by the State. Further, a reasonable classification of groups for purposes of legislation is permissible and what is prohibited is discrimination between persons who are included in the group to which the law applies. AIR 1952 SC 123, Rel. on.

If, therefore, the Legislature has in its wisdom thought it fit to treat men differently from women in regard to modesty and to make an assault or use of criminal force with intent to outrage the modesty punishable under S. 354 when committed only with respect to women, the provisions contained in S. 354, Penal Code cannot be condemned as repugnant to Art. 14 of the Constitution. (Para 4) Anno: Penal Code, S. 354 N. 1.

**†(d) Penal Code (1860), S. 354 — Does not violate Art. 15 of the Constitution — (Constitution of India, Art. 15(1)).**

The word 'only' in Art. 15(1) emphasises the fact that the discrimination that is prohibited under the Article is a discrimination based on the ground of sex, or race, etc. alone. If the discrimination is based not merely on any of the grounds stated in Art. 15(1) but also on considerations of propriety, public morals, decency, decorum and rectitude, the Legislation containing such discrimination would not be hit by the provisions of the Article.

(Para 5)

Anno: Penal Code, S. 354 N. 1.

**(e) Penal Code (1860), S. 354 — Sense of modesty — A girl of 9 years asked to remove her clothes — Her refusal to do so and shouting for help shows her sense of modesty to be developed — Jack J.'s opinion in AIR 1933 Cal 142, Dissent.**

(Para 6)

Anno: Penal Code, S. 354 N. 1.

Bhagwandas Gupta, for Applicant; Mungre, Govt. Advocate, for the State.



## CASES CITED:

- (A) ('52) AIR 1952 SC 123: 1952 Cri LJ 305 (SC)  
 (B) ('51) AIR 1951 SC 41: ILR (1951) Hyd 461 (SC)  
 (C) ('52) 1952 Madh B LR 385  
 (D) ('33) AIR 1933 Cal 142: 34 Cri LJ 308

ORDER: In this case the petitioner Gir-dhar Gopal has been convicted by the City Magistrate, Lashker for offences under Ss. 342 and 354, Penal Code and sentenced to six months and one year rigorous imprisonment respectively for each of the offences. The sentences were directed to run concurrently. The Sessions Judge of Gwalior rejected an appeal preferred by the accused against the convictions and sentences. The applicant has now come up in revision to this Court.

(2) Before me, Mr. Bhagwandas Gupta learned counsel for the applicant did not challenge the conviction and sentence of the applicant under S. 342, Penal Code. His contention was that S. 354, Penal Code offended against the provisions of Arts. 14 and 15 of the Constitution of India and that therefore, S. 354 being void, the conviction of the applicant under that section was illegal. The argument of Mr. Gupta is that as the Penal Code does not make the act of assault or use of criminal force to any man with intent "to outrage his modesty" an offence, S. 354, Penal Code contravenes Art. 14 of the Constitution and that in enacting S. 354, Penal Code, the legislature has discriminated in favour of women only on the ground of sex and that therefore, S. 354 offends against Art. 15(1). In my view this argument is unsound and must be rejected. The offence under S. 354 is committed only when a person assaults or uses a criminal force to a woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty. It is not the act of outraging the modesty that is made an offence under this section. In order to constitute an offence under S. 354, Penal Code there must be an assault or use of criminal force to any woman with the intention or knowledge that the woman's modesty will be outraged. The offence under S. 354, Penal Code can be committed by any man or a woman with the necessary intent or knowledge. For, a woman can assault or use criminal force to any other woman as equally and effectively as any man; and the intention or knowledge that the modesty of the woman assaulted or against whom criminal force has been used will be outraged, is not of a kind which a woman on account of inherent differences from man is incapable of having. The pronoun "he" used in the expression "that he will thereby outrage her modesty" must therefore be taken under S. 8, Penal Code as importing a male or a female. It is thus clear that under S. 354, Penal Code a man as well as a woman can be held guilty of the offence of assaulting or using criminal force to any woman with the intention or knowledge that the woman's modesty will be outraged, and be punished for the offence. Section 354, therefore, operates equally upon all persons whether males or females and it cannot be maintained that as women are exempt from any punishment under this section, it offends against the provisions of Art. 14 of the Constitution.

(3) It is true that the act of assault or use of criminal force to any man with the inten-

tion or knowledge of "outraging his modesty" is not made an offence under the Penal Code. Learned counsel for the applicant was, however, unable to say what according to him was the meaning of the expression "outraging the modesty of a man" or whether the expression meant "offending the impudence of man" or dishonouring him. It would however, appear from S. 353 that an assault or use of criminal force to any man by a woman intending thereby to dishonour him otherwise than on grave provocation is punishable. Be that as it may, the objection of the learned counsel for the applicant that the Penal Code gives no protection to man against assault or criminal force with intent to "outrage his modesty" is really an objection as to the policy of law in not creating a particular offence. It is not an objection as to the infringement of Art. 14 of the Constitution. This Article provides that the State shall not deny to any person equality before the law or the equal protection of laws within the territories of India. Article 14 has been construed by the Supreme Court in several cases (See — *Raning Rawat v. State of Saurashtra*, AIR 1952 SC 123 (A); — *Charanjitlal v. Union of India*, AIR 1951 SC 41 (B) and by this Court also in — *Miss Sumitra Devi v. State of Madhya Bharat*, 1952 Madh B LR 385 (C) and in effect it means that every law that the State makes shall operate alike upon all persons, and property under the same conditions and circumstances. It does not mean that all persons, property or occupation must be treated alike by the State. As pointed out by His Lordship Das J., in — *'AIR 1952 SC 123' (A)* :

"While Art. 14 forbids class legislation it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act. What is necessary is that there must be a nexus between the basis of classification and the object of the Act."

(4) From these observations it is clear that a reasonable classification of groups for purposes of legislation is permissible and what is prohibited is discrimination between persons who are included in the group to which the law applies. If, therefore, the Legislature has in its wisdom thought it fit to treat men differently from women in regard to modesty and to make an assault or use of criminal force with intent to outrage the modesty punishable under S. 354 when committed only with respect to women, the provisions contained in S. 354, Penal Code cannot be condemned as repugnant to Art. 14 of the Constitution.

(5) The contention of the learned counsel for the applicant that S. 354 violates the provisions of Art. 15(1) of the Constitution is equally untenable. This Article says that the State shall not discriminate on grounds only of religion, race, caste, sex, place of birth or any of them. The word "only" is important and deserves to be noted. It emphasises the



fact that the discrimination that is prohibited under Art. 15(1) is a discrimination based on the ground of sex, or race, etc. alone. If the discrimination is based not merely on any of the grounds stated in Art. 15(1) but also on considerations of propriety, public morals, decency, decorum and rectitude, the legislation containing such discrimination would not be hit by the provisions of Art. 15(1). It cannot be denied that an assault or criminal force to a woman with intent to outrage her modesty is made punishable under S. 354 not merely because women are women, but because of the factors enumerated above. Our country is not peculiar in making the acts described in S. 354 punishable as an offence. Such acts constitute a penal offence in all other civilised countries. After all civilisation depends on morality. In any country claiming or aspiring to be a civilised country morality and all the incidents of morality are as essential as justice to the citizen and personal liberty. No civilised country whose action is directed towards securing "the greatest good of the greatest number" can allow assaults or criminal force to women with intent to outrage their modesty to go unpunished and permit the position of women to be injuriously affected by chartered libertines. In my opinion, the contention advanced on behalf of the applicant that S. 354 offends Art. 15(1) must be rejected.

(6) As to the facts of the case, I see no reason to differ from these concurrent conclusions arrived at by the Courts below. On the evidence on record it is conclusively established that on the afternoon of 10-2-1951 at about 4-30 p.m., the applicant who is a Pujari of a Mandir caught hold of a young girl named Saroj of about 9 years of age, took her to his house on the pretext of giving "Parshad" to her and then when she was inside he closed the door of the room, made her lie on a bed, put a covering on her and then sat upon her for some time. Later on the applicant became naked and asked Saroj, to remove all her clothes. When the girl shouted and called her brother, who happened to come near the house in search of Saroj, the applicant forcibly closed her mouth. Saroj was then rescued by the neighbours who forcibly opened the door and entered the room. On her return home, Saroj then complained to her mother. Mr. Bhagwandas Gupta urged that as Saroj was a little girl of nine years of age, she could not have developed the sense of modesty of a woman as contemplated by S. 354, Penal Code and further as her mother was not examined, to support her statement that she complained to her mother, it was doubtful whether the applicant had committed any offence at all under S. 354, Penal Code. Learned counsel relied on — 'Soko v. Emperor', AIR 1933 Cal 142 (D). In that case Jack J., felt some doubt as to whether the act of a man putting a finger into the private parts of a girl of five and half years of age, constituted an offence under S. 354, Penal Code. The learned Judge was inclined to think that when the girl had no hesitation in telling her mother exactly what had happened and having regard to her age, it could not be said that she had developed a sense of modesty, Ghose J., who was the other member of the Bench which decided that case did not agree with the view taken by his learned brother that the case did not fall under S. 354, Penal Code. In the

Calcutta case, the accused was ultimately convicted under S. 323, Penal Code and the sentence of six months rigorous imprisonment which had been awarded to him by the trial Magistrate under S. 354, Penal Code was maintained. Having regard to the circumstance that the sentence was maintained, Bose J., did not wish to differ with the conclusion arrived at by Jack J. With all respect to Jack J., I am unable to find myself in agreement with his reasoning. It is unnecessary to consider here whether a little girl of five years of age can be said to have developed a sense of modesty contemplated by S. 354, Penal Code. So far as the present case is concerned, it is clear that when the applicant asked Saroj to remove her clothes, she refused to do so and shouted. It cannot, therefore, be said that she had not developed any sense of modesty. To my mind, the act of the applicant in confining Saroj in a room, in making her lie on a bed and then sitting on her and becoming naked is clearly one amounting to use of criminal force with the intention or knowledge that the girl's modesty will be outraged. The applicant has been rightly convicted under Ss. 354 and 342, Penal Code. The appropriateness of the sentences awarded to him is amply made out.

(7) In the result this revision petition is dismissed.

A/D.R.R.

Revision dismissed.

A.I.R. 1953 M.B. 149 (Vol. 40, C. N. 52)

(GWALIOR BENCH)

DIXIT J.

Cheranjlal, Applicant v. Jabar Chand, Non-applicant.

Criminal Ref. No. 25 of 1952, D/- 9-12-1952.

(a) Criminal P. C. (1898), S. 520 — Scope. AIR 1918 Bom 186 and AIR 1924 All 675 (2), Dissented.

Section 520 means that any Court which has powers of appeal, confirmation, reference or revision in respect of the trial Court can make any substantive order it thinks fit under the section. There is nothing in the section to justify the view that the Court of appeal or revision means a Court to which an appeal or revision lies in a particular case or that the Court of revision means the High Court. AIR 1932 Bom 534 (FB), Foll. (Para 3) Anno: Cr.P.C., S. 520 N. 1, 2a, 3.

(b) Criminal P. C. (1898), S. 520 — Concurrent jurisdiction of Courts.

The jurisdiction of one of the Courts specified in the section to deal with an application under that section is not taken away by the mere fact of the earlier presentation of a petition under the section to another of such Courts. It is only when an application is entertained and decided by either of the Courts that the jurisdiction of the other of them to deal with the matter is lost. AIR 1931 Mad 772(2), Rel. on. (Para 4) Anno: Cr.P.C., S. 520 N. 1 Pt. 13.

(c) Criminal P. C. (1898), S. 438 — Power of Sessions Judge or District Magistrate to refer.



There is no provision in the Code which gives power to the District Magistrate or the Sessions Judge to make a reference to the High Court for obtaining its opinion on a question arising in a case pending before him. The District Magistrate or the Sessions Judge is bound to dispose of all questions of law or fact arising before him and decide the case or appeal himself.

(Para 5)

Anno: Cr. P. C., S. 438 N. 4 Pts. 1 and 2.

Bhagwandas Gupta, for Applicant; Mungre, Govt. Advocate, for the State.

#### CASES CITED:

(A) ('32) AIR 1932 Bom 534: 33 Cri LJ 807 (FB)

(B) ('18) AIR 1918 Bom 186: 42 Bom 664: 19 Cri LJ 597

(C) ('24) AIR 1924 All 675(2): 25 Cri LJ 1168

(D) ('31) AIR 1931 Mad 772(2): 54 Mad 842: 32 Cri LJ 1278

ORDER: This is a reference by the District Magistrate of Shivpuri seeking orders of this Court with regard to the disposal of an application under section 520, Cr. P. C. pending before the District Magistrate. The facts are that the non-applicant Jabar Chand was tried by the Sub-Divisional Magistrate of Shivpuri for an offence of theft of ten bags of Jeera. The learned Sub-Divisional Magistrate while acquitting Jabar Chand ordered the confiscation to the State of the property. The complainant Chiranjil Lal then filed a revision petition under S. 520, Cr. P. C., before the District Magistrate for the delivery of the bags of Jeera to him. While this revision petition was pending before the District Magistrate, Jabar Chand presented a petition under section 520 of the Code to the Sessions Judge of Gwalior for the return of the property to him. The learned Sessions Judge after hearing Jabar Chand and the Public Prosecutor allowed the petition and passed an order directing the return of the bags of Jeera to Jabar Chand or in the alternative the payment to him of the proceeds of the sale if the property had already been sold. The District Magistrate now wants to know the effect the order of the Sessions Judge has on the application under section 520 of the Code pending before the District Magistrate.

(2) Mr. Mungre on behalf of the State contends that in view of the provisions of section 435 (4), the learned Sessions Judge having entertained and decided the application presented to him by Jabar Chand, the District Magistrate has now no jurisdiction to deal with the application filed before him by the complainant Chiranjilal, Mr. Bhagwandas Gupta, learned counsel for Chiranjilal, on the other hand, contended that under section 407 (1) an appeal lies to the District Magistrate from a sentence passed by Second Class Magistrate and that therefore in the present case the District Magistrate's Court being the "Court of Appeal" for the purposes of S. 520 of the Code, he alone had the power to modify, alter or annul the order passed by the Sub-Divisional Magistrate of the Second Class under S. 517 of the Code with regard to the confiscation of the Jeera to the State.

(3) In my opinion, the contention of the learned Government Advocate is well-founded and must be accepted. For the purposes of this reference I do not propose to examine the conflicting decisions of the various High Courts as to the forum to which an application under S. 520 of the Code is to be made or as to the nature

of the jurisdiction exercised by a superior Court under this section. It is, however, sufficient to state that, to me the view taken by a Full Bench of the Bombay High Court in — 'Wal Chand v. Hari Anant', AIR 1932 Bom 534 (A) as to the meaning and scope of section 520 of the Code appears to be correct. In that case it has been held that section 520 means that any Court which has powers of appeal, confirmation, reference or revision in respect of the trial Court, that being the Court subordinate thereto referred to in the section, can make any substantive order it thinks fit in respect of property dealt with by the trial Court under S. 517, 518 or 519 of the Code. It has been further held in that case that if an application is made to the Sessions Court as the Court having powers of revision in respect of the trial Court in regard to orders relating to property made under S. 517, 518 or 519, then the Sessions Court can itself make a proper order and need not refer the matter to the High Court. It seems to me that the narrow interpretation put on S. 520 in the earlier decision of the Bombay High Court, namely — 'In re Khima Rukhad', AIR 1918 Bom 186 (B) and also in—'Debi Ram v. Emperor', AIR 1924 All 675 (2) (C) is not justified by the wording of S. 520 and the existence of sections 423 and 439 in the Code which define the powers of the appellate Court and of the High Court as a Court of revision. I do not see anything in section 520 of the Code to justify the view that the words "Court of appeal", in that section refer only to a Court to which either of the parties to the case could appeal and the Court of revision means the High Court. If the intention of the Legislature had been that the Court to which an appeal or revision lies in the particular case alone should modify, alter or annul the order of the trial Court under S. 517, 518 or 519 then it was unnecessary for the Legislature to insert the provisions of S. 520 in the Code. For, without that section when a party to a criminal case has appealed the appellate Court would have ample power under S. 423 of the Code to pass an appropriate order in respect of property dealt with by the trial Court under S. 517, 518 or 519 and likewise the High Court would have the power under S. 439 of the Code to pass order as to the disposal of property in cases that come up before it in revision. The provisions of S. 520 would thus be rendered superfluous if they are interpreted in a narrow sense.

(4) On the view I have taken of S. 520 it is clear that in the present case, both the Sessions Judge and the District Magistrate as a Court of revision had power under S. 520 to interfere with the orders of the trial Court under section 517 with regard to the confiscation of the Jeera. The question, then, arises whether the learned Sessions Judge was justified in entertaining an application under S. 520 of the Code by the accused, when the complainant had already sought redress under that section from the District Magistrate. I do not think that in the face of the clear provisions of cl. (4) of S. 435, there can be any doubt on the point. Under S. 435, an applicant may go for redress either to the District Magistrate or to the Sessions Judge, but under cl. (4) of the section when an application has been made either to the Sessions Judge or to the District Magistrate, no further application can be entertained by the other of them. It must, however, be noted that on general principle, the jurisdiction of one of the Courts of concurrent jurisdiction to deal with the matter exists so long as the other Court of co-ordinate



power has not actually exercised jurisdiction in the matter and dealt with it. Therefore, the jurisdiction of the Sessions Judge to deal with an application under S. 520 is not taken away by the mere fact of the earlier presentation of a petition under S. 520 of the Code to the District Magistrate. It is only when an application is entertained and decided either by the District Magistrate or the Sessions Judge that the jurisdiction of the other of them to deal with the matter is lost. This view is supported by the decision of the Madras High Court in — 'Appachi Goundan v. Emperor', AIR 1931 Mad 772 (2) (D). I am, therefore, inclined to think that the learned District Magistrate can now only reject the petition filed before him by the complainant. The question whether the order passed by the Sessions Judge is correct on merits does not arise for consideration in this reference. If the complainant and the State are in any way aggrieved by that order, they are at liberty to move this Court by way of appropriate proceedings.

(5) Before concluding I must observe that the reference made by the learned District Magistrate is really not warranted by any provision of the Code. No section in the Code gives power to the District Magistrate to make a reference to this Court for obtaining its opinion on a question arising in a case pending before the District Magistrate. The District Magistrate or the Sessions Judge is bound to dispose of all questions of law or fact arising before him and decide the case or appeal himself. I have no doubt, expressed an opinion on the question of the power and jurisdiction of the Sessions Judge to dispose of the application presented to him under S. 520 of the Code by the accused. But this I have done because of the special circumstances of the case and not because the District Magistrate is entitled to obtain an opinion of this Court in a case pending before him. With these observations this reference is returned to the District Magistrate without any orders from this Court as to what he should do in the petition pending before him.

B/G.M.J.

Reference answered.

**A.I.R. 1953 M.B. 151 (Vol. 40, C. N. 53)**  
**(INDORE BENCH)**

**KAUL C. J. AND CHATURVEDI J.**

**Mahadeo Ganesh and another, Appellants v. Sadashiv Khanderao and others, Respondents.**

**Second Appeal No. 131 of 1949, D/- 14-7-1950.**

**(a) Civil P.C. (1908), Ss. 105 and 11 — Error or Irregularity.**

Section 105 applies where there is any error or irregularity affecting the decision of the case — Decision relating to court-fees, even though wrong is not an error or irregularity affecting decision of the case — Such a decision can be challenged in second appeal even though no objection was taken to it by way of taking ground in first appeal against the decision of the trial Court after remand — In such a case, no question of 'res judicata' also arises.

(Para 4)

Anno: Civil P. C., S. 105 N. 5 S. 11 N. 2.

**(b) Court-fees Act (1870), S. 7(IV)(b), Sch. II, Art. 17 (VI) — Expression "to enforce the right to share in the property", imply that**

plaintiff has been excluded from enjoyment of common property — Clause does not apply to a suit for partition by co-owner who has not been excluded from enjoyment of common property — Such a suit comes under clause (VI) of Art. 17 of Schedule II corresponding to Art. 11 (VI) of Indore Court-fees Act — Art. 11(VI) of the Indore Act makes no distinction between an appeal filed by plaintiff or by the defendant — Court-fee of Rs. 15 on memorandum of appeal, held sufficient — Under Art. 11 of Indore Act, Court-fee to be paid by defendant in appeal from decree in partition suit depends on amount of court-fee paid by plaintiff in the suit — (Indore Court-fees Act, Art. 11(VI)). AIR Commentary on Court-fees Act, S. 7(iv)(b) Note 2, Ref. (Para 5)

Anno: Court-fees Act, S. 7(iv)(b) N. 2; Sch. II, Art. 17(VI) N. 10.

V. R. Newaskar, for Appellants; Bharucha (for No. 1); Phadnis (for Nos. 1 and 2) and Kulkarni (for No. 3), for Respondents.

**CASES CITED:**

(A) ('43) AIR 1943 Pat 433:

217 Ind Cas 49

(B) ('32) AIR 1932 Cal 353: 137 Ind Cas 519

(C) ('34) AIR 1934 Lah 563:

15 Lah 531 (FB)

(D) ('27) AIR 1927 Nag 248: 101 Ind Cas 770

(E) ('38) AIR 1938 Rang 76: 1937 Rang LR 447

(F) ('42) AIR 1942 Mad 103(1):

197 Ind Cas 738

(G) ('35) AIR 1935 All 292:

57 All 787

(H) ('12) 16 Ind Cas 771: 6 Sind LR 74 Note

**KAUL C. J.:** A preliminary objection has been taken to the hearing of this appeal which raises the question what is the proper court-fees payable on the memorandum of grounds of appeal in this case. The facts in so far as they are material for this purpose are as follows:

(2) A suit for partition was brought by Keshav and his son Malhar against Keshav's brother Sadashiv, his son Dattatraya and Keshav's mother Laxmibai for partition and separate possession of his share in the joint family property. Subsequently, Ramchandra and Anant sons of Vishwanath and Mahadeo and Rangnath sons of Ganpat Rao who were first cousins of Keshav and Sadashiv applied that they were also members of a joint family with Keshav & Sadashiv were entitled to a definite share in the joint family property. These applications were not opposed by Keshav. They were however contested by Sadashiv and the other defendants. Ultimately the applications were allowed and the four applicants above named were impleaded as defendants. Sadashiv admitted that he and Keshav formed a joint family. It was however pleaded on his behalf that Ramchandra, Anant, Mahadeo and Rangnath were not joint with them and had no interest in the joint family property. The learned District Judge of Garoth held on the evidence led before him that Ramchandra and Anant were joint with Keshav and Sadashiv but that Mahadeo and Rangnath were separate. He passed a preliminary decree for partition. Two appeals were preferred against his decision one by Mahadeo and Rangnath and the other by Sadashiv, Dattatraya and Laxmibai defendants Nos. 1 to 3. Ramchandra filed cross-objections challenging the correctness of the finding as regards the extent of his share. These matters came up for hearing before



Rege J. and the question was raised before him what was the proper court-fee payable on their memorandums of grounds of appeal by Mahadeo and Rangnath. They had paid a court-fee of Rs. 15/- only under Article 11 of the Indore Court-fees Act. The learned Judge took the view that these appellants were liable to pay 'ad valorem' court-fee on the value of their share. They were called upon to fix a value on the share claimed by them and pay court-fee according to the figure at which the share was valued. The appellants valued their share at Rs. 6000/- and paid the requisite court-fee. Having heard the parties Mr. Justice Rege was of opinion that proper issues had not been framed in the trial court and all the questions that should have been considered were not decided. He accordingly framed fresh issues and remanded the case to the trial Court for decision in the light of the observations made by him.

The learned District Judge thereupon heard the case afresh. He held on the evidence which was before him that Ganpat father of Mahadeo and Rangnath was separate from his brother Khanderao father of Keshav and Sadashiv and accordingly had no interest in the joint family property. As regards Ramchandra and Anant, his finding was that though they formed a joint family with Keshav and Sadashiv all the property in suit was self-acquired property of Khanderao in which Ramchandra and Anant could not claim a share. He however held that Keshav was entitled to a third share in the property in suit and passed a preliminary decree for partition. Dissatisfied with this decision Mahadeo and Rangnath, and Ramchandra and Anant have preferred these two appeals.

(3) An objection was raised by Mr. Bharucha learned counsel for Sadashiv and Mr. Kulkarni who appears for Laxmibai that Mahadeo and Rangnath were liable to pay 'ad valorem' court-fee on the memorandum of their grounds of appeal. It may be mentioned that though in compliance with the order of Rege J. Mahadeo and Rangnath had paid 'ad valorem' court-fee in their appeal before the case was remanded the present appeal was filed by them on a stamped paper of Rs. 15/- only. Mr. Newaskar learned counsel for the appellants challenges the correctness of the view taken by Rege J. and contends that irrespective of whether the case is covered by Art. 11 of the Indore Court-fees Act or S. 4 of that Act he is liable to pay a court-fee of Rs. 15/- only. The two learned counsel Mr. Bharucha and Mr. Kulkarni who raised the preliminary objection put forward different grounds in support of their contention. Mr. Bharucha contended that the appellants having accepted the decision of Rege J. and having failed to challenge it when he filed his first appeal after remand was bound by that decision. He argued that the matter was 'res judicata'. Mr. Kulkarni, on the other hand, contended that inasmuch as the appellants were not in possession of any part of the joint family property and their claim was in effect one not only for a declaration of their right but also for possession of a share in the joint family property they must pay 'ad valorem' court-fee according to the figure at which they put their share. We will deal with each of these contentions in order.

(4) Reference was made by Mr. Bharucha to S. 105, Civil P. C. He argued that having failed to challenge the decision of Rege J. on

the question of court-fee by incorporating a ground to that effect in the memorandum of their grounds of appeal when they challenged the decision of the trial court after remand they could not challenge it in this appeal which is filed against the decision of a single Judge of this Court. It may be mentioned incidentally that after the decision of the case by the trial Judge subsequent to remand the appeal came up before Mehta J. who affirmed the decision of the trial court. According to Mr. Bharucha's contention it was open to Mehta J. to set aside the decision of Rege J. on the question of court-fee. No satisfactory answer was however forthcoming when I put it to the learned counsel whether if the appeal which was heard by Mehta J. had come up for hearing before Rege J. he himself could be free to set aside his previous decision given before remand. I am clear that no question of 'res judicata' arises in the present case nor has S. 105, Civil P. C. has any application to it. Apart from other grounds section 105 is inapplicable because it applies only to cases where there is any error or irregularity "affecting the decision of the case". A question relating to court-fees is, we are clear, not an error or irregularity of this description.

(5) Turning now to the ground urged by Mr. Kulkarni we may point out that under Art. 11 of the Indore Court-fees Act the amount of court-fee payable by a defendant who is a party to the suit for partition and files an appeal against the decision given against him, would depend entirely on the amount of the court-fee that was paid by the plaintiff. Article 11 opens with these words:

"Plaint or memorandum of appeal in each of the following suits."

It is cl. VI of this Article which according to Mr. Newaskar applies to this case. It runs:

"Every other suit where it is not possible to estimate at a money-value(?) the subject-matter in dispute and which is not otherwise provided for by this Act."

As observed by Chitaley and Rao in their Commentary on the Court-fees Act 1944, Edition page 128 (Notes on section 7(IV) (b) note (2), it is now generally settled in most of the High Courts that this clause (clause 7 (IV)(b) does not apply to a suit for partition by a co-owner who has not been excluded from the enjoyment of the common property. This view, the commentators add is based on the ground that the words in the clause "to enforce the right to share in the property" imply that the plaintiff has been excluded from the enjoyment of such property and are inapplicable to a case in which he has not been so excluded. Reference in support of this view is made to a number of cases including — 'Kameshwar Singh v. Rajbansi Singh', AIR 1943 Pat 433(438) (A); — 'In re Nandlal', AIR 1932 Cal 353 (355) (B); — 'Asa Ram v. Jagan Nath', AIR 1934 Lah 563 (573) (FB) (C) and — 'Bhagwan Appa Wani v. Shivalla Wani', AIR 1927 Nag 248 (249) (D). See also in — 'Ma Ma Nyun v. Maung Mva', AIR 1938 Rang 76 (78) (E). It has been held by Madras and Allahabad High Courts as well as in Sind that such a suit comes under cl. (VI) of Art. 17 of the II schedule which is the same as article 11(VI) of the Indore Court-fees Act. See — 'Mallayya v. Jagannadhamma', AIR 1942 Mad 103 (1) (F); — 'Narain Mohan Dev v. Mt. Krishna Ballabhi Devi', AIR 1935 All 292-293 (G) and — 'Haji Yusuf v. Ghulam Hussain Kassim', 16 Ind Cas



771 (772) (Sind) (H). We respectfully agree with the view taken in these decisions as to the applicability of Art. 17 of II schedule to such cases. In the case before us admittedly Keshav was in joint possession of the family property with Sadashiv. In any case, he had not been excluded from joint possession and accordingly the suit was rightly filed on a plaint whereon a court-fee of Rs. 15/- was paid.

(6) A reference to the opening words of Art. 11 of Indore Court-fees Act will show that the article draws no distinction between an appeal filed by a plaintiff or that filed by a defendant when it arises out of a suit covered by that article. The Indore Court-fees Act is a fiscal statute and must be construed strictly in favour of the citizen. In the present case, the plaintiff was admittedly in possession of the joint family property with another coparcener. Mahadeo and Rangnath were impleaded as defendants. Even though they were not in possession of any portion of the family property an appeal filed by them would be clearly covered by this article. We hold therefore that the court-fee of Rs. 15/- paid on their memorandum of grounds of appeal by Mahadeo and Rangnath is sufficient. The preliminary objection is overruled.

(7) B. K. CHATURVEDI J.: I agree.  
B/R.G.D. Preliminary objection overruled.

**A.I.R. 1953 M.B. 153 (Vol. 40, C. N. 54)**  
**(INDORE BENCH)**

MEHTA J.

Prakash, Applicant v. State of Madhya Bharat.

Criminal Misc. Appln. No. 25 of 1951, D/- 24-3-1951.

(a) Public Safety — Preventive Detention Act (1950), S. 7 — That the detenu had eloped with a girl and married her would not endanger public peace — Ground is outside scope of Act.  
(Para 2)

(b) Public Safety — Preventive Detention Act (1950), S. 7 — Some of grounds for detention outside scope of Act — Whole order is bad. AIR 1948 Bom 334 (FB) and AIR 1943 FC 1, Relied on.  
(Para 2)

(c) Public Safety — Preventive Detention Act (1950), S. 7 — Merely stating that detenu belonged to communist party which is illegal and carried on subversive activities without giving any particulars of the nature of activities indulged in by detenu, is vague and is not enough — Nature of activities to enable detenu to make effective representation should be given.  
(Para 3)

(d) Public Safety — Preventive Detention Act (1950), S. 7 — To take part in procession taken out by socialist to protest against cut in rations, is not such prejudicial or subversive activity as would endanger peace of city.  
(Para 4)

Homi Daji, for Applicant; P. R. Sharma, Govt. Advocate, for the State.

#### CASES CITED:

(A) ('48) AIR 1948 Bom 334: 49 Cri LJ 465 (FB)

(B) ('43) AIR 1943 FC 1: 44 Cri LJ 558 (FC)

ORDER: This is an application by one Prakash Sarkar under S. 491, Criminal P. C. Prakash was arrested by Indore Police and detained for two months from 16-2-51 under the orders of the District Magistrate District Indore. He has been detained under S. 3 (1)(a), sub-clause (ii) of the Preventive Detention Act No. IV of 1950. On 26-2-1951 the grounds were supplied to the detenu as required by S. 7 of the said Act. The detenu contended that he is a peaceful citizen and that none of his activities was such as to endanger public tranquillity of the City of Indore. The allegations contained in the grounds are false, vague and extraneous for the purposes of the Act. The grounds did not satisfy the requirements of S. 7, Preventive Detention Act, and hence the applicant's detention is illegal.

(2) It will be necessary to examine minutely the grounds under S. 7, Preventive Detention Act, under which the detenu is kept in detention. In my opinion, the ground No. 5 that the detenu eloped with a girl named Kamala daughter of Chunnilal Koshi, in 1950 and created sensation is absolutely outside the scope of the Preventive Detention Act. The mere fact that the detenu took away Kamala and then married her as stated by the detenu in his affidavit would not endanger public tranquillity of the City of Indore.

So also ground No. 9 that on 6-2-1951 the detenu with Lagu and others and the Socialist Flag in hand staged a demonstration against 25 per cent. cut in ration with a view to create disaffection amongst the labourers, is not at all a ground under S. 7 which could induce the authority to detain a person. In — 'Rajdhar Kalu Patil In re', AIR 1948 Bom 334 (FB) (A), it was held that if a reason is given for the detention of a person which is not within the scope and ambit of the Act conferring power upon the Government to detain then the whole order is vitiated notwithstanding the fact that the other reasons given are good because something may have operated upon the mind of the detaining authority which is foreign and extraneous for the purpose of the Act. This ruling is based on the ruling of the Federal Court reported in — 'Keshav Talpade v. Emperor', AIR 1943 FC 1 (B), wherein Sir Morris Gwyer observed

"if a detaining authority gives four reasons for detaining a man without distinguishing them and any of the 2 or 3 reasons are held to be bad, it can never be certain to what extent the bad reasons operated on the mind of the authority and whether the detention order would have been made at all if only 1 or 2 good reasons had been before him."

(3) Ground No. 2 states that the detenu is a member of the Communist Party which is an illegal body. It further states that the activities of the detenu have all along been subversive and because of such prejudicial and illegal activities, the peace of Indore City is in danger and to prevent the detenu from indulging in any of the activities prejudicial to the public tranquillity it is necessary to detain him under the Preventive Detention Act. Now it will appear from the grounds quoted above that no particulars have been given against the petitioner except the bare statement that he is a member of the Communist Party which is an illegal body. There is absolutely no reference to the nature of activities indulged in by the petitioner apart from the membership of the



Communist Party. There is no specification as to what activities have been undertaken by the detenu in pursuance of his being a member of the Communist Party. No particulars have been given of the nature of the activities above indicated. Mere vague and general statement to the effect that the activities are prejudicial and illegal is not enough. The nature of the activities must be indicated in the grounds furnished and some particulars should be given. There is nothing to show that the detenu indulged in activities which were subversive of the public safety and the maintenance of public order after the Communist Party was declared illegal.

(4) In my opinion, the crucial point is that the nature of the activities for which the person has been detained must be specified in the grounds under S. 7 to enable the detenu to make an effective representation. The Provincial Government or the District Magistrate must indicate the nature of the activities and give particulars thereof. In the absence of any indication of the nature of the activities and particulars thereof, the grounds must be held to be no grounds at all. In my opinion, to carry on a propaganda for the removal of 25 per cent. cut in the ration would not amount to such prejudicial or subversive activity as would endanger public tranquillity of the City of Indore. There is no objection to criticise or even to demonstrate against the food policy of the Government and no man can be detained merely because he carries on a propaganda against 25 per cent. cut in the ration. On the whole I am satisfied that some of the grounds supplied to the detenu for his detention in this case are outside the scope and ambit of the Preventive Detention Act and some grounds are vague and indefinite generalisations.

(5) I, therefore, direct that the detenu be released forthwith and set at liberty.

B/R.G.D.

Application allowed.

**A.I.R. 1953 M.B. 154 (Vol. 40, C. N. 55)**

**(GWALIOR BENCH)**

**DIXIT J.**

Ram Swarup, Applicant v. Ram Prasad, Respondent.

Civil Revn. No. 116 of 1951, D/- 10-8-1951.

**Civil P. C. (1908), Ss. 94, 151 and O. 39 Rr. 1, 2 — Power to grant temporary injunction under inherent powers.**

Reading S. 94 and O. 39 together, it follows that the power of a Court to grant a temporary injunction is limited to one prescribed by Rr. 1 and 2 of O. 39. In a matter which is specifically dealt with by O. 39 there cannot be implied in the Court, outside the limits of O. 39 Rr. 1 and 2, general and wider discretion to grant temporary injunctions under Ss. 94 and 151 of the Code in circumstances not covered by O. 39. AIR 1938 Mad 190, Rel. on.

(Para 4)

Anno: C.P.C., S. 94 N. 2, 5; S. 151 N. 2; O. 39 R. 1 N. 3, 22.

Bhagwandas Gupta, for Applicant; Kak, for Respondent.

**CASES CITED:**

(A) ('23) AIR 1923 Lah 144(2): 73 Ind Cas 909

(B) ('26) AIR 1926 Mad 574: 95 Ind Cas 196

(C) ('22) AIR 1922 Bom 385(2): 46 Bom 939

(D) ('38) AIR 1938 Mad 190: 176 Ind Cas 688

**ORDER:** This is a petition by the defendant in the suit to revise the order of the Additional District Judge Gwalior refusing to grant the temporary injunction prayed for to the applicant.

(2) The facts of the case are that the plaintiff-non-applicant has instituted a suit in the Court of District Judge Gwalior against the applicant for a partition of joint family property. The defendant is said to be in possession of a joint family Hosiery Factory known as the Trilok Hosiery. Some time after the institution of the suit the defendant made a report to the Police that the plaintiff had stolen yarn belonging to the factory. Criminal proceedings were then instituted in respect of the alleged theft. They resulted in the discharge of the plaintiff who was the accused in those proceedings. During the investigation, the police seized some yarn from Ram Prasad, the plaintiff. As regards this yarn, it was ultimately ordered on 11-5-51 by this Court in Criminal Revision No. 43 of 1951 that the yarn be returned to Ram Prasad from whose possession it was taken. On 12-5-1951, the applicant Ram Swarup presented an application to the lower Court praying that the Court should issue an order of injunction under S. 151 of the Civil P. C. prohibiting the plaintiff Ram Prasad from taking possession of the yarn which was in the custody of the City Magistrate Lashkar and also prayed that the yarn be made over to the applicant. The learned District Judge rejected the application for the grant of injunction holding that the Court had no power under S. 151 to grant injunction and that, therefore, the petitioner's application for the grant of injunction was incompetent.

(3) Mr. Bhagwandas Gupta for the applicant urged before me that even if O. 39 Rr. 1 and 2 do not apply to the facts of this case, there is an inherent power in the Court to issue an injunction if it is satisfied that the applicant has no other remedy and that if injunction prayed for is not issued, the applicant would suffer an irreparable injury.

(4) I am unable to accede to the arguments of the learned counsel for the petitioner. The application for the issue of an interim injunction was made under S. 151, Civil P. C. Obviously, O. 39 Rr. 1 and 2 have no application to the facts of the case, nor was it contended before me that it had any application. In my opinion, the power of subordinate Courts to issue injunctions has been expressly stated in O. 39 and S. 151 of the Code, cannot be invoked to add to the powers conferred by O. 39. It is true that it has been ruled in some decisions that apart from the powers under O. 39 Rr. 1 and 2, the Court has power to issue an injunction under S. 151. — 'Kanshi Ram v. Sharaf Din', AIR 1923 Lah 144 (2) (A); — 'Adaikkala Thevan v. Imperial Bank, Madura Branch', AIR 1926 Mad 574 (B). A different view was taken in — 'Nasarvanji Cawasji v. Shahajadi Begam', AIR 1922 Bom 385 (2) (C). In regard to the cases which hold that O. 39 is not exhaustive of the Court powers to grant to a temporary injunction, it was observed by Varadachariar J. in — 'Murugesu Mudali v. Angamuthu Mudaliar', AIR 1938 Mad 190 (D), that those cases do not give due weight to the words "if it is so prescribed" occurring in the opening paragraph of



S. 94 of the Code. With due respect I find myself in complete accord with Varadachariar J. The word "prescribed" in S. 94 means 'prescribed by the rules contained in 1st Schedule of the Code'. This is clear from the definition of the words "prescribed" and "Rules" given in S. 2 of the Code. Reading, therefore S. 94 and O. 39 together, it follows that the power of a Court to grant a temporary injunction is limited to one prescribed by Rr. 1 and 2 of O. 39. I think it is impossible to hold that in a matter which is specifically dealt with by O. 39, there can be implied in the Court outside the limits of O. 39 Rr. 1 and 2 a general and wider discretion to grant temporary injunctions under Ss. 94 and 151 of the Code in circumstances not covered by O. 39. I do not, however, propose to discuss the question further, because even assuming for the sake of arguments that the Court has power under S. 151 to grant temporary injunctions, there is no justification in this case to exercise that power. The yarn of which the plaintiff is entitled to retain possession under the order of this Court in criminal Petition No. 43 of 1951 was in the plaintiff's possession on 18-1-48 when the criminal proceedings were instituted against him in respect of the theft of yarn. On 27-4-48, the learned District Judge passed an order prohibiting either party from interfering with the possession of the properties held by the other party; the applicant is, therefore, clearly not entitled to say that the yarn which was not proved to be in his possession prior to 27-4-48 and 18-1-48 but which was in possession of the plaintiff-non-applicant, should now be made over to him. No authority has been cited to me to show that the retention by the plaintiff of the yarn under the orders of this Court and consistent with the order dated 27-4-48 of the trial Court would amount to committing an irreparable injury to the petitioner. Learned counsel for the petitioner suggested that if the order of injunction is not given, the plaintiff would be encouraged to disturb the possession of the applicant as regards other property and that the petitioner would not be able to get yarn for the factory from the Controller. I am not impressed with this argument which is hardly relevant to the question of the grant of an injunction in respect of the possession of the yarn. If the plaintiff disturbs the applicant's possession of other property, he is at liberty to complain to the Court that the plaintiff be punished for disobedience of the order made on 27-4-48.

(5) For the above reasons, I think the learned Additional District Judge was right in refusing to grant the temporary injunction prayed for to the applicant.

(6) In the result this revision petition is dismissed with costs.

B/D.H.

Revision dismissed.

**A.I.R. 1953 M.B. 155 (Vol. 40, C. N. 56)**

**(GWALIOR BENCH)**

**DIXIT AND CHATURVEDI JJ.**

**Shrilal, Appellant v. State.**

**Criminal Appeal No. 18 of 1952, D/- 14-11-1952.**

**(a) Criminal P. C. (1898), Ss. 236, 237 and 238 — Principal offence and abetment thereof.**

It is not permissible for a Court to find accused person guilty of abetment of an offence, when he is charged only with the substantive offence. *Cri. Appeal No. 11 of 1951 (Madh-B), Rel. on.* (Paras 3, 4)

Hence, where the accused is charged with murder but is convicted of abetment of murder the conviction must be quashed when the accused is prejudiced. (Para 4) *Anno: Cr. P. C., S. 236 N. 8 Pts. 1, 2.*

**(b) Penal Code (1860), S. 107 — Abetment, what constitutes.**

Under S. 107, I. P. C. it is the instigation to the commission of the act itself which constitutes the offence that is regarded as abetment. To ask a person as a mere threat to fire a gun without intending that he should really fire it, is not to instigate him to fire the gun. The threat would become instigation only if it is found that in the event of the threat having no effect, the gun should in fact be fired. (Para 5) *Anno: Penal Code, S. 107 N. 1, 2.*

*J. P. Gupta, amicus curiae; Mungre Govt. Advocate, for the State.*

**CASES CITED:**

- (A) ('51) *Cri. Appeal No. 11 of 1951 (Madh-B)*
- (B) ('52) *AIR 1952 Madh-B 17: 1952*  
*Cri LJ 246*

**DIXIT J.:** The appellant Shri Lal was tried by the Sessions Judge of Morena for offences under Ss. 114, 380, 457 and 302, I. P. C. At the end of the trial, the learned Sessions Judge found him guilty under S. 302 read with S. 109, I. P. C. and sentenced him to six years rigorous imprisonment. The accused has now preferred this appeal from Jail against the conviction and sentence. Mr. J. P. Gupta volunteered to appear on behalf of the appellant and we are indebted to him for helping us in the disposal of this appeal.

(2) The prosecution story, briefly stated, was that on the evening of 22-12-47 at about 7 p.m. the appellant Shrilal, one Hukum Singh & some other seven or eight persons with a view to abduct one Mst. Patha, came to a garden in Morena known as 'Madho Prashad ka garden' where Mst. Patha and the complainant Shriya were staying. It was alleged by the prosecution that Mst. Patha was living with Shriya as his mistress and that Hukum Singh wanted her to live with him. On seeing Shri Lal, Hukum Singh and his companion and hearing their commotion, Mst. Patha closed the door of her room. Thereupon, it is alleged that Hukum Singh asked Mst. Patha to open the door and come out; and that when she did not come out the appellant Shri Lal asked Hukum Singh to fire a gun at her. Accordingly Hukum Singh fired the gun he was carrying through a window of the room and injured Mst. Patha. She died immediately afterwards. In the first information report, which was lodged by Shriya soon after the occurrence, Shri Lal, Lal and Hukum Singh were named as the persons responsible for the crime. According to the prosecution, the appellant was absconding for a long time after the alleged occurrence and the other accused persons Lal and Hukum Singh are still in hiding. The appellant denied his complicity in the crime. He pleaded alibi and also said that he had been falsely implicated on account of enmity.



(3) After hearing the learned counsel for the appellant and the learned Government Advocate, I think the conviction of the appellant must be quashed on the short ground that the learned Sessions Judge was not justified in convicting the appellant of abetment of the offence of murder, on a charge of committing the offence of murder itself. It has already been pointed out by a Division Bench of this Court in — 'State v. Gauri Shanker', Cri. Appl. No. 11 of 1951 (Madh-B) (A), that it is not permissible for a Court to find the accused person guilty of abetment of an offence, when he is charged only with substantive offence. In that case, the Division Bench approving the decision of a Single Bench in — 'Narvir Chand v. the State', AIR 1952 Madh B 17 (B), observed that:

"The ingredients that must be proved for the abetment of an offence are quite different from those required to establish the substantive offence. A charge for the substantive offence as such gives no intimation of a trial to be held for abetment. When a person is accused of a substantive offence, he may not be conscious that he will have to meet an imputation of collateral circumstances constituting the abetment of the substantive offence itself. Again having regard to the omission of any reference to an abetment of an offence in S. 238 (2) (A), Criminal P. C., it cannot be held that an abetment of an offence is a minor offence within the meaning of S. 237, Criminal P. C."

(4) The learned Govt. Advocate sought to distinguish the above case by saying that in the present case the charge framed against the accused distinctly mentioned the fact that he had instigated Hukm Singh to fire the gun by saying 'Kya dekhata hai lage salee ke banduk' and that the accused was also asked to explain in his examination under S. 342 whether he did or did not utter these words. The distinction drawn by the learned Government Advocate is, in my view, not tenable. From what has been said in the cases referred to above of Narvir Chandra and Gauri Shankar, it is clear that the charge framed on the accused must give him an intimation of the fact that on the allegations stated therein he has to meet a charge of the abetment of the offence and not of the substantive offence itself. The accused clearly does not get any notice of the fact that he has to meet a charge of abetment when the facts alleged against him are said to be constituting the substantive offence itself and when the accused is examined as regards those facts in relation to substantive offence, the important point to note is that unless the accused knows precisely the charge he has to meet, he cannot lead his defence properly. It is obvious that if in the present case the appellant had been charged with the abetment of the offence of murder, the whole trend of the cross-examination of the prosecution witnesses would have been different and the accused would have concentrated all his efforts in establishing the fact that he did not utter the words attributed to him. As it is, in the mass of the details of the main occurrence deposed to by the various prosecution witnesses, the essential fact of the appellant having instigated Hukm Singh to fire a gun by uttering some words has not been brought out with clarity or precision either by the prosecution or by the defence. It cannot, therefore, be denied that in finding the appellant guilty of the abetment of murder on a

charge of the substantive offence itself he has not been prejudiced. The conviction of the appellant must therefore be quashed.

(5) There appears to me no sufficient ground for ordering a retrial of the appellant. He has been in custody for over two years. The evidence on record as to whether the appellant Shri Lal said anything before the gun was fired, and if he did, as to what exactly he said and with what intention, is by no means clear and unassailable. Again, the learned Sessions Judge himself has observed at one place in his judgment that it is possible that when the appellant asked Hukm Singh to fire the gun, he really intended to give a threat to Mst. Patha so that on hearing his words she should open the door, and that it was not his intention that Hukm Singh should actually fire the gun. If this is the conclusion to which the learned Sessions Judge has arrived, it is difficult to understand how he has found the appellant guilty of the offence of abetment by instigation. Under S. 107, I. P. C., it is the instigation to the commission of the act itself which constitutes the offence, that is regarded as abetment. To ask a person as a mere threat to fire a gun without intending that he should really fire it, is not to instigate him to fire the gun. The threat would become instigation only if it is found that in the event of the threat having no effect the gun should in fact be fired. But this is not the conclusion of the learned Sessions Judge.

(6) For all these reasons, I would quash the conviction and the sentence imposed on the appellant and discharge him. He be set at liberty forthwith.

(7) CHATURVEDI J.: I agree.

B/K.S.

Conviction quashed.

**A.I.R. 1953 M.B. 156 (Vol. 40, C. N. 57)**

**(INDORE BENCH)**

**KAUL C. J.**

Rahim Poonaji, Applicant v. Abdul Rahim and another, Opponents.

Criminal Revn. Nos. 122 and 123 of 1950, D/- 16-10-1951.

**Criminal P. C. (1898), Ss. 435 and 436 — Which Court can revise — Offence committed in railway area.**

The jurisdiction to entertain a revision application by a Sessions Judge is determined by reference to the situation of the Court by which the order sought to be revised is passed and not the place of offence. (Para 4)

Anno: Cr. P. C., S. 435 N. 9; S. 436 N. 4.

S. R. Vyas, for Applicant; P. R. Sharma, Govt. Advocate, for the State.

**ORDER:** These two revision applications have been filed by Abdul Rahim. He does not know to which Court he is to go to seek redress. He has gone to two Courts — the Sessions Judge Court, Ujjain and the Sessions Judge Court, Indore — and both of them have held that the matter agitated by Abdul Rahim could not be taken cognizance of by them hence the petitioner comes to this Court. He has filed an application in revision against the order of



each Sessions Judge. Application No. 122 of 1950 is against the order of the learned Sessions Judge of Ujjain and Application No. 123 of 1950 is against the order of the Additional Sessions Judge, Indore.

(2) The material facts are shortly stated: Abdul Rahim who lives within the precincts of Ujjain Railway Station filed a complaint against his alleged wife Jumrath and Abdul Rahiman for offences under Ss. 497 and 498, I. P. C. in the Court of the Railway Magistrate Mhow. There are two Railway Magistrates for the whole of Madhya Bharat. One of them has his head quarters at Mhow and the other at Lashkar. All the Railway areas within the State are divided into two circles. The Railway Magistrate at Mhow exercising jurisdiction over one circle and the Railway Magistrate, Lashkar over the other. The Railway area Ujjain is within the circle of Railway Magistrate Mhow. The learned Magistrate discharged the accused under S. 253 (1), Criminal P. C. Dissatisfied with this order the complainant filed a revision application before the Sessions Judge of Ujjain. The learned Judge took the view that inasmuch as the head quarters of the Railway Magistrate Mhow was within the Sessions Division Indore an application for revision of an order passed by that Court can be entertained only by the Sessions Judge Indore. He accordingly refused to entertain the application. When Abdul Rahim approached the Sessions Judge, Indore with a similar application the learned Additional Sessions Judge of Indore took a different view of S. 435, Criminal P. C. For reasons which are not clear the learned Additional Sessions Judge took the view that inasmuch as the offence complained of was committed outside his local jurisdiction an application for revision of an order passed by the Railway Magistrate with respect to such an offence could not be entertained by him.

(3) I have considered the judgment of the learned Additional Sessions Judge of Indore and am of opinion that he is in error in the view taken by him. An application for revision before a Sessions Judge lies under S. 436, Criminal P. C. The relevant portion of that section reads as follows:

"The High Court or any Sessions Judge..... may call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed.....of such inferior Court....."

(4) It is clear therefore that the power to entertain a revision application against an order passed by an inferior Criminal Court is given to the Sessions Judge exercising jurisdiction over the area where such inferior Criminal Court is situate. The jurisdiction to entertain a revision application is determined by reference to the situation of the Court by which the order sought to be revised was passed. It is determined not with reference to the place where the offence was committed. Accordingly in the instance before us even though the offence was alleged to have been committed in the Railway area at Ujjain the order sought to be revised was passed by the Railway Magistrate Mhow. In view of the provisions of S. 435, Criminal P. C. it is the Sessions Judge of Indore and not the Sessions Judge at Ujjain who has the authority to entertain a revision

application against that order. Apart from other grounds the reasons stated above show that the view taken by the Additional Sessions Judge Indore is not correct.

(5) I accordingly accept Revision Application No. 123 of 1950 and set aside the order passed by the learned Additional Sessions Judge Indore. The case shall go back to him with the direction that he should entertain the revision application and dispose it of in accordance with the law.

(6) Criminal Revision Application No. 122 of 1950 filed against the order of the learned Sessions Judge of Ujjain is dismissed.

B/V.S.B.

Ordered accordingly.

**A.I.R. 1953 M.B. 157 (Vol. 40, C. N. 58)**  
**(GWALIOR BENCH)**

SHINDE J.

Deviprasad Ramdayal, Applicant v. Manohara Sundarpal and another, Opponents.

Small Cause Revn. No. 38 of 1950, D/- 9-3-1951.

**Evidence Act (1872), S. 92, Prov. 4 — Contract of debt — Modification of.**

The law does not require that a contract of debt must be in writing. Therefore, an oral agreement can be proved to modify the terms of a written contract of debt. AIR 1933 Lah 453 and 27 Mad 368, Rel. on.

Anno: Ev. Act, S. 92 N. 30.

Jadhoprasad, for Applicant; Sant, for Opponents.

**CASES CITED :**

(A) ('33) AIR 1933 Lah 453: 142 Ind Cas 413

(B) ('04) 27 Mad 368

**ORDER :** The only point for consideration in this case is whether evidence of any oral agreement can be admitted for the purpose of varying the terms of a contract which has been reduced to writing. Deviprasad petitioner filed a suit against Manohara and Motiram in the Small Causes Court, Gwalior on the basis of a bond for the recovery of Rs. 210/-. The defendants pleaded discharge of the debt by putting in one year's service at the rate of Rs. 10/- a month. The trial Court dismissed the suit of the plaintiff on the ground of discharge. Hence this revision.

(2) The learned counsel for the applicant contends that the bond being in writing its terms cannot be varied by an oral agreement. The bond, no doubt, states that Rs. 24/- will be paid at the rate of Rs. 2/- a month within a year, and Rs. 100/- will also be paid within a year. But the defendants pleaded that subsequently there was an oral agreement by which it was agreed between the parties that Rs. 120/- borrowed under the bond would be paid by defendant 1 serving with the plaintiff for a year as gardener on Rs. 10/- a month. The learned counsel for the applicant contends that oral agreement cannot be proved to vary the terms of a written agreement. Section 92 of the Evidence Act reads as follows:

"When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in



interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms .....

Proviso 4: The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of document."

Section 92 Evidence Act no doubt lays down that evidence of any oral agreement shall not be admitted as between the parties to any such instrument for the purpose of contradicting, varying or subtracting from its terms. But there are several exceptions to this general rule. Proviso 4 allows oral agreement to be proved to modify the terms of a written contract provided written contract is not required by law to be in writing. The law does not require that a contract of the debt in dispute must be in writing. Therefore, an oral agreement can be proved to modify the terms of a written contract. Vide — 'Durga Datt v. R. J. Wood & Co., Delhi', AIR 1933 Lah 453 (A) and — 'Subba Row v. Narasimham', 27 Mad 368 (B). The contention of the applicant, therefore, has no force.

(3) No other point has been raised in this revision. The revision, therefore, fails. Accordingly the application in revision is dismissed with costs.

B/V.S.B.

Revision dismissed.

A.I.R. 1953 M.B. 158 (Vol. 40, C. N. 59)  
(GWALIOR BENCH)

SHINDE J.

Motiram Kalaram, Applicant v. Ratna Mukundi, Opponent.

Small Cause Revn. No. 32 of 1950, D/- 12-3-1951.

(a) Stamp Act (1899), S. 2 (5) — "Bond" — Definition is not exhaustive — Bond which might require for purposes of Act to be attested, may not require to be attested by law for all purposes — (Evidence Act (1872), S. 68).

A bond which fell under S. 2 (5) (b) held was not a document required by law to be attested as contemplated by S. 68, Evidence Act, and its execution did not require to be proved by producing an attesting witness. AIR 1940 Nag 240 and AIR 1948 Oudh 258, Rel. on. (Para 2)

Anno: Stamp Act, S. 2 (5) N. 14; Evid. Act, S. 68 N. 2.

(b) Provincial Small Cause Courts Act (1887), S. 25 — Interference with findings of fact.

If a finding of fact is perverse the High Court has power to interfere. Interference in regard to appreciation of evidence should, in general, only be exercised when there appears to the Court to be very clear case of misappreciation which has resulted in injustice to a party and makes the decree one that cannot be regarded by a revisional Court as 'according to law'. AIR 1921 Bom 407 and AIR 1933 All 373, Rel. on. (Para 4)

Anno: Prov. Small Cause Courts Act, S. 25 N. 11.

Sant, for Applicant; Vidyasagar, for Opponent.

CASES CITED:

(A) ('40) AIR 1940 Nag 240: 188 Ind Cas 638

(B) ('48) AIR 1948 Oudh 258: 1948 Oudh WN 85

(C) ('21) AIR 1921 Bom 407: 45 Bom 292

(D) ('33) AIR 1933 All 373: 144 Ind Cas 270

ORDER: This is a petition in revision by the plaintiff against the decree of the small cause Court Lashkar. The plaintiff alleges that on 9-3-48 the defendant pledged 300 Tolas of imitation silver and borrowed Rs. 300/- on condition of repaying Rs. 303/- after a fortnight. As the defendant failed to repay the money the suit is filed to recover the amount. The trial Court dismissed the suit of the plaintiff. Consequently he has filed this revision.

(2) The learned counsel for the applicant contends that the bond in dispute not being a document required by law to be attested it was not necessary for the plaintiff to prove its execution by producing the attesting witness, and as the execution of the document has been proved by other evidence on record the trial Court has erred in law in dismissing the suit of the plaintiff. The bond in dispute is no doubt attested by a witness. The learned counsel for the applicant argues that as the attesting witness was dead he could not be produced. There is, however, no evidence on record to show that it was proved to the satisfaction of the Court that the attesting witness Govind Sunar was dead. We have, therefore, to consider whether it is necessary to produce the attesting witness in order to prove the execution of the bond.

Section 2 (5) of the Stamp Act reads as follows:

" 'Bond' includes:

- any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be;
- any instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another; and
- any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another:

The bond in dispute no doubt appears to fall within the definition of 'Bond' given in Cl. (b). Therefore, it would appear that it is necessary that a bond must be attested. For one thing, the definition of the 'bond' does not appear to be exhaustive as is clear from the word 'includes'. Besides although for the purpose of Stamp Act it may be necessary for a bond to be attested, it does not follow that a bond is required by law to be attested for all purposes. In — 'Ram Chandra v. Jhibal', AIR 1940 Nag 240 (A), Gruer J. observed as follows:

"The definition, it is to be noted, is not exhaustive, nor is it proper to infer from this definition of 'bond' in the Stamp Act which deals with stamp matters only, that it means that such a document is required by law to be attested. In the case of mortgages and gifts it is clearly so stated in the Transfer of Property Act and in the case of wills in the Succession Act, but a bond as such is not an instrument required by law to be attested. Therefore, it is S. 72, Evidence Act, which applies and not S. 68."



Similar observations were made in — 'Ramdat Ram v. Lalta Prasad', AIR 1948 Oudh 258 (B) by Kaul J. The learned Judge observed:

"Reference was made by the learned counsel for the appellant to the definition of that term as contained in the Stamp Act and the Limitation Act. As pointed out by the learned Judge in the Court below, none of these definitions are exhaustive. The definitions of these Acts are meant only for the purposes of those Acts and cannot be taken to apply generally to the term 'bond'."

I am, therefore, of the opinion that a bond is not a document required by law to be attested as contemplated by S. 68, Evidence Act, and it is, therefore, unnecessary to prove its execution by producing an attesting witness.

(3) In this case the plaintiff has produced Gappa and Nathulal in support of his claim and has also examined himself. Gappa and Nathulal both clearly depose that the defendant pledged certain imitation ornaments and borrowed Rs. 300/- and put his thumb impression on the bond. The learned Judge thought there was a discrepancy in their statements. Gappa has stated that the bond was written in the plaintiff's shop. While Nathulal has stated that it was written in his house. But the learned Judge appears to have over-looked the fact that the shop and the house are not two separate buildings. The front of the building is used for shop and the back of the shop is apparently used for residential purposes. This is clear from the re-examination of Nathulal. The plaintiff also has supported his claim by his statement. In his defence the defendant has examined himself and produced no other evidence. The defendant denies the execution of the bond. From the statements of Gappa, Nathulal and Motiram it is clear that the bond Ex. P/1 was signed by the defendant in their presence. In these circumstances, there is no reason to disbelieve the execution of the document. The learned Judge was prejudiced by the fact that Govind Sunar, the attesting witness, was not produced. But as stated above it is not necessary to prove the execution of the bond by producing an attesting witness. In these circumstances the claim of the plaintiff must be held to be proved.

(4) The learned counsel for the non-applicant argues that this Court cannot interfere with the finding of fact in revision. Section 25, Small Cause Courts Act, gives power to this Court to interfere in the decision of the lower Court if the decision is not according to law. If therefore, a finding of fact is perverse this Court has power to interfere in the decision of the lower Court. In — 'Nathuram Shivnarayan v. Dhularam Hariram', AIR 1921 Bom 407 (C), their Lordships of the Bombay High Court held that although High Court would be averse to interfering under S. 25 on pure questions of facts, it cannot be said that the High Court has no power whatever of interfering with decisions on questions of fact. They further held that interference in regard to appreciation of evidence should, in general, only be exercised when there appears to the Court to be very clear case of misappreciation which has resulted in injustice to a party and makes the decree one that cannot be regarded by a revisional Court as 'according to law'. In — 'Bhagwati Prasad v. Abdul Latif', AIR 1933 All 373 (D) Kendall J. held that the High Court will not interfere in revision with the decision of the lower Court on a pure question of fact unless

the judgment of the lower Court is perverse. As pointed above the trial Court was of the opinion that the attesting witness was necessary to prove the execution of the document. But for that impression there is no doubt that the Court would have come to the conclusion that the execution of the document is proved that the claim of the plaintiff is true. As the judgment of the lower Court is perverse I have no hesitation in holding that this Court can interfere in revision.

(5) In the result I allow the revision and decree the suit of the plaintiff for Rs. 307-8-0 with interest at the rate of 3 P. C. P. A. from the date of the decree to the date of the payment. Applicant to get his costs of both the Courts from the non-applicant.

C/R.G.D.

Revision allowed.

**A.I.R. 1953 M.B. 159 (Vol. 40, C. N. 60)**

**SHINDE AND DIXIT JJ.**

Mahila Gumano, Appellant v. Ram Dayal, Respondent.

Appeal No. 116 of 1949, D/- 2-11-1951.

(a) **Gwalior Hindu Widow's Remarriage Act (Smt. 1992), S. 8 — Remarriage of widow — Mode of proof.**

To prove the remarriage of a Hindu widow the same religious rites and ceremonies that are necessary to constitute her first marriage valid should be shown to have been observed in her remarriage. Where, therefore, there is no evidence whatsoever of any such ceremonies or rites the plaintiff's claim based on the alleged remarriage must fail. AIR 1930 Oudh 426, Rel. on.

(Para 4)

(b) **Gwalior Hindu Widow's Remarriage Act (Smt. 1992), S. 3 — Custom not pleaded — Effect.**

In the absence of any pleading or proof of the custom, any remarriage if proved, must be held to be one under the statutory provisions of the Hindu Widow's Remarriage Act. AIR 1937 All 230, Ref.

(Para 5)

(c) **Gwalior Hindu Widow's Remarriage Act (Smt. 1992), S. 3 — Applicability to widows entitled to remarry under custom. (Quaere).**

Quaere: Whether S. 3, Gwalior Hindu Widow's Remarriage Act applies to the case of those widows who are entitled under the custom of their caste to remarry.

(Para 5)

Ram Rup Tiwari, for Appellant; Anand Bihari Mishra, for Respondent.

**CASES CITED:**

- (A) ('32) AIR 1932 All 617; 55 All 24 (FB)
- (B) ('37) AIR 1937 All 343; 169 Ind Cas 767
- (C) ('29) AIR 1929 Mad 765; 57 Mad LJ 253
- (D) ('18) AIR 1918 Cal 609; 40 Ind Cas 783
- (E) ('98) 22 Bom 321 (FB)
- (F) ('22) AIR 1922 Pat 378; 1 Pat 706
- (G) ('30) AIR 1930 Oudh 426; 128 Ind Cas 71
- (H) ('37) AIR 1937 All 230; 58 All 1034

**DIXIT J.:** This appeal by the defendant arises out of the plaintiff-respondent's suit for a declaration of title and possession of a certain house originally belonging to one Nathu, who died leaving a widow Mahila Gumano. The plaintiff's case is that he and his uncle Nathu were the joint owners of an ancestral house and each of them had half share in the house; that on the death of Nathu, his wife Mahila Gumano contracted a second marriage with one



Kunji, and that, therefore, Mahila Gumano forfeited her husband's estate on her remarriage and the plaintiff was entitled to succeed to the property as the nearest collateral of Nathu. Mahila Gumano in her defence claimed that she was the exclusive owner of the house having inherited it from her ancestors, and denied the remarriage alleged by the plaintiff. The learned Munsif of Bhind found the remarriage not proved. He also held that the plaintiff had not proved that the house in dispute was the joint property of Nathu and himself. He, therefore, dismissed the plaintiff's suit.

On an appeal by the plaintiff, the learned District Judge of Bhind allowed the plaintiff's claim. The District Judge came to the conclusion that the remarriage was established by the evidence on the record and that, therefore, Mahila Gumano forfeited her husband's estate on her remarriage under S. 3, Gwalior Hindu Widow's Remarriage Act of Samvat 1992 and that the plaintiff was entitled to succeed to the property. In this appeal, learned Counsel for the appellant assails the finding of the District Judge that Mahila Gumano contracted a second marriage with Kunji by saying that the finding is not supported by the evidence on record. It was also argued that the parties are Telis by caste and belong to a community in which remarriage is, by custom, permissible without entailing forfeiture of the widow's estate and that S. 3, Hindu Widow's Remarriage Act does not apply to the case of those widows who are entitled, under the custom of their caste, to remarry. In support of his contention, learned Counsel for the appellant referred us to — 'Bhola Umar v. Mt. Kausilla', AIR 1932 All 617 (FB) (A) and — 'Narain v. Mohan Singh', AIR 1937 All 343 (B).

(2) On behalf of the respondent, it was contended by Mr. Anand Bihari Mishra that the finding of the learned District Judge that Mahila Gumano remarried Kunji was correct; that S. 3, Hindu Widow's Remarriage Act applies not only to widows who could not remarry before the passing of the Act but also to those who were not so precluded from remarrying by the custom of their caste. Counsel for the respondent relied on — 'Gajapathi Naidu v. Jeevammal', AIR 1929 Mad 765 (C); — 'Mahomed Umar v. Mt. Man Koer', AIR 1918 Cal 609 (D); — 'Vithu v. Govinda', 22 Bom 321 (FB) (E) and — 'Suraj Pal v. Uttim Pardey', AIR 1922 Pat 378 (F). It was further said that the defendant was not entitled to say in this court that the remarriage, if any, was under the custom of her caste as she had not pleaded or proved any such custom.

(3) On a consideration of the arguments of the learned Counsel for parties and the evidence on record, I think the plaintiff's suit must be dismissed as, in my opinion, the plaintiff has failed to establish that Mahila Gumano contracted a second marriage with Kunji. The plaintiff sought to prove the remarriage by the evidence of his witnesses Kalyan and Mathuri. (After discussing the evidence of these witnesses the judgment proceeds as follows:) In these circumstances, the bare statement of Kalyan that Mahila Gumano remarried Kunji, can have very little evidentiary value to prove the fact of remarriage.

(4) It is noteworthy that the plaintiff-respondent's claim to the property in suit is based mainly on the provisions of the Hindu Widow's Remarriage Act of Gwalior State. Section 8 of this Act is to the effect that whatever words

spoken, ceremonies performed or engagements made on the marriage of a Hindu female, who has not been previously married, are sufficient to constitute a valid marriage shall have the same effect if spoken, performed or made on the marriage of a Hindu widow. It is perfectly clear from this provision that in order to establish the fact of remarriage of Mahila Gumano the plaintiff should have shown that in the case of Gumano's remarriage, the same ceremonies and rites were observed which are necessary to constitute the marriage of a maiden in the Teli community. Section 8, Gwalior Hindu Widow's Remarriage Act is analogous to S. 6, Hindu Widow's Remarriage Act of 1856 in force in Part A States. With reference to S. 6 of the Act of 1856 it has been held in — 'Ram Pearey v. Mt. Kailasha', AIR 1930 Oudh 426 (G) that to prove the remarriage of a Hindu widow the same religious rites and ceremonies that are necessary to constitute her first marriage valid should be shown to have been observed in her remarriage. In the present case there is no evidence, whatsoever, of any such ceremonies or rites. The plaintiff's claim, therefore, based on the alleged remarriage must fail.

(5) In this view of the matter, it is unnecessary to consider the question whether S. 3, Hindu Widow's Remarriage Act applies to the case of those widows who are entitled under the custom of their caste to remarry. In deed, even if it had been held in this case that the remarriage was established, the question of the applicability of S. 3, Hindu Widow's Remarriage Act Gwalior to communities in which remarriage is, by custom, permissible, would not have arisen for consideration. For, the defendant denies altogether the fact of remarriage. She did not plead that the remarriage, if any, was under a custom of her community quite independent of the Hindu Widow's Remarriage Act. Unless such a custom is specifically pleaded and proved, the plaintiff cannot be called upon to prove a custom in rebuttal involving forfeiture of the widow's estate and the question, whether a custom permitting a widow to retain her first husband's property after remarriage can be allowed to prevail and override the provisions of S. 3, Hindu Widow's Remarriage Act, cannot arise. In the absence of any pleading or proof of the custom, any remarriage if proved, must be held to be one under the statutory provisions of the Hindu Widow's Remarriage Act. See 'Bhola Umar v. Mt. Kausilla', AIR 1937 All 230 (H). As the plaintiff has not succeeded in proving the remarriage of Mahila Gumano and as she herself has not pleaded or proved any custom of remarriage in her community, I do not think I would be justified in expressing any opinion on the very controversial question as to the applicability of S. 3 of the Act to widows of the community in which remarriage is permissible. Any such expression of opinion would, in the circumstances and facts of the case, be obiter.

(6) For the above reasons, I would set aside the decision of the learned District Judge of Bhind and restore the judgment and decree of the learned Munsif Bhind dismissing the plaintiff's claim. The defendant's appeal must, therefore, be allowed with costs throughout.

(7) SHINDE J.: I agree.

C/D.R.R.

Appeal allowed.



**A.I.R. 1953 M.B. 161 (Vol. 40, C.N. 61)  
(INDORE BENCH)**

**DIXIT J.**

Gangabai, Appellant v. Kanhaiyalal and another, Respondents.

Second Appeal No. 66 of 1949, D/- 29-4-1952.

**(a) Civil P.C. (1908), O. 2, R. 2 — Applicability.**

The identity of the cause of action is the 'Sine Qua Non' to the application of O. 2, R. 2. (The principles which govern the applicability of O. 2 R. 2, stated.) AIR 1949 PC 78, Relied on. (Para 6)  
Anno: Civil P. C. O. 2 R. 2, N. 2

**(b) Civil P.C. (1908), O. 2, R. 2 — Suit by co-sharer for share of profits.**

Two types of suit are possible for share of profits — One when defendant is in wrongful possession and another, when he is under obligation to account for profits — Prior suit by co-sharer for mesne profits only, alleging that defendants were in sole possession of land and had been receiving profits but did not pay her share — Subsequent suit for joint possession of her one-third share in property and alternatively for mesne profits for subsequent period — Held, that plaintiff having failed to claim possession of her share in property in the previous suit, was now precluded from seeking relief of possession and consequently could not also claim mesne profits — (Distinction drawn between a suit for the recovery of profits of a property from a person who has been in wrongful possession thereof, and a suit for the recovery of profits from a person who has realised the profits, and who is under an obligation to account and hand over the profits to the plaintiff, (Para 7)

(The principle that every co-owner is a tenant-in-common and that the possession of a tenant-in-common is not adverse to the co-tenant explained). AIR 1918 PC 1. AIR 1923 Bom 440 and AIR 1949 EP 243, Distinguished. AIR 1931 PC 229; AIR 1939 All 52; AIR 1940 All 524; AIR 1942 Pesh 9 and AIR 1915 Sind 35, Followed. 9 Cal 283; 11 Mad 210; AIR 1940 Mad 934 and AIR 1915 Mad 912 (FB), Not followed.

(Para 7)

**(c) Civil P. C. (1908), O. 2, R. 4 — Scope of.**

Clause (a) of O. 2, R. 4 means nothing more than that the joinder of claims for mesne profits or rent being on the same cause of action is not forbidden by the rule. The rule cannot be taken to mean that in all cases a suit for the recovery of immovable property must necessarily be based upon a cause of action different from that in a suit for arrears of rent or mesne profits of the property: AIR 1942 Bom 338 and AIR 1915 Sind 35, Foll.

(Para 12)

S. M. Samvatsar, for Appellant; B. P. Gupta (for No. 1); K. A. Chitale and W. Y. Pande (for No. 2), for Respondents.

**CASES CITED :**

(A) ('40) AIR 1940 All 524:

ILR (1940) All 781

(B) ('42) AIR 1942 Pesh 9: 198 Ind Cas 803

(C) ('39) AIR 1939 All 52: 180 Ind Cas 356

(D) ('49) AIR 1949 EP 243

(E) ('31) AIR 1931 All 429:

53 All 951 (SB)

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(F) ('37) AIR 1937 Mad 849: 174 Ind Cas 181

(G) ('40) AIR 1940 Mad 934:

194 Ind Cas 840

(H) ('49) AIR 1949 PC 78:

ILR (1948) All 571 (PC)

(I) ('31) AIR 1931 PC 229:

134 Ind Cas 654 (PC)

(J) ('42) AIR 1942 Bom 338:

ILR (1943) Bom 49

(K) ('18) AIR 1918 PC 1:

64 Pun Re 1918 (PC)

(L) ('23) AIR 1923 Bom 440: 73 Ind Cas 424

(M) ('23) AIR 1923 PC 175: 46 Mad 751 (PC)

(N) ('15) AIR 1915 Sind 35: 9 Sind LR 23

(O) ('83) 9 Cal 283: 12 Cal LR 434

(P) ('88) 11 Mad 210

(Q) ('15) AIR 1915 Mad 912: 38 Mad 829 (FB)

**JUDGMENT:** This second appeal arises out of the plaintiff-appellant's suit for the recovery of Rs. 600/- as her share of the profits of certain lands situated in Mouja Bagera for the years Samvat 2000, 2001 and 2002. The plaintiff sought to recover this amount, also in the alternative, as damages for the use and occupation of the lands by the defendants. The plaintiff-appellant sued on the allegations that the land in Mouja Bagera was the ancestral property of a joint family consisting of her deceased husband and the defendants; that she was a recorded co-tenant of the land and had one-third share in it & that since the year Samvat 1997, the defendants were in possession of her share of the land with her permission and that they had not paid to her, her share of the profits of the land for the year Samvat 2000 2001 and 2002 at the rate of Rs. 200/- per annum. It was further stated by the plaintiff that previous to the institution of the present suit, she had instituted a suit for the recovery of the amount of profits for the years Samvat 1997, 1998, 1999 and that the suit was decreed in her favour. The plaintiff pleaded in the alternative that if the defendants be held to be in possession of her share in the land without her permission, then her claim be decreed as damages for the use & occupation of the land by the defendants. The defendant-respondents admitted that the appellant Gangabai was a recorded co-tenant of the land but denied that the land in question was a joint family property or that Gangabai had any share in it. They resisted the suit also on the ground that it was barred by O. 2 R. 2 inasmuch as in the previous suit for mesne profits, the plaintiff Gangabai did not seek the relief of possession of the land, she was not now entitled to claim the possession of the land, and that therefore he could not claim any mesne profits.

(2) The learned Munsiff of Tarana who tried the suit, found that Gangabai was a recorded co-tenant of the land and had one-third share in the profits thereof and was, therefore, entitled to recover Rs. 600/- as her share for the three years from Samvat 2000 to 2002. He also held that the land was the property of the joint family constituted by the defendants and Gangabai's deceased husband. But he dismissed the plaintiff's suit on the ground that Gangabai having failed to sue for possession of the land in the previous suit, her present suit for mesne profits was barred under O. 2 R. 2. In coming to this conclusion, the learned Munsiff followed — 'Saghir Hassan v. Tayab Hasan', AIR 1940 All 524 (A); — 'Mahomed Yunas v. Mt. Jahan Sultan', AIR 1942 Pesh 9 (B) and — 'Tayyab Hasan v. Saghir Hasan', AIR 1939 All 52 (C). The plaintiff, thereupon, appealed to the court of District Judge Shajapur. The learned District



Judge only considered the question of the applicability of O. 2 R. 2 and agreeing with the decision of the trial court on the point, upheld the decree of the trial court dismissing the plaintiff's suit. The plaintiff has now appealed to this court from the decision of the District Judge Shajapur.

(3) Before me Mr. Samvatsar the learned counsel appearing on behalf of the appellant argued that the decisions relied on by the courts below which related to the recovery of possession and mesne profits of the property from a person in wrongful possession of the property, were not applicable in the present case as the plaintiff Gangabai's suit was not a suit for the recovery of mesne profits from a person in wrongful possession of the land in suit. It was maintained that Gangabai's present suit, as her previous suit, was for the recovery of her share of profits from a co-sharer whose sole possession of the land was the possession of all the co-tenants and who had received the profits of the joint property and who had not paid to the plaintiff her share. Learned counsel for the appellant further argued that Gangabai's previous suit and the present suit were based on different causes of actions; that in the previous suit, the cause of action was Gangabai's title as a co-sharer and the realisation by the defendants of her share of the profits for the years Samvat 1997, 1998 and 1999 and that in the present suit, the cause of action consisted of Gangabai's title and the receipt by the defendants of her share of the profits for the years Samvat 2000 to 2002. In support of this argument, learned counsel placed reliance on — 'Dunichand v. Jagdev', AIR 1949 EP 243 (D). It was also said on the authority of — 'Ram Karan Singh v. Nakchhad Ahir', AIR 1931 All 429 (SB) (E) — 'Tadepalli Ramiah v. Madala Thathiah', AIR 1937 Mad 849 (F) and — 'Venugopal Pillai v. Thirugnanavilli Pillai', AIR 1940 Mad 934 (G) that a claim for possession and a claim for mesne profits were based on different causes of action and that, therefore, even if Gangabai's claim was regarded as one for the recovery of mesne profits from a person in wrongful possession of the land, O. 2, R. 2 could not be a bar to her present claim.

(4) The argument of Mr. Chitale, learned counsel for the respondent, was that in the courts below it was not the case of the appellant that the respondents being her co-sharers, the possession and the receipt of profits by them could not in law be wrongful and that therefore, her right to such profits was not as mesne profits received by a person in wrongful possession but as appurtenant to her right in the share of the property and that, therefore, she was entitled to sue for the recovery of those profits for any period whenever the defendant co-sharers realised her share of profits and withheld them from her. Learned counsel for the respondent drew my attention to the decision of the Indore High Court in an appeal arising out of the previous suit of the appellant Gangabai & said that by that decision Gangabai's claim for the profits of the years Samvat 1997 to 1999 was regarded as a claim for mesne profits and decreed on the admitted fact that the respondents had ousted Gangabai from her rights and denied her claim to a share. It was further said that as the present suit of the plaintiff was framed to fit in with the decision of the Indore High Court in the previous suit, it could not but be regarded as one for the recovery of mesne profits from persons in

possession without title. Referring to the tests laid down by the Privy Council in — 'Mahomed Khalil Khan v. Mahoub Ali Mian', AIR 1949 P. C. 78 (H) to determine whether the causes of action in two claims are different or the same, learned counsel argued that the causes of action in Gangabai's former suit and the present suit were the same, namely, the plaintiff's being kept out of possession and that as Gangabai failed to sue for possession in the previous suit, she was not entitled to file a second suit claiming mesne profits for the period subsequent to the previous suit during which she was kept out of possession by the defendant. Learned counsel for the respondents proceeded to say that there was no doubt a conflict of opinion as to whether a suit for the mesne profits bars a subsequent suit for possession or for mesne profits, and commended for acceptance the view that a second suit for mesne profits or possession is barred by O. 2, R. 2 by saying that the contrary view which regarded a claim for possession and a claim for mesne profits as founded on two different causes of action was difficult to reconcile with the opinion of the Privy Council in — 'Naba Kumar Hazra v. Radhashayam Mahish', AIR 1931 P. C. 299 (I) to the effect that a claim for mesne profits rested on the same foundation of facts and law as the right to seek possession of the property. In support of this submission, Mr. Chitale further relied on — 'Channappa Girimalappa v. Bagalkot Bank', AIR 1942 Bom 338 (J) where it is observed that the provision in O. 2 R. 4 C. P. C., that no cause of action shall, unless with the leave of the court be joined with a suit for the recovery of immovable property, except claims for mesne profits or arrears of rent, is a provision "inserted ex abundanti cautela without intending to lay down that the causes of action for possession and for mesne profits or arrears of rent accruing were distinct."

(5) On a prolonged and careful consideration of the arguments of learned counsel for the parties, I have formed the opinion that this appeal must be dismissed.

(6) The identity of the cause of action being the Sine Qua Non to the application of O. 2, R. 2, the main question that arises for determination in this appeal is whether the cause of action in the appellant Gangabai's previous suit for the recovery of profits for the years Samvat 1997, 1998 and 1999 was different from the cause of action in the subsequent suit out of which this appeal arises. If the causes of action in the two suits are the same, then, undoubtedly the plaintiff appellant's present suit must be held to be barred under O. 2, R. 2. The principles governing the applicability of O. 2, R. 2 have been authoritatively laid down in a number of Privy Council and English cases which have been reviewed in 'AIR 1949 P. C. 78 (H)'. Briefly summarised the principles are that

"(1) the correct test in cases falling under O. 2, R. 2 is whether the claim in a new suit is in fact founded upon a cause of action distinct from that which was the foundation for the former suit; (2) the cause of action means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment; (3) if the evidence to support the two claims is different, then the causes of action also are different; (4) the causes of action in the two suits may be considered to be the same, if in substance they are identical and (5) the cause of action has no relation whatever to the defence that may be set up by the defendant. Nor does it depend



upon the character of the relief prayed for by the plaintiff. It refers to the media upon which the plaintiff asks the court to arrive at a conclusion in his favour".

(7) Before proceeding to find out on an application of these principles whether the causes of action in Gangabai's previous suit & in the present suit are the same or distinct, it is necessary to bear in mind the distinction between a suit for the recovery of profits of a property from a person who has been in wrongful possession thereof and a suit for the recovery of profits from a person who has realised the profits and who is under an obligation to account and hand over the profits to the plaintiff. Wrongful possession by the defendant is the very essence of a claim in the first type of suit which is a suit for the recovery of mesne profits as defined in S. 2, Cl. 12, Civil P. C., such profits being really in the nature of damages. In the second type of cases, the possession or the receipt of the profits by the defendant is not wrongful and the plaintiff's claim rests on his right to the profits, the realisation of the profits by the defendant and the defendant's obligation to account and pay the profits to the plaintiff. Now when one co-sharer seeks to recover profits from another co-sharer in sole occupation of the common property, the suit may be of either type. He may claim mesne profits because the defendant co-sharer has excluded or ousted him from possession or has challenged his title to joint possession of the property of which they are tenants-in-common. In such a case, in the absence of ouster, the plaintiff co-sharer would not be entitled to any decree for mesne profits. Or, he may, when there is no ouster or exclusion, claim profits from the co-sharer in sole possession on the ground that the defendant co-sharer by reason of his exclusive possession of the property is bound to account to the plaintiff for the profits received by him in excess of his share. Learned counsel for the appellant sought to argue on the authority of — 'Hardit Singh v. Gurumukh Singh', AIR 1918 P C 1 (K); — 'Kimappa v. Manjaya', AIR 1923 Bom 440 (L) and AIR 1949 EP 243 (D) that where co-sharers are entitled to joint possession of immoveable property as tenants-in-common each of such co-sharer is entitled to be in possession of each and every part of the common land and that the exclusive possession of the property by a tenant-in-common is not adverse to his co-tenant and enures for the benefit of all and that, therefore, it is always open to a tenant-in-common to sue a co-sharer who is in the exclusive possession of the common property for the recovery of profits as the right to an account and payment of profits is one implicit in the right to a share in the property. I do not think that any of the cases cited by the learned counsel for the appellant lay down the proposition that even when a co-sharer has been dispossessed or ousted, he 'can' instead of suing for mesne profits, maintain a suit against the co-sharer in wrongful possession for his share of profits and for an account of the profits. The remedy of the co-sharer who is dispossessed must be to sue the other for joint possession and he can claim along with it mesne profits. It is true that the principle of possession between the co-owner is that every co-owner is a tenant-in-common and that the possession of a tenant-in-common is not adverse to his co-tenant and as a general proposition the entry of one co-tenant in the absence of clear proof to the contrary enures for the benefit of all. But it is clear from the observations made in the very cases relied on by the learned counsel for the appellant that

where a co-sharer enters into possession of the share of other co-sharer not in his right as a co-tenant but in denial of such right of the co-tenant cannot be said that this possession would enure for the benefit of the other co-sharers whom he has excluded from the enjoyment of the property. A person cannot be a tenant-in-common with a person who has never recognised him as a co-tenant, and claim that the sole possession of such a person is not wrongful.

(8) Turning now to the nature of the two suits of Gangabai it appears to me that in the previous suit which was filed in 1945 Gangabai alleged that she was a co-tenant of the land with the defendants, that the defendants were in the sole possession of the property and had been receiving the profits and had not paid her share to her, and on that basis asked for mesne profits for the years Samvat 1997, 1998 and 1999. The defendant in that suit admitted that she was a recorded co-tenant but claimed exclusive right of possession and title by adverse possession as against Gangabai. The learned Judge in that suit passed a decree in favour of Gangabai for Rs. 200/- as damages for the use and occupation of the land by the defendant. The defendants then appealed to the Indore High Court and took the objection that the suit as framed did not lie as there could be no suit for damages for the use & occupation as between co-tenants. In rejecting this objection and in affirming the decree of the trial court, Rege J., of the Indore High Court said in his judgment:—

"The plaint, it is true, is artistically drafted but it is a common ground that the defendant has ousted the plaintiff from her rights and denied her claim to a share. The formal defect in the plaint, therefore, has not caused any prejudice".

The precise form in which the objection to the plaint in that suit was taken is not clear from the judgment in appeal of the Indore High Court in that suit. But I understand from the observations of the learned Judge reproduced above that the defect in the plaint consisted in Gangabai's omission to state that she had been ousted. The learned Judge however found that as a fact that she has been dispossessed and then decreed her claim as mesne profits. It is thus clear that the foundation of Gangabai's first suit was the wrongful possession of the defendants and her suit was for the recovery of mesne profits. Gangabai may have described in the plaint her claim as one for the recovery of her share of profits, not as mesne profits but as appurtenant to her right in the share of the property. But the true juridical nature of the relationship between her and the defendants was that she was a co-tenant who had been ousted by the defendants. That being so, it was the admitted fact of ouster which furnished a cause of action for her claim to mesne profits.

(9) In the suit out of which this appeal arises, Gangabai seeks to recover Rs. 600/- as profits from the defendants alleging in the first instance that the defendants are in sole occupation of the land with her permission and that, therefore, they are under an obligation to account and pay the profits of her share of the land. In the alternative she pleads that if the defendant's possession be regarded as wrongful since Samvat 1997, her claim may be decreed as damages for the use and occupation of the land by the defendants. It is strenuously contended on behalf of the appellant that on these state-



ments in the plaint, there can be no doubt that Gangabai's present suit is not for the recovery of mesne profits from a person in wrongful possession of the property but is one for the recovery of her share of profits from a tenant-in-common whose sole possession of the land is the possession of all and who has realised the profits of the common property. In my view, having regard to the nature of the previous suit of Gangabai and to the basis on which she secured a decree for mesne profits in that suit, the contention of the learned counsel for the appellant is untenable. Gangabai's first suit being based on the fact of the ouster and the decree for mesne profits in her favour in that suit being made to rest on the finding of ouster, the possession of the defendant-respondent at the institution of the present suit must also be regarded as wrongful. If a co-tenant is in wrongful possession of the property and the court makes a declaration showing that his possession is wrongful then as pointed out by the Privy Council in — 'Subbaiya Pandaram v. Mohamad Mustafa', AIR 1929 P. C. 175 (M), that does not affect the quality of his possession but merely advertises the fact that it is adverse. The appellant Gangabai is bound by the plea she took in her suit of 1943 and by the decision in that suit, and she cannot now say that although she did not pray for the relief of possession in that suit and obtain joint possession of the property, the effect of the decree in her previous suit was to break possession of the defendants so far as it was adverse to her. If as I think and has been found by the courts below the defendant respondent's possession of the land was wrongful at the institution of the suit then Gangabai's claim to the profits she seeks to recover can only be as mesne profits and her present suit cannot on her pleadings be regarded as any other than one for the recovery of mesne profits from persons in wrongful possession of the property.

(10) It is clear from what has been stated above that the facts relied on by Gangabai in her first suit are in substance the same as those on which she seeks to rely in the action with which we are now concerned. The media or the grounds of the suit of 1943 and of the present suit are the same, namely, the plaintiff's title to the land and her dispossession by the defendants which commenced in Samvat 1997. The cause of action therefore, in the present suit is the same as the cause of action in the first. The fact that the previous suit was for the recovery of mesne profits for the years Samvat 1997 to 1999 and the present suit is for the recovery of the profits for the subsequent years makes no difference. To say that because of this fact the cause of action in the two suits is not the same, is to confuse the cause of action with the relief claimed which as stressed by the Privy Council in 'AIR 1949 P. C. 78' (H) is a common error. The period during which the defendant's wrongful possession continued is material only for fixing the extent of his liability for the amount of mesne profits. But the plaintiff's right to recover mesne profits arises out of her title to the property and her right to immediate possession of the property. If the cause of action in the appellant's two suits were not the same the result would be that even if she had failed to establish her right to mesne profits in the first suit, she would have been entitled to file a fresh suit to recover the land or the mesne profits. But this she could not have clearly done for her

second suit would have been barred by the plea of *res judicata* as to her title. The causes of action in Gangabai's two suits being the same, the further point that arises for decision is whether she could have in the first suit claimed in substance any relief which she is seeking in the present suit. It is quite true that as Gangabai's first suit was not for the recovery of possession of the property she could not have under O. 20, R. 12 claimed in that suit future mesne profits. But she could have sued for possession of the land in her first suit. She, however, omitted to do so though she was entitled to joint possession of the land. As the relief of the recovery of possession could have been claimed in the first suit, the relief cannot be granted in a subsequent suit founded on the same cause of action. Again a person is not entitled to a decree for mesne profits, unless he shows that he is entitled to immediate possession of the property. It follows, therefore, that Gangabai having omitted without the leave of the court to sue in the first suit for the recovery of possession in the land, she is now debarred from doing so under O. 2, R. 4(3) and if she cannot now sue for possession, she can have no claim for mesne profits. The view that a claim for mesne profits rests on the same foundation of facts and law as the right to seek possession of the property seems to me supported by the judgment of the Privy Council in 'AIR 1931 P. C. 229 (I)'. It is also supported by the decisions reported in 'AIR 1939 All 52 (C)'; 'AIR 1940 All 524 (A)'; AIR 1942 Pesh 9 (B)' and — 'Hiromal v. Faridkhan', AIR 1915 Sind 35 (N). In these four cases, it has been held that where the plaintiff on being dispossessed of land files a suit for mesne profits only which is decreed in his favour, he cannot subsequently file a suit for recovery of possession of the land and if he is not entitled to possession, he is not entitled to mesne profits also. A contrary view has, no doubt, been taken in — 'Monohur Lall v. Gouri Sunkur', 9 Cal 283 (O) is distinguishable on the ground that in that case it was held on the facts of the case that there were two different causes of action, one arising upon the death of one person and the second cause of action arising upon the death of that person's widow. The decision in — 'Tirupati v. Narasimha', 11 Mad 210 (P) proceeded on the basis that a claim for possession and a claim for mesne profits were separate causes of action. It seems to me difficult to reconcile the view taken in 11 Mad 210 (P) with the observations of the Privy Council in 'AIR 1931 P. C. 229 (I)' to the effect that the right to the rents and profits of a property rests on the same foundation of facts and law as the right to have the possession of the property. With reference to this Privy Council decision it has been observed in 'AIR 1937 Mad 849 (F)' and 'AIR 1940 Mad 934 (G)' that the Privy Council case did not deal with a claim for mesne profits and there is nothing in that decision contrary to the principle laid down in — 'Ponnamal v. Ramamirda Aiyar', AIR 1915 Mad 912 (FB) (Q) that a claim for possession and a claim for mesne profits are distinct causes of action. It is difficult for me to see how the fact that in the Privy Council case there was no question of wrongful possession by the purchaser, affects the general principle indicated in that case that the right to the profits of a property rests exactly on the same facts and law as the claim to the corpus of the property. I am, therefore, not inclined to agree with the view taken in '11 Mad 210 (P)' that a claim



for possession and a claim for mesne profits are separate causes of action and that a suit for mesne profits only is no bar to a subsequent suit for possession or mesne profits.

(11) I do not think it necessary to consider in this case the decisions reported in 'AIR 1931 All 429 (S.B.) (E)' and 'AIR 1937 Mad 849 (F)'. These and other cases relied by the appellant are all cases in which a suit for possession had been brought in the first instance and a claim for mesne profits was made in a subsequent suit. These cases are not in point here. I may however, observe that all these cases treat a claim for possession and a claim for mesne profits as distinct causes of action mainly on the wording of O. 2 R. 4, Civil P. C., which provides that no cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property, except claims for mesne profits or arrears of rent in respect of the property claimed or any property thereof. It seems to have been thought that this rule itself recognises a claim for mesne profits and a claim for possession as separate and distinct causes of action. I do not, however, think that the words of O. 2, R. 4 imply this conclusion. I agree if I may say so, with what has been said by Beaumont C. J. in — 'Chanappa v. Bagalkot Bank', AIR 1942 Bom 338 (J) with reference to the wording of O. 2, R. 4. He said that "it may well be that the expression "cause of action" in O. 2, R. 2, has a wider meaning than the expression in O. 2, R. 4. Moreover, the provision in the latter rule may have been inserted *ex abundanti cautela* without intending to lay down that the causes of action for possession and mesne profits or arrears of rent accruing were distinct." It may also be noted that in AIR 1915 Sind 35 (N) Pratt J.C., after comparing O. 2, R. 4 with the analogous rule of the Supreme Court of England observed:

"There the use of word claim as synonymous with cause of action is probably due to the fact that in the phraseology of the English Law, a plaint is called a statement of claim. The word claim therefore, denotes, not only the demand for relief but the basis on which that demand is made. In the Sind case Fawcett, A. J. C., was inclined to think that O. 2, R. 4 must be read with the provisions of Rr. 1 and 2, and so read, R. 4 only meant that "no claim shall, unless with the leave of the court, be joined with a claim for the recovery of immovable property except ...."

(12) In my opinion, cl. (a) of O. 2, R. 4 means nothing more than that the joinder of claims for mesne profits or rent, being on the same cause of action is not forbidden by the rule. The rule cannot be taken to mean that in all cases a suit for the recovery of immovable property must necessarily be based upon a cause of action different from that in a suit for arrears of rent or mesne profits of the property.

(13) For the above reasons, I am of the opinion that the appellant Gangabai having omitted without the leave of the Court to sue in the first suit for the recovery of possession is precluded from suing for the relief of possession in the present suit, and that as she is not entitled to possession, she cannot also claim mesne profits. The courts below were, therefore, right in holding that the appellant's present suit was barred by the provisions of O. 2, R. 2, Civil P. C.

(14) In the result, this appeal must, and is, accordingly, dismissed with costs.

B/H.G.P.

Appeal dismissed.

A.I.R. 1953 M.B. 165 (Vol. 40, C.N. 62)

(GWALIOR BENCH)

DIXIT AND CHATURVEDI JJ.

Dineshcharan Muzumdar, Applicant v. The State of Madhya Bharat and another, Opponents.

Civil Misc. Petn. No. 22 of 1952, D/- 18-2-53.

(a) Constitution of India, Art. 226 — Writ of mandamus, when issued.

There is no doubt that where a party, who has a legal right to the performance of a legal duty by another party, has no other specific remedy, the High Court will assist him by issuing under Art. 226 an order in the nature of mandamus in order to his obtaining such right. But the Court will not assist him unless he first shows that he has a clear and undisputable right and that justice cannot be done to him without a writ of mandamus being issued. (Para 8)

The object of Art. 226 being the enforcement of fundamental rights and other statutory rights and not the establishment of a legal right, the right of a petitioner to the performance of a statutable duty must be clear and complete. (Para 8)

If the High Court finds itself unable to decide on the rights of the parties and thinks they could be investigated more properly in a civil suit, no direction under Art. 226 can be issued. AIR 1952 SC 12, Foll. (Para 8)

The power under Art. 226 would not be exercised if the petitioner's right depended on facts which were disputed and on the legal effect of facts to be proved. AIR 1952 Madh B 105, Rel. on. (Para 8)

(b) Constitution of India, Art. 226 — Other remedy — Burden of proof.

The remedy under Art. 226 is intended to supply defects of justice and to the end that justice may be done and is not intended to supersede the ordinary remedies of law. Ordinarily, therefore, the power under Art. 226 should not be exercised by the High Court if the petitioner has other convenient or adequate remedy. AIR 1952 S C 12 and AIR 1952 Madh B 105, Rel. on. (Para 8)

The burden lies on the applicant asking the High Court to exercise the jurisdiction under Art. 226 to show that he had no other specific and adequate legal remedy or that the remedy of a suit is not convenient, beneficial or effectual and one by which justice could be satisfactorily obtained by him. AIR 1952 Madh B 105, Rel. on. (Paras 8, 12)

The question whether an alternative specific remedy is or is not equally convenient, beneficial and effective has to be considered on the facts and circumstances of each case. AIR 1952 All 753 (FB) and AIR 1952 All 836, Disting. (Para 12)

(c) Gwalior State Civil Service Rules, Smt. 1991 — Right to pension not enforceable right.

The Civil Service Rules are issued neither under a statute, nor by the Ruler of the former Gwalior State and cannot be regarded as having the force of a statute. The



fact that the rules used the words 'Haq' (right) and 'isthaqaq' (rights) in relation to pension is not sufficient to constitute the rules a statute or the claim of a public servant to receive a pension an enforceable right. 1927 AC 674 and 1898 AC 782, Disting. (Para 8)

If the Civil Service Rules do not confer on the applicant a statutory right in the matter of pension the payment of pension would be an ex gratia act on the part of the Government, depending entirely on the bounty of the Crown i.e. the head of the State. AIR 1948 PC 121, Rel. on. (Para 8)

**(d) Constitution of India, Art. 226 — Grounds for urgency of remedy.**

The fact that the petitioner is an old man, of itself, is not a decisive reason for exercising the jurisdiction under Art. 226 when the petitioner does not allege that an early payment of the pension due to him is so vital to him that without it he cannot live and maintain his family. (Para 12)

Similarly though the question whether the Gwalior Civil Service Rules confer a statutory right in respect of pension is of some importance to public servants who have earned pensions under the Rules and to whom pension has been denied, it does not make a speedy decision on that question a matter of urgency. (Para 12)

**(e) Constitution of India, Art. 226 — Issue of writ of mandamus — (Gwalior State Civil Service Rules, Smt. 1991).**

Where the right which the applicant is seeking to enforce in the petition does not depend merely on an interpretation and construction of certain Civil Service Rules but substantially rests upon certain doubtful facts which are under adjudication in a civil suit and on a controversial legal effect of the facts which may be held to be proved in that suit, there can be no question of issuing an order or a writ to compel the Government of the State to pass a pension payment order, particularly when the Government is willing to perform the act, but which has for the time being become difficult of performance by reason of the applicant's civil suit. (Para 11)

Moreover, to issue an order in the nature of mandamus directing the Government to pass a pension payment order in such circumstances would be "to create a defect of justice" and "not to supply a defect of justice" as it would amount to a determination of matters which are in substantial litigation in the applicant's suit. (1884) 12 QBD 461, Ref. (Para 11)

**(f) Covenants creating United State of Madhya Bharat (1948), Art. 16 (i) — Right of Civil Servants to pension.**

Article 16, taken by itself is not enforceable by an individual in the Courts for the reason that the Covenant has not been made a part of law of the State by any enactment. It does not therefore, confer on the Civil Servants retiring after the formation of Madhya Bharat an enforceable right to pension. (Para 13)

**(g) Constitution of India, Art. 14 — Application.**

Article 14 as enacted applies to laws and not to administrative acts, or omissions said to be contrary to any law. AIR 1951 Bom 132, Foll. (Para 13)

**(h) Gwalior State Civil Service Rules, Smt. 1991 — Right to pension-contributions by employer.**

Pension-contributions made by an employer on behalf of a servant whose services have been borrowed by him, are not a part of the salary and therefore, on retirement, a public servant is not entitled to receive the amount so contributed by his employer. (Para 13)

A. N. Sinha, Dey, J. P. Gupta, Ram Ratan Gupta and P. L. Dubey, for Applicant; K. A. Chitale, Advocate-General, Mungre and Shivdayal, Government Advocates, for the State.

**CASES CITED:**

- (A) (1920) 89 LJ Ch 417: 1920 AC 508
- (B) (1927) 96 LJPC 88: 1927 AC 674
- (C) (1898) 67 LJPC 129: 1898 AC 782
- (D) (1880) 49 LJQB 577: (1880) 5 AC 214
- (E) (1886) 30 Law Ed 220: 118 US 356
- (F) ('37) AIR 1937 PC 27: 64 Ind App 40 (PC)
- (G) ('37) AIR 1937 PC 31: 64 Ind App 55 (PC)
- (H) ('48) AIR 1948 PC 121: 75 Ind App 225 (PC)
- (I) ('52) AIR 1952 Madh B 105: ILR (1952) Madh B 253
- (J) ('52) AIR 1952 SC 12: 1952 SCR 28 (SC)
- (K) ('50) AIR 1950 Madh B 46: ILR (1952) Madh B 231
- (L) ('51) AIR 1951 Madh B 121: 52 Cri LJ 1305 (FB)
- (M) (1884) 53 LJQB 229: 12 QBD 461
- (N) (1790) 99 ER 334: 2 Douglas 524
- (O) (1926) SLT 568: 1926 SC 842
- (P) ('52) AIR 1952 All 836: 1952 All LJ 163
- (Q) ('52) AIR 1952 All 753: 1952 All LJ 505 (FB)
- (R) ('51) AIR 1951 Bom 132: 53 Bom LR 393

**ORDER:** By this application under Art. 226, Constitution of India, the petitioner seeks from this Court an order or a writ in the nature of a writ of Mandamus directing the State of Madhya Bharat to pass a pension payment order in his favour.

(2) The facts as stated in the petition, the return filed on behalf of the Government and the applicant's rejoinder thereto, and which give rise to the present proceedings are as follows:

(3) The petitioner entered the service of the former Gwalior State in 1910 as a ceramic engineer and worked in an institution known as Gwalior Potteries until 1919. In that year the management of the Gwalior Potteries was handed over to the Gwalior Trust Ltd., and the services of the petitioner were lent by the Gwalior Durbar to the Trust. The petitioner continued to work in the Potteries and on 17-9-1920, an agreement was executed between the Gwalior Trust Ltd., and the applicant as regards his employment as the General Manager of the Gwalior Potteries Ltd. — a Joint Stock Company subsidiary to the Trust. The agreement inter alia proved that the petitioner would be employed as the General Manager of the Potteries for a period of ten years beginning from 1-1-1920; that during the continuance of his employment he would get a salary of Rs. 600/- P.M. for the first year and with an annual increment of Rs. 50/-; that he would draw for the fifth and every succeeding year, a maximum salary of Rs. 800/- per month; that he would also be entitled to a commission at the rate of 25 per cent. of the net profits in any year arrived at after deducting the dividend amount and the usual depreciation;



that during the continuance of the agreement the Trust would pay to the Gwalior State pension contribution on behalf of the applicant; and that the rules and regulations of Gwalior State Civil Service relating to furlough, leave of absence, sick leave, sick pay and termination of employment due to ill health would be binding on the parties to the agreement.

In 1928 the Gwalior Trust Ltd. was liquidated and the Gwalior Potteries Ltd., was taken over by the State and managed by the State as a separate entity under the name of Gwalior Potteries Ltd. By a resolution dated 26-3-1928 the Board of Directors of the Gwalior Potteries Ltd., continued the agreement of the petitioner's employment with some modifications, which are not material here. In pursuance of an order dated 6-8-1929 of the Council of Regency the Gwalior Potteries Ltd., continued to pay to the State Pension Fund pension contribution on behalf of the applicant. On 1-7-1943 the petitioner's salary was raised to Rs. 900/- P.M. and in the subsequent years it was raised to Rs. 1500/- P.M. In 1945 by a Durbar order dated 26-10-1945 the Gwalior Potteries Ltd., ceased to function as a limited liability concern and was placed on the footing of a State Commercial Concern. The petitioner continued to work in Gwalior Potteries, now a State Commercial Concern, as the General Manager until 1-9-1949, when he was retired.

Thereafter the applicant made a claim on the State for the payment of pension due to him and also for the payment of his share in the profits under the agreement dated 17-9-1920. In reply to his representation with regard to these two claims, the Under Secretary Industries and Commerce Department wrote a letter on 26-1-1950 to the petitioner telling him that his claims for a share in the profits and for a pension were inconsistent and that the pension claim would be considered only if he withdrew his claim with regard to the profits. The petitioner was also told that the contract dated 17-9-1920 did not subsist as he had accepted a salary higher than that provided in the contract; that the petitioner's refusal to hand over to his successor the processes and formulae evolved and used in the Gwalior Potteries constituted "an obstacle to the consideration of his pension case." By that letter the petitioner was also asked to clarify certain matters. On 16-9-1950 the petitioner acknowledged the letter dated 26-8-1950 of the Under Secretary and wrote back explaining at length how the two claims were consistent, and protesting against the delay in the consideration of his claims. In his reply the petitioner also threatened legal action to enforce his claims.

On 14-5-1951 the petitioner served on the Government a notice under S. 80, Civil P. C., as regards his claim for profits on the basis of the agreement dated 17-9-1920. On 16-7-1951 the applicant filed a suit in the Court of Additional District Judge Gwalior against the State of Madhya Bharat claiming his share of profits in respect of the years 1944 to 1949 to the extent of Rs. 2,07,513-9-0. The claim in the suit which is still pending in the Court of the Additional District Judge Gwalior, is based on the agreement dated 17-9-1920. On 10-4-1952 the petitioner served a notice on the Government in regard to his claim for a pension. Therein he mentioned that if the Government

failed to pass a pension payment order and pay him the pension amount due to him since the date of his retirement within 15 days of the receipt of the notice, he would move this Court for an appropriate writ. In reply to this notice the Deputy Secretary to Government by a letter dated 7-7-1952 drew the applicant's attention to the letter addressed to him on 26-8-1950 and informed him that his claim for pension was inconsistent with his claim for a share in the profits on the basis of the contract dated 17-9-1920; that he could not simultaneously claim a pension as a Government servant as well as profits as a co-sharer; and that it would be possible for the Government to consider his claim for a pension if he withdrew the suit in respect of a share in the profits.

This reply having been received, the applicant presented this application on 15-7-1952. He says that by reason of his length of service and the amounts contributed on his behalf from time to time to the pension fund he is entitled under the Gwalior State Civil Service Rules Samvat 1991 to a monthly pension of Rs. 618-5-4. He asks for an order or a writ in the nature of a writ of mandamus directing the opponents to issue an order with regard to the payment of pension to him.

(4) Mr. Sinha learned counsel for the petitioner contended that the Gwalior Civil Service Rules Samvat 1991 by which the petitioner's case was governed was a statute; that under Rr. 3 and 119 of the Civil Service Rules a civil servant of the former Gwalior State after thirty years' service could claim as of right a pension; that the applicant who was retired after a service extending over thirty years had thus acquired a statutory right to pension which could be enforced in a Civil Court of Justice. While conceding that the applicant held his office until the formation of Madhya Bharat during the pleasure of the Ruler of the Gwalior State and thereafter during the pleasure of the Rajpramukh, learned counsel for the petitioner said that this fact did not affect his right to pension and that as the matter of pension was covered by the statute, namely the Gwalior Civil Service Rules enacted by the Ruler of the former Gwalior State, it could not be said that the applicant's claim for pension was on the bounty of the sovereign power or that no pension could be claimed except as a matter of grace or that the applicant had no legally enforceable right in regard to pension. In support of this contention learned counsel relied on — 'Attorney General v. De. Keyser's Royal Hotel', 1920 A. C. 508 (A) — 'Wigg v. Attorney General for the Irish Free State', 1927 A. C. 674 (B); — 'Smyth v. The Queen', 1898 A. C. 782 (C). It was further said that the provision regarding payment of pension on retirement in the Gwalior State Civil Service Rules was manifestly intended for the protection and benefit of the retired officers and it imposed a public duty of a purely ministerial character on the State and that the State was under an obligation to discharge the duty by passing a pension payment order for the benefit of the applicant, and could not evade it. A reference was made in this connection to the observations of Lord Cairns in — 'Julius v. Lord Bishop of Oxford', (1880) 5 A. C. 214 (D). Learned counsel proceeded to argue that the petitioner's claim for a share in the profits, which is now



the subject matter of a suit, has no relation to the claim for pension; that whereas the right to pension is a statutory right arising under the Gwalior State Civil Service Rules, the claim for a share in the profits is based on a contract, which is binding on the State as the successor in business of Gwalior Potteries Ltd., and that the opponent State is, therefore, not justified in withholding the payment of pension of the petitioner by saying that the two claims are incompatible with each other or that the pension amount cannot be determined unless and until the applicant's suit for a share in the profits is decided or withdrawn.

It was further submitted that the refusal of the State to pass a pension payment order on the ground that the petitioner did not hand over to his successor certain formulae and processes and on the ground that the petitioner during the period of his service with the Government worked as a Managing Director of the Gwalior Potteries Ltd., Delhi and received remuneration from that concern, was mala fide; that the formulae and processes were the property of the petitioner and the demand that they should be handed over to the successor had no basis in law and that the petitioner's association with the Gwalior Potteries Ltd., Delhi was under an order of Gwalior Durbar which the Madhya Bharat Government at no time during the petitioner's service cancelled. Learned counsel also urged that the withholding of the pension payment and of the amount contributed from time to time by the petitioner to the pension fund was an infringement of the petitioner's fundamental right to property granted by the Constitution and was an act of confiscatory nature. Relying on — '*Yick Wo v. Hopkins*', (1886) 118 U. S. 356 (E) learned counsel argued that it was also discriminatory. Lastly it was said that the petitioner was an old man of 70 years of age and if he were to file a suit to enforce his right to pension, it was doubtful whether in his life-time it would be finally decided; that, therefore the remedy of a suit was not a convenient, effectual and beneficial remedy in the present case and it was in the interest of justice that the petitioner's right to pension, which was a question of considerable public importance should be decided by this Court in these proceedings.

(5) On behalf of the State the learned Advocate General did not dispute that the petitioner was entitled to a pension as a public servant. He, however, contended that the applicant had no right in law enabling him to bring this petition for enforcing his pension claim. It was said that the applicant like all other public servants of the State held his position during the pleasure of the head of the State and that consequently payment of pension to a public servant was not a matter of legal right vesting in a public servant but was an act of grace of State policy on the part of the ruling power. This right of the State to pay pension at pleasure could not be derogated from by any rules framed by the Government as to the circumstances in which a pension could be earned by a Civil Servant; that the only manner in which this overriding right of the head of the State could be limited or modified was by a statute.

It was further urged that the Gwalior Civil Service Rules had no statutory force; they were not rules framed under any statute; nor were

they rules framed by the Ruler of the former Gwalior State. The rules were merely administrative rules for the guidance of the officers of the Government laying down the conditions, the circumstances, the manner and the method in which a pension could be earned, computed and paid to a Civil Servant. The learned Advocate-General proceeded to say that the Civil Service Rules did not confer any statutory right on a civil servant in regard to pension, that they were based on the principle of pension being a ex gratia payment made to a public servant for maintaining the dignity of his office or to assure the due discharge of his duties. It was pointed out by the learned Advocate-General that under Rr. 2 and 3 of the Gwalior Civil Service Rules the Government reserved to itself the right of changing the rules from time to time, at its discretion and of interpreting their meaning in case of a dispute and that a Government servant's claim to pension was regulated by the Rules in force at the time of his retirement and not by the rules in force at the time of his entry in the service; that under R. 92 future good conduct was made an implied condition to every grant of a pension and the Government reserved to itself the right of withholding or withdrawing pension or any part of it, if the pensioner was convicted of serious crime or found guilty of grave misconduct; that under R. 139 pensions were exempted from attachment. It was said that these provisions showed that the payment of pension to a civil servant was entirely within the discretion of the Government and that a claim in regard to pension was not a claim in respect of a contractual debt which could be asserted in the law Courts; that the Civil Service Rules gave to the applicant no more than a right to put forward his claim before the Government in respect of a pension and to receive such pension as the Government might award to him and that if the applicant thought that his pension was being withheld unjustly & contrary to the Civil Service Rules, he was not entitled to come to this Court; his remedy was by an appeal of a financial or political kind to the Administrative Authorities. For this purpose reference was made to the cases of — '*Rangachari v. Secretary of State*', AIR 1937 P. C. 27 (F); — '*Venkata Rao v. Secretary of State*', AIR 1937 P. C. 31 (G); — '*High Commissioner for India v. I. M. Lall*', AIR 1948 P. C. 121 (H) and — '*Lilawati Mutatkar v. State of Madhya Bharat*', AIR 1952 Madh B 105 (I). Learned Advocate-General sought to distinguish the cases reported in — '*1927 A. C. 674 (B)*' and — '*1898 A. C. 782 (C)*' relied upon by the petitioner by saying that those cases dealt with statutes conferring a right of pension and laid down that where there was a statutory right to pension, an aggrieved public servant to whom no pension has been paid could enforce his right in a Court of law; that those cases were not authorities for the proposition that apart from a statutory right an action would lie.

(6) In reply to the contention advanced on behalf of the petitioner that the withholding of pension and of the pension contribution amount from him was an act of confiscation and discriminatory nature the learned Advocate-General said that the pension contribution amount was not in any sense a part of the remuneration paid to a public servant, that the



petitioner could not claim the refund of the amount; that as there was no refusal on the part of Government to pay a pension to the petitioner but only delayed action there was no confiscation or infringement of the petitioner's right to pension; that as the petitioner was not challenging the validity of any law but only complaining against Government's inaction in passing a pension payment order under the Civil Service Rules, the petitioner could not seek protection under Art. 14 of the Constitution, which applied to laws and not to administrative acts or omissions alleged to be contrary to any law. As to the case of — '(1886) 118 U. S. 356 (E)' cited by the learned counsel for the applicant, the learned Advocate-General stated that it did not support the contention of the applicant that a specific mala fide action of an officer could be challenged by a petition in support of the fundamental right guaranteed under Art. 14, that it only illustrated the case of a statute, which may be valid on its face and yet in its actual administration be so arbitrary, unequal and unfair as to be unconstitutional.

(7) The relief asked for by the petitioner was stoutly opposed by the learned Advocate-General also on the ground that in the present case there was no refusal on the part of Government to grant a pension to the applicant but only a delay in passing an appropriate order; that the delay had been occasioned by the petitioner himself who put forward inconsistent claims as regards pension as well as a share in the profits; and that the delay was now inevitable because the petitioner had filed a suit for enforcing his claim as regards a share in the profits. It is further submitted by the Advocate-General that in the Civil Suit the applicant has claimed on the basis of the contract dated 17-9-1920 which was to be in force for a period of ten years a share in the profits earned by the concern right upto the date of his retirement and that if in that suit it is held that the contract subsisted even after the expiry of the ten years and when the Gwalior Potteries became a purely government concern, and was binding on the Government and that the petitioner's employment right upto the date of his retirement was governed by that contract, then the question would arise whether in view of the provisions of R. 4 of the Civil Service Rules, which excludes from the purview of the rules a civil servant with whom there was a covenant as regards salary, leave, pension, allowance, the applicant is at all entitled to any pension under the Civil Service Rules; and that even assuming that the petitioner would be entitled to a pension in addition to profits, a further question that would arise for consideration would be whether the pension should be computed on the basis of the salary permissible under the contract or on the basis of the higher salary actually drawn by the petitioner. It was said that in these circumstances if we were to ignore the contract which is now the subject-matter of a suit, take the view that the petitioner was entitled to pension and to mandamus, the State to pass a pension payment order, and if the Civil Court were to take the view referred to above as to the operation of the contract, there would be a conflict of decisions. It was urged that an order in the nature of mandamus should not be issued when there is a willingness on the part of the Government

to pay a pension to the applicant, and when the petitioner's act of filing a suit claiming a share in the profits has rendered a prompt performance of the duty sought to be enforced difficult of performance for the time being, and when this Court's command is likely to be rendered nugatory by a decision of the Civil Court in the applicant's suit. It was finally urged on behalf of the State that even assuming that the petitioner has a legally enforceable right as regards pension yet according to the rule which has always been acted upon in this Court an order or writ in the nature of mandamus should not be made in respect of the claim because the applicant has another convenient and sufficient remedy. It was said that except stating that he was an old man and that the question whether under the Gwalior Civil Service Rules a public servant has statutory right to pension was a question of public importance, the petitioner had made no attempt whatsoever to show how the remedy of a suit was not equally specific, effectual and convenient.

(8) On giving the matter my anxious and careful consideration, I have formed the view that this is not a case in which an order or a writ in the nature of mandamus ought to be issued from this Court. There is no doubt that where a party, who has a legal right to the performance of a legal duty by another party, has no other specific remedy, this Court will assist him by issuing under Art. 226 an order in the nature of mandamus in order to his obtaining such right. But the Court will not assist him unless he first shows that he has a clear and undisputable right and that justice cannot be done to him without a writ of mandamus being issued. The object of Art. 226 being the enforcement of fundamental rights and other statutory rights and not the establishment of a legal right, the right of a petitioner to the performance of a statutable duty must be clear and complete. In the case of — '*State of Orissa v. Madan Gopal Rungta*', AIR 1952 S. C. 12 (J), their Lordships of the Supreme Court stressed the point that the existence of a legal right was the foundation of the exercise of the jurisdiction under Art. 226 and observed that if the High Court found itself unable to decide on the rights of the parties and thought they could be investigated more properly in a Civil suit, no direction under that Art. 226 of the Constitution could be issued. It was also pointed out in that case that ordinarily the power under Art. 226 should not be exercised by the High Court if the petitioner has other convenient or adequate remedy. Following that decision it was held by this Court in — '*AIR 1952 Madh. B. 105 (I)*' that the burden lay on the applicant asking this Court to exercise the jurisdiction under Art. 226 to show that he had no other specific and adequate legal remedy and that the power under Art. 226 would not be exercised if the petitioner's right depended on facts which were disputed & on the legal effect of facts to be proved.

In the earlier case of — '*Harendranath Sharma v. The State*', AIR 1950 Madh B 46 (K) which was affirmed in — '*Dayabhai v. Regional Transport Authority*', AIR 1951 Madh. B. 121 (L) by making the observation that the object of Art. 226 in giving to the High Court the discretionary jurisdiction to issue certain directions or writs or orders was to secure the pro-



tection of the rights of the public and to am-  
pliate justice and redress grievances in any  
matter which the ordinary course of law was  
defective to reach, I attempted to make it am-  
ply clear that the remedy under Art. 226 was  
intended to supply defects of justice and to the  
end that justice may be done and was not in-  
tended to supersede the ordinary remedies of  
law.

The rule governing the discretion of the  
Court in the matter of an issue of writ of man-  
damus has been stated clearly by Brett, M. R.  
in — 'The Queen v. Commissioners of Inland  
Revenue', (1884) 12 Q. B. D 461 (M). Explaining  
the observation of Lord Mansfield in —  
'Rex v. Bank of England', (1790) 2 Douglas 524  
(N) that "when there is no specific remedy the  
Court will grant a mandamus that justice may  
be done", he said that the construction of that  
sentence was that where there was no specific  
remedy and by reason of the want of that spe-  
cific remedy justice could not be done unless  
a mandamus was to go, then a mandamus would  
go. The principle that it is incumbent upon  
the party applying for a writ of mandamus to  
show that he has a clear legal right has also  
been laid down in a number of American de-  
cisions. In Corpus Juris Vol. 38 (1925 Edi-  
tion) it is stated at page 582 that:

"Since the purpose of a writ of mandamus  
is not to establish a legal right but to en-  
force one which has already been establish-  
ed, the legal right of plaintiff or relator to  
the performance of the particular act of  
which performance is sought to be complet-  
ed must be clear and complete. Indeed it  
has been said, and with good reason, that  
the right to its performance must be so clear  
as not to admit of reasonable doubt of con-  
troversy".

Again at page 585 of the same volume it has  
been observed that:

"Mandamus will not issue to enforce a right  
which is in substantial dispute, or which is  
inchoate or prospective, or as to which a sub-  
stantial doubt exists although objections rais-  
ing mere technical questions will be disre-  
garded if the right is clear and the case  
meritorious. Likewise mandamus will not  
issue to enforce a right which is contingent  
upon the further act of a third person or  
tribunal. However, it has been held that  
the rule that mandamus will not lie to en-  
force a doubtful right does not apply where  
the doubt is one arising upon the mere con-  
struction of a Statute or judicial order, or a  
legal doubt as to the effect or meaning of  
a record".

On these well settled principles, the question  
which arises and which we have to determine  
first is whether the petitioner has succeeded  
in showing that he has a clear and indisputable  
right to pension. The petitioner founds his  
claim mainly on the Gwalior State Civil Ser-  
vice Rules Samvat 1991 and says that these  
rules, which have a statutory force, confer on  
him a statutory right to get a pension and im-  
pose a statutory duty on the opponent to pay  
him pension. In the absence of any attempt  
on the part of the learned counsel for the peti-  
tioner to show by reference to the law and  
custom of the former Gwalior State that the  
right in the Gwalior Government to make  
these rules was given by a law enacted by the  
Ruler of the Gwalior State or existed without

the necessity of any such enactment, it is diffi-  
cult to see how the Civil Service Rules issued  
neither under a statute, nor by the Ruler of the  
former Gwalior State and having the charac-  
teristics pointed out by the learned Advocate-  
General, can be regarded as having the force  
of a statute. The fact that the rules use these  
words 'Haq' (right) and 'isthaqaq' (rights) in  
relation to pension is not, I think, sufficient to  
constitute the rules a statute or the claim of a  
public servant to receive a pension an enforce-  
able right. The cases reported in '(1927) A. C.  
p. 674 (B)' and '(1898) A. C. page 782 (C)' and  
cited by the learned counsel for the applicant  
would apply only when it is held that the  
Civil Service Rules confer on the applicant a  
statutory right in the matter of pension. Other-  
wise the payment of pension to the applicant  
would be an ex gratia act on the part of the  
Government and would fall within the rule  
laid down in the case of — 'A. I. R. 1948 P. C.  
121 (H)' in which following the observations  
of Lord Blackburn in — 'Mulvenna v. Lords  
Commissioners of the Admiralty', 1926 S. C.  
842 (O) the Privy Council held that the pay-  
ment of arrears of salary to a public servant  
was entirely on the bounty of the Crown i. e.  
the head of the State. The same rule applies  
to pensions. I say so much upon this point  
and no more because of the objection, which  
has been raised by the learned Advocate-Gen-  
eral and which I think must prevail, that if the  
petitioner thinks that he has a statutory right  
to pension enforceable against the State in a  
Court of law, he has the remedy of a suit and  
that the Government though willing to pass an  
appropriate order as regards the pension due to  
the applicant, is now unable to do so till the  
applicant's suit for profits is decided.

(9) It is not disputed that the petitioner  
entered the service of Gwalior State in 1909;  
that in 1920 his services were lent to the  
Gwalior Trust Ltd., and an agreement was exe-  
cuted between him and the Trust as regards  
the terms of his employment. It is also clear  
that on the dissolution of the Trust the Gwalior  
Potteries though functioning as a limited liabi-  
lity concern was practically a State concern  
and that in any case it was so after 26-10-45  
when the limited liability concern went in liqui-  
dation under a Durbar order, and during all  
these years the applicant continued to work  
with the Potteries. It is also not in dispute  
that on the basis of the agreement dated 17-9-  
1920 which provided that it was to be opera-  
tive for a period of ten years and which gov-  
erned the terms of the petitioner's lent ser-  
vices with the trust, the applicant has filed a  
suit claiming a share in the profits of the con-  
cern from 1944 to the date of his retirement in  
1949. The foundation of the petitioner's claim  
in the civil suit is that the agreement dated  
17-9-1920 between him and the Gwalior Trust  
Limited remained in force right upto the time  
of his retirement in 1949; that on the dissolu-  
tion of the Trust it became binding on the  
Gwalior Potteries Ltd., and that on the Gwalior  
Potteries Ltd., becoming a purely State Concern,  
in 1946 the Gwalior Government became bound  
by that agreement; and that, therefore, the  
Madhya Bharat Government as the successor  
Government was liable to pay his share of  
profits under the agreement. From the record  
of the civil suit it appears that the fact of the  
applicant's retirement on 1-9-1949 is not in dis-



pute. But an issue has been framed as to whether on this date the applicant retired from the service of the Gwalior Potteries and from the post of the General Manager of the concern. The question as to whether the agreement dated 17-9-1920 remained in force after the expiry of the period of ten years stipulated in the contract is also in issue. There is also a general issue as to the liability of the State to pay to the applicant any profits. The question whether the applicant having accepted a salary higher than that provided in the contract and having worked for another concern during his employment with the Gwalior Potteries contrary to the contract is entitled to the benefit of the contract is also the subject-matter of an issue in the suit. In the written statement the Government have taken the plea that the applicant's claim for profits is inconsistent with his claim for pension. But no issue seems to have been framed as regards this plea.

(10) The capacity in which and the service from which the petitioner retired is itself thus in dispute in the suit. If it is held in the civil suit that the agreement dated 17-9-1920 after the expiry of its term was not binding on the Gwalior Potteries Ltd., and on the Gwalior Government when the Potteries became a State concern, then the nature, terms and conditions of the petitioner's service from 1909 to 1949 and his claim for pension would be easy of determination. If, on the other hand, the civil Court accepts the applicant's case in the suit and in effect holds that the petitioner's employment with the Potteries even when it became a purely State concern and right up to the date of his retirement was covered by the agreement, then I think, it could with considerable degree of force be contended, as the learned Advocate-General did, that by reason of R. 4 of the Civil Service Rules the petitioner was not entitled to the benefit of pension under the rules and that even if he was entitled it would be on the basis of the contractual salary and not on the basis of the higher salary actually drawn by him. In answer to the contention of the learned Advocate-General that the applicant's claim to pension was now dependent on the result of the suit, learned counsel for the petitioner attempted to put in an attractive way the case of the petitioner on the point by saying that the petitioner's right to pension from State, being qua State was distinct and independent from his claim to profits from the State as successor in business of the Gwalior Potteries Ltd., and that the opponent State in asking the petitioner in their letters to withdraw his claim for profits before his claim for pension could be considered was trying to avoid a decision by a Court of law on the merits of the petitioner's claim for profits and was adopting an unwarranted and unjustified attitude.

In fairness to the learned Advocate-General it must be stated that he candidly admitted that the tone of letters dated 26-8-1950 and 7-2-1952 addressed by the Government to the petitioner smacked of brow-beating. But he said, however unfortunate the language of the letters was, all that was intended by the Government was to impress on the petitioner the fact that it was not possible for the Government to consider his pension claim so long as his suit for profits was not decided. I am myself inclined to think that the Government's point of view could have been brought home

to the applicant without the use of minatory language. However, to revert to the reply of the applicant's learned counsel, here again, I think, as the applicant is claiming in the suit a share in the profits also of the years 1946 to 1949 that is of a period not covered by that stated in the agreement and during which the Potteries was run purely as a State concern, the question whether the petitioner was seeking to make the Government liable for his claim in respect of profits as a Government or as a successor in business of the Gwalior Potteries Ltd., is a part of the very issue as regards Government's liability to pay to the petitioner profits, into which the civil Court has to enquire. To a question put by the Bench counsel for the applicant was unable to clarify the basis on which the applicant was claiming a share in the profits of the years 1946 to 1949.

(11) It is thus plain that the right which the applicant is seeking to enforce in this petition does not depend merely on an interpretation and construction of the Civil Service Rules. It substantially rests upon certain doubtful facts which are now under adjudication in the civil suit and on a controversial legal effect of the facts which may be held to be proved in that suit. Until that suit is determined, it is difficult to say whether the petitioner is entitled to any pension and if he is entitled on what salary basis and at what rate he is entitled to a pension. In these circumstances there can be no question of issuing an order or a writ to compel the opponent to pass a pension payment order, which act, as the learned Advocate-General says, Government is willing to perform, but which has for the time being become difficult of performance by reason of the applicant's civil suit for profits. Again in the circumstances stated above to issue an order in the nature of mandamus directing the Government to pass a pension payment order, would be to use the words of Bowen L. J. in '(1884) 12 Q B D 461 (M)' "to create a defect of justice" and "not to supply a defect of justice". Because it would amount to a determination of matters which are in substantial litigation in the applicant's suit for profits.

(12) There is a further consideration which leads me to the conclusion that the relief asked for by the petitioner cannot be granted. Assuming in favour of the applicant what I do not myself think for the moment is established, that the petitioner has a statutory right to pension under the Gwalior Civil Service Rules and the Government is under a statutory obligation to pay him a pension, then the petitioner has the remedy of a suit to enforce his right. From the cases I have already referred to, it will be apparent that a heavy onus is thrown on the applicant to show that the remedy of a suit is not convenient, beneficial or effectual and one by which justice could be satisfactorily obtained by him. The question which arises is whether he has discharged that onus. We were pressed by counsel for the applicant on the authority of — '*Prabhawati Devi v. District Magistrate, Allahabad*', AIR 1952 All 836 (P) and — '*Buddhu v. Municipal Board, Allahabad*', AIR 1952 All 753 (Q) to hold that the remedy of a suit was really no remedy at all to meet the grievance of the petitioner on the ground that the applicant is an old man and that the case raises a question of public importance. I do not think much assistance can be derived from these cases in



determining whether the remedy of a suit is in the present case an adequate or an inadequate remedy. For, after all the question whether an alternative specific remedy is or is not equally convenient, beneficial and effective has to be considered on the facts and circumstances of each case.

In the Allahabad case the learned Judges of the Allahabad High Court thought it fit to direct under Art. 226, the District Magistrate not to give effect to an order passed by him requisitioning a newly constructed house because the petitioner in that case had built the house with a view to live in it and pass her old age and widowhood in piety in the holy city of Allahabad and because no alternative suitable accommodation had been provided to her. The other case which dealt with the validity of a municipal bye-law prohibiting slaughter of cows, bulls etc. is also similarly distinguishable on facts. No such considerations as those which existed in the cases cited by the learned counsel for the applicant are present here to impel us to treat this matter of pension as one of urgency. The petitioner is no doubt an old man. That, of itself, is not a decisive reason for exercising our jurisdiction under Art. 226 when the petitioner does not allege that an early payment of the pension due to him is so vital to him that without it he cannot live and maintain his family. I do not agree that this case raises a question of public importance requiring an early decision from this Court. The question whether the Gwalior Civil Service Rules confer a statutory right in respect of pension is no doubt of some importance to public servants who have earned pensions under the Rules and to whom pension has been denied. But this does not make a speedy decision on that question a matter of urgency. For whatever justification there may be in the allegation that officers responsible for passing pension payment orders are generally inclined to make difficulties and perhaps be contumelious and hostile, and delay the making of an order, one is yet fortunately able to say that cases of capricious and arbitrary denial of pensions are very rare indeed.

(13) In view of what I have said above, it is really unnecessary to consider the argument put forward on behalf of the applicant that the opponent's act in withholding pensions and the amount of pension contribution from the applicant is an act of confiscatory and discriminatory nature. But I think it is right to say that the argument is based on the assumptions that the petitioner has a statutory right to pension and that the opponent has infringed that right. As I have indicated above the applicant has not been able to show conclusively that the Gwalior Civil Service Rules under which he claims a pension is a statute. During the course of his argument counsel for the applicant suggested that Art. XVI of the Covenant creating the United State of Madhya Bharat guaranteed the payment and continuance of pensions and that, therefore, the right to pension was a statutory right. As to this it is sufficient to say that Cl. (i) of that Article guaranteed the continuance in service or the payment of reasonable compensation to the permanent members of the public service of each of the Covenanting States. The Article did not confer on the Civil Servants retiring after the formation of Madhya Bharat an enforceable right to pension. That Article taken by itself is not enforceable

by an individual in the Courts for the reason that the Covenant has not been made a part of law of the State by any enactment. Again there has been no refusal to pay a pension to the applicant; and it seems to me quite impossible to suggest that pension contributions made by an employer on behalf of a servant whose services have been borrowed by him, are a part of the salary and that, therefore, on retirement a public servant is entitled to receive the amount so contributed by his employer. The petitioner cannot really challenge the omission, according to him, on the part of the Government to pass under the Gwalior Civil Service Rules a pension payment order as contravening Art. 14 of the Constitution of India. This article as enacted applies to laws and not to administrative acts, or omissions said to be contrary to any law. If any authority is needed for this proposition I refer to the case of — '*Dhanraj Mills Ltd. v. B. K. Kochar*', AIR 1951 Bom 132 (R). In that case the learned Judges of the Bombay High Court after distinguishing the decisions in '*(1886) 118 U S 356 (E)*', made the following observations with which I am in respectful agreement. They said:

"Now a clear distinction must be borne in mind between the law and the administration of the law. If the law itself permits discrimination even though the law may appear to be fair and undiscriminatory, the Court may interfere and say we are more concerned with how the law actually works rather than how it appears in black and white in the statute book. One may even have a case where in exercising the discretion vested in officers under the statute the State may, as a policy of administration, require its officers to exercise the discretion unfairly and unequally. We can imagine that even in such a case the Court may interfere and say that although administrative orders are being challenged, the administrative orders suggest behind them a policy of the state of discrimination. But to our mind the position is different when a subject comes to the Court and challenges a specific act of an individual officer as being in contravention of Art. 14. The officer in acting contrary to Art. 14 is really acting contrary to the law and not in conformity with or in consonance with the law. When the law invests an officer with a discretion, the law assumes that the officer will exercise the discretion bona fide and not dishonestly, arbitrarily or capriciously, and if he exercises the discretion dishonestly, arbitrarily or capriciously, he is really going contrary to the law. In such a case the subject comes to Court not for protection under Art. 14, but for protection against the dishonest, arbitrary or capricious act of the officer. The Court is not powerless to give the subject protection against a dishonest officer, but that protection cannot be sought under Art. 14 or under Art. 226."

(14) For all these reasons in my judgment, this application fails and must be dismissed. As we have not considered this application on the merits, the points raised by the applicant are entirely at large and the civil Court before whom the applicant's suit for profits is pending need not itself feel bound by the opinion expressed by us in this order.

(15) The consequence is that this application fails and is dismissed. In the circumstances of



the case there will be no order as to costs of this application.

A/D.R.R.

Application dismissed.

A.I.R. 1953 M.B. 173 (Vol. 40, C.N. 63)

(INDORE BENCH)

KAUL C. J.

Narsingh Jivraj Soni and others, Petitioners v. The State.

Criminal Revn. No. 101 of 1951, D/- 17-10-1951.

**Madhya Bharat Gambling Act (51 of 1949), S. 6 — Presumption under — Duty of Court — Consideration of material or circumstances — Public Gambling Act (1867), S. 6.**

From the expression "the seizure of such an instrument or thing shall be evidence until contrary be made to appear" it necessarily follows that if the contrary be made to appear which is clear and distinguishable from saying that until the contrary is proved the presumption referred to in the section ought not to be raised.

(Para 10)

Anno: Public Gambling Act, S. 6 N. 1.

L. S. Shukla, for Petitioners; P. R. Sharma, Govt. Advocate, for the State.

ORDER: Narsing along with seven others was convicted on a summary trial under S. 4, Gambling Act by the learned Municipal Magistrate, Indore, for an offence under the Gambling Act and sentenced to one month's simple imprisonment and a fine of Rs. 200/- each. Soniram who was accused No. 4 was further convicted under S. 3, Gambling Act, and sentenced to one month's simple imprisonment and a fine of Rs. 200/- for that offence. Both the sentences of imprisonment were to run concurrently in his case. An appeal preferred by them to the Sessions Judge of Indore was dismissed; hence this revision application.

(2) The material facts lie within a short compass: On the night of the last Diwali festival Sub-Inspector Chaturbhuj of Police Station Bada Sarafa received information that gambling was going on in a certain house in his circle. He satisfied himself as to the correctness of the information received and raided the house. He took with him besides others, Head Constable Balmukund and two Panchas who appear to have been picked up by him on the way. They reached the house in question whereof the exit door was found open. On the first floor they found the eight accused in a closed room. It is alleged that they peeped through a chink in the door and found the accused gambling with playing cards. They were stated to be playing a game of Mang Patta. The Sub-Inspector got the door opened. The raiding party according to the evidence of the prosecution witnesses permitted its members to be searched before entering the room. When the room was searched by the Police a pack of playing cards (52 in number) and a sum of Rs. 77-14-9 were recovered. Some change was found lying in front of the persons who were taking part in the game. It has also come out in the evidence that actually only six persons (excluding Narsing and Chhagan) were taking part in the game. Narsingh was asleep and Chhagan was sitting apart. The petitioners were accordingly challaned, tried and convicted as already stated. Their defence that they were playing a game of Chhakdi and not Mang Patta, was rejected by the Courts below, mainly in view of the presumption that arises in Gambling Act cases under S. 6.

(3) It was contended by the learned counsel for the petitioners that this was not a case in

which the presumption under S. 6 ought to have been raised. He argued that it was a misappreciation of the true import of that section and a mis-application of its provisions which has resulted in the petitioners' conviction.

(4) Having considered the argument carefully I have come to the conclusion that this revision application should succeed. Madhya Bharat Gambling Act, No. 51 of 1949 can by no means be said to be model of skilful draftsmanship. Keeping of a gaming house and gaming houses are offences punishable under the said Act. Under S. 4, whoever is found in any gaming house, gaming or present for the purpose of gaming is liable to punishment. Section 6 embodies a rule of evidence. It runs as follows:

"When any instrument of gaming has been seized in any house, room, tent, enclosure, space, vehicle, vessel or place entered or searched under the provisions of the last preceding section or about the person of any of those who are found therein and in the case of any other thing so seized, if the Court is satisfied that the Officer who entered or searched such house, room, tent, enclosure, space, vehicle, vessel or place had reasonable grounds for suspecting that the thing so seized was an instrument of gaming, the seizure of such instrument or thing shall be evidence, until the contrary be made to appear that such house, tent, enclosure, space, vehicle, vessel or place is used as a gaming house and that the persons found therein were then present for the purpose of gaming although no gaming was actually seen by the Magistrate or Police Officer".

(5) It will be seen that if the court is satisfied that the Officer who entered or searched such house, room etc. had reasonable grounds for suspecting that the thing so seized was an instrument of gaming the seizure of such an instrument or thing shall be the evidence, until contrary is made to appear, that such house, room etc. was used as a gaming house and that the persons found therein were then present for the purpose of gaming although no game was seen by the Magistrate or the Police Officer. The section thus makes the fact of seizure of a thing which the officer concerned had reasonable grounds for suspecting to be an instrument of gaming evidence of the place being used as a gaming house and that the persons found therein were then present for the purpose of gaming. A careful examination of this not very felicitously worded section presents the following elements for consideration:

1. Under it, the seizure of a thing is evidence of,
  - (a) that the place is used for gaming house,
  - (b) that the persons found therein were then present for the purpose of gaming, although no game was seen either by the Magistrate or the Police Officer.
2. The seizure of a thing will be evidence of facts mentioned above until the contrary is made to appear.
3. The seizure of a thing shall be evidence of facts mentioned above only if the Court is satisfied that the Officer concerned had reasonable ground for suspecting that the thing so seized was an instrument of gaming.

(6) Accordingly before the seizure of the thing can be relied on as evidence of any fact under the section the court must be satisfied that the Officer concerned had reasonable grounds for suspecting that the thing so seized was an instrument of gaming.

(7) Before I proceed further, I should like to make it clear that though Sub-Inspector Chaturbhuj stated in evidence that the six of the ac-



cused were playing a game of Mang Patta he admitted in cross-examination that he did not know how Mang Patta is played. Naturally, in these circumstances, his evidence as to the nature of the game that was being played cannot be of much assistance. We should not in the circumstances of a case like the present forget that it was a Diwali night. It is well known that numerous Hindus indulge in gambling on this night as a mark of observance of this national festival. At the same time, we should not readily jump to the conclusion that wherever a few friends are playing a game of cards on Diwali night they are gambling and thus make themselves liable under the provisions of the Act. We further find that Head Constable Balmukund went further than Sub-Inspector Chaturbhuj and actually stated that the accused were gambling with playing cards for money. He could naturally throw no light on what kind of game they were playing and how he inferred that they were gambling for money.

(8) It is an elementary principle of our criminal Law that every person shall be presumed to be innocent till he is proved guilty. The presumption to which S. 6 may give rise takes a line which is contrary to the general principle referred to above. In applying this presumption, care should however be taken that the general principle of the innocence of the accused person is negatived only to the extent provided by the Law and no further. As the language used in framing S. 6 is very general, it is of the utmost importance that the provisions of the section should be applied with great care and discrimination. We should not lose sight of the expression "the seizure of such an instrument or thing 'shall be evidence' 'until contrary 'be made to appear' ". It necessarily follows that if the contrary be made to appear which is clear and distinguishable from saying that until the contrary is proved — the presumption referred to in the section ought not to be raised. It is further necessary to justify the raising of presumption under that section that the Court must be satisfied that the Officer concerned had reasonable grounds for suspecting that the things so seized were instruments of gaming. The law enjoins that the Court should before raising any presumption satisfy itself that the Officer concerned had reasonable grounds for suspecting that the thing seized by him was an instrument of gaming. If the Court is not satisfied on this point, there is no room for any presumption under the section.

The question therefore arises how is the Court to satisfy itself whether reasonable grounds existed for the Officer concerned to suspect that the thing seized by him was an instrument of gaming. This can be done only on the material placed before the court by the prosecution. It is the duty of the Officer concerned either by his own evidence or in some other way to place before the court material which would enable it to satisfy itself whether reasonable grounds existed for his suspicion. The thing seized in the present case was a pack of cards and monies found with the different accused. Both these articles may be used as instruments of gaming or for innocent and lawful purposes. This was a night of festivity. A national Hindu festival was being observed. Possession of a sum of Rs. 77-14-9 by the eight petitioners on such a night can therefore be no reasonable ground for suspecting that the money was used or was intended to be used for any illegitimate purpose. The same may be said about a pack of cards. It has

come out in the evidence of Head Constable Balmukund that from what he saw in the room he could infer that Laxmi Pooja had been performed there. If this was so, it is not at all surprising that some of Narsingh's friends may have collected there for the Pooja and afterwards decided to spend the night playing at cards.

The only material placed by Sub-Inspector Chaturbhuj before the court to satisfy it that there were reasonable grounds for his suspecting that the cards and the monies recovered were instruments of gaming was that he had received information from an informer that gambling was going on in that house and that he had satisfied himself that this information was correct. This material is of too indefinite a character to enable the court to form any opinion as to whether there did or did not exist reasonable grounds for suspecting that the playing cards and the monies found in the room were used as instruments of gaming. What the Law requires is not a mere suspicion on the part of the Officer concerned that a thing seized was an instrument of gaming but it further insists that before a presumption is raised under section 6 a court should satisfy itself that there were reasonable grounds for the Officer to suspect that the thing seized was an instrument of gaming. So long as there is not sufficient material for the Court to satisfy itself on that point no presumption could arise. Sub-Inspector Chaturbhuj was asked if he could name his informer and he declined to do so. How he satisfied himself that the information given to him by his informer is correct was not disclosed by him.

(9) It will further be noted that under the Law as it stands the Court before it raises a presumption has not only to examine the material placed before it by the prosecution to enable it to satisfy itself with regard to the existence of reasonable grounds for the Officer concerned's suspicion that a thing seized by him is an instrument of gaming. It has further to consider whether there is any material or circumstances from which it appears that no such reasonable grounds existed for the suspicion of the Officer concerned. The law does not require the accused 'to prove' that there were no reasonable grounds for the suspicion of the Officer concerned. It is sufficient if he is able to place before the Court a material or circumstances from which 'it appears' that reasonable grounds did not exist for suspecting that the thing seized was an instrument of gaming no presumption can arise.

(10) Having carefully considered the judgments of the courts below I have come to the conclusion that the true meaning of S. 6 was not fully appreciated in those courts. Merely because a pack of cards and some money was recovered from the room in which the accused were found a ready assumption was made that they were gambling. Not improbably the courts below were mainly influenced in coming to that conclusion because it was Diwali night on which the house of Narsingh was raided.

(11) The learned Sessions Judge has rejected the plea raised on behalf of the accused that they were playing an innocent game of cards on two grounds (1) that all the accused did not unanimously state that they were playing a game of Chhakdi and (2) if they were playing a game of Chhakdi four TWOS of the pack of cards should have been found separate from the rest. No question appears to have been put to any of the witnesses with regard to the last mentioned point. As regards the other point, it is sufficient to say that on being challaned in a criminal case every accused puts forward what he considers his



best defence and the fact that some of the accused in the present case did not state that they were playing a game of Chhakdi should not be considered as a factor which should affect the accused who gave that explanation. Courts should not in dealing with such cases lose sight of the provisions of S. 15 of the Act under which the Magistrate trying the case may direct any portion of the fine which shall be levied under Ss. 3 and 4 of this Act, or any part of the money or proceeds of articles seized and ordered to be forfeited under this Act to be paid to an informer. In many cases this may be a temptation to the informers to give information which is not necessarily true. This is yet another reason why the presumption under S. 6 should be raised after carefully considering the entire material on the record. I am clear that in this case the prosecution did not place before the Court any material on which it could satisfy itself that there were reasonable grounds for Sub Inspector Chaturbhuj to suspect that the pack of cards and the money seized by him in the room which he raided were used as instruments of gaming. If no presumption under that section is raised the evidence that the accused were gambling falls far short of the standard necessary to satisfy a reasonable man that the accused were guilty of the offence with which they were charged.

(12) The result therefore is that the revision application is allowed. The conviction of the petitioners and the sentences passed upon them are set aside. They are on bail and need not surrender thereto. The fine if paid shall be refunded.

B/G.M.J.

Revision allowed.

**A.I.R. 1953 M.B. 175 (Vol. 40, C.N. 64)**  
**(GWALIOR BENCH)**

**DIXIT J.**

Kundan Lal, Applicant v. The State.

Criminal Ref. No. 23 of 1951, D/- 22-10-1951.

(a) **Madhya Bharat Kerosene Control Order (1949), S. 3 — Possession of kerosene stock for sale without license must be proved by prosecution — Evidence Act (1872), Ss. 101 to 103. (Para 3)**

Anno: Evi. Act, Ss. 101 to 103 N. 3.

(b) **Madhya Bharat Kerosene Control Order (1949), S. 3 (kha) — Dealer, meaning of — Words and Phrases.**

A person can be said to carry on business in some commodity only when he conducts more transactions than one by way of trade or commerce. A single transaction of sale or purchase of the commodity is not business and the person making the sale does not by a single transaction become a dealer in that commodity.

(Para 3)

(c) **Criminal P. C. (1898), S. 256 — Right of accused to cross-examine prosecution witnesses.**

Under S. 256, Criminal P. C., the right of the accused to cross-examine is absolute and a witness cannot be discharged unless and until the accused declares that he does not wish to cross-examine him or if he wishes to cross-examine him until the cross-examination is concluded. The accused person cannot be deprived of this right, by discharging the prosecution witnesses before the framing of the charge and then by accepting the statement of the prosecution that the witnesses cannot be traced.

(Paras 4, 5)

Anno: Cr. P. C., S. 256 N. 6.

Inamdar, for Applicant; Shiv Dayal, Deputy Govt. Advocate, for the State.

**ORDER:** This is a reference by the learned Sessions Judge of Gwalior recommending that the sentence of fine of Rs. 100/- imposed on Kundanlal by the City Magistrate, Lashkar, for an offence under S. 8, Madhya Bharat Essential Supplies (Temporary Powers) Act (Act No. III of 1948) be enhanced. On 23-4-51, the reference was admitted and on 2-8-51 a notice was issued to Kundanlal to show cause why the sentence should not be enhanced. Kundanlal has now filed objections contending that his conviction under S. 8 of Act 3 of 1948 is itself illegal and that he should be acquitted of the charge of having contravened the provisions of S. 3, Madhya Bharat Kerosene Control Order of 1949.

(2) The facts are that on 29-4-1950, the Chief Inspector, Civil Supplies Department, received information that Kundanlal was selling kerosene oil and storing it without obtaining licence for the purpose under the Kerosene Control Order. On receipt of this information, the Chief Inspector sent a bogus customer Vishwambar Dayal with marked currency notes of the value of Rs. 12/- for purchasing a tin of kerosene from Kundanlal. It was alleged by the prosecution that Kundanlal sold a tin of kerosene for Rs. 11-10-0 to Vishwambhar Dayal and returned to him a change of 0/6/- annas from the amount of Rs. 12/- given by Vishwambhar Dayal to Kundanlal. Immediately after this purchase, the Chief Inspector went to the shop of Kundanlal, seized the tin sold by him to Vishwambhar Dayal and also recovered from Kundanlal the marked currency notes. The Chief Inspector Mr. Kishori Mohan also searched the shop of Kundanlal and recovered therefrom 13 other tins full of kerosene oil. Kundanlal was then tried by the City Magistrate, Lashkar on two charges (1) firstly, that he sold a tin of kerosene to Vishwambhar Dayal at a price in excess of the control rate and as such contravened the provisions of S. 6, Kerosene Control Order; (2) and that he stored for sale 13 other tins of kerosene oil. Kundanlal was acquitted of the charge of selling one tin of kerosene oil to Vishwambhar Dayal at a price in excess of the control rate. He was, however, found guilty of the other charge and sentenced to pay a fine of Rs. 100/-. The accused admitted the recovery of 13 tins of kerosene oil from his shop, but he pleaded that they belonged to one licence-dealer of the village Guthina and that that dealer had temporarily deposited the tins with him. The learned City Magistrate rejected the defence of the accused.

(3) Having heard the learned Counsel for the accused and the Counsel for the State, I have come to the conclusion that the conviction and sentence imposed on Kundanlal must be set aside. It appears to me that in holding Kundanlal guilty under S. 8 of the Essential Supplies (Temporary Powers) Act by contravening the provisions of S. 3, Kerosene Control Order, the City Magistrate and the learned Sessions Judge have assumed that under the Kerosene Control Order, it was for the accused to explain the possession of the thirteen tins of kerosene oil and the fact that these tins were stored for sale was proved by the fact that Kundanlal sold one another tin to Vishwambhar Dayal. In my opinion, both these assumptions are unwarranted. Under the Kerosene Control Order, no restriction has been



placed on the quantity of kerosene oil that may be sold, purchased or stored by any person. There is also no provision in the Control Order which lays down that a Court will presume that any kerosene oil, for which the accused person is unable to account satisfactorily, is kerosene oil in respect of which he has contravened the Control Order. In the absence of any restriction on the quantity of kerosene oil that may be possessed by any person and of any provision in the Control Order placing the burden of proof on the accused person, clearly there can be no justification for holding that after the recovery of the tins was established by evidence and also admitted by the accused, it was for him to prove that he had not stored the kerosene tins for sale. In my view, the burden of proof was initially on the prosecution and it was for the prosecution to prove circumstances suggesting the inference that the accused held the 13 tins of kerosene oil for sale, before calling upon the accused to repel the inference. There is in the present case no evidence whatsoever, to show that Kundanlal held the stock for sale. It must be remembered that the charge of storage for sale was in respect of the 13 tins of kerosene oil which the Chief Inspector found in the shop of Kundanlal. The tin of kerosene oil which was alleged to have been sold to Vishwambhar Dayal was not one of the tins included in the charge of storage for sale. It was, therefore, necessary for the prosecution to prove that Kundanlal had already sold these thirteen tins to some person or that he intended to sell them under a contract to be entered into in the future or that he was a dealer in kerosene oil and would have in the ordinary course sold these thirteen tins of kerosene oil. There is no evidence that Kundanlal had stored these thirteen tins of kerosene oil for purposes of fulfilling the terms of a contract entered into beforehand for their sale or that he had stored them for sale under a contract to be entered into in the future. Nor is there any evidence to show that Kundanlal was a dealer in kerosene oil. A dealer has been defined in S. 3 (Kha) of the Kerosene Control Order itself, as a person dealing in the purchase, sale or distribution of kerosene. In the present case, even if the evidence of Vishwambhar Dayal is accepted that Kundanlal sold a tin of kerosene oil to him, it only shows that Kundanlal conducted a solitary transaction of sale of one tin of kerosene. But it does not establish the fact that Kundanlal carried on business in kerosene oil as a dealer. A person can be said to carry on business in some commodity only when he conducts more transactions than one by way of trade or commerce. A single transaction of sale or purchase of the commodity is not business and the person making the sale does not by a single transaction become a dealer in that commodity. It is clear from the evidence of Kishorimohan the Chief Inspector that he did not examine the books of Kundanlal to find out whether he had been carrying on business in kerosene oil. He also did not question the accused as to how he was in possession of the thirteen tins. Kishori Mohan also admitted that he was not in a position to say whether the accused was the owner of the tins or whether he had kept them with him as a bailee. There being thus no evidence to show that Kundanlal used to carry on business in kerosene oil, from the mere fact that Kundanlal sold one another tin to Vishwambhar Dayal, the inference that he had stored 13 tins

of kerosene oil for sale cannot be drawn. In my opinion, as the prosecution failed to prove in this case that the storage of these thirteen tins was for sale, the learned City Magistrate was not right in concluding that the storage was for sale merely because the explanation of the accused about the possession of the tins did not appear to the Magistrate satisfactory.

(4) Mr. Inamdar, learned Counsel for the accused Kundanlal, also urged that the learned City Magistrate erred in considering the evidence of Vishwambhar Dayal, as the witness was not recalled by the Magistrate for cross-examination after the framing of the charge. The contention is, in my opinion, well founded. It appears from the record that after the framing of the charge, when the accused was asked whether he wished to cross-examine any of the prosecution witnesses, the accused expressed a desire to cross-examine Vishwambhar Dayal. A summons was accordingly, issued for securing the attendance of Vishwambhar Dayal. A constable Ram Singh who was entrusted with the service of the summons deposed that he was unable to trace Vishwambhar Dayal. The learned City Magistrate thought that as the witness could not be traced, the evidence which he had given before the framing of the charge could be taken into consideration. In my view, this is not a correct proposition of law. Under S. 256 of the Cr. P. C., the right of the accused to cross-examine is absolute and a witness cannot be discharged unless and until the accused declares that he does not wish to cross-examine him or if he wishes to cross-examine him until the cross-examination is concluded. In the present case, the Magistrate was altogether wrong in discharging the witness immediately after his examination before the charge. If the learned Magistrate had not discharged the witness, it would not have been at all difficult to trace the witness and produce him in the Court for further cross-examination. When, therefore, Vishwambhar Dayal was allowed to leave, to suit his convenience or the convenience of the Court, before the charge had been framed and before the right conferred by S. 256, Cr. P. Code had been exercised by the accused, it was the duty of the Court to see that the witness was produced by the prosecution for further cross-examination.

(5) In these circumstances, the Magistrate should have expunged the evidence given by Vishwambhar Dayal before the framing of the charge. The right of cross-examination under S. 256 of the Cr. P. Code is a very important right. The accused person cannot be deprived of this right, by discharging the prosecution witnesses before the framing of the charge and then by accepting the statement of the prosecution that the witnesses cannot be traced. I think it cannot be maintained that in this case the accused has not suffered any substantial injury in the course of the trial by the failure of the prosecution and also of the Court to see that Vishwambhar Dayal was present in the Court for cross-examination after the framing of the charge.

(6) For the above reasons, I set aside the conviction and sentence imposed on Kundanlal under S. 8 of the Essential Supplies (Temporary Powers) Act and discharge the notice of enhancement of sentence issued to him. The amount of fine, if already paid by Kundanlal, be refunded to him.

C/K.S.

Conviction and sentence set aside.



A.I.R. 1953 M.B. 177 (Vol. 40, C.N. 65)

(GWALIOR BENCH)

DIXIT AND CHATURVEDI JJ.

Fuljari Lal, Appellant v. Ram Sarup, Respondent.

First Appeals Nos. 29 and 56, of 2005, D/-4-8-1952.

**(a) Gwalior Pre-emption Act (Smt. 1992), S. 19 — Consideration for pre-emption sale — Onus — Fixation by Court.**

Under S. 19, Gwalior Pre-emption Act, 1992, if there is no agreement between the parties with regard to the consideration for a pre-emptible sale, the Court has to determine in the first instance whether the amount for which the sale is alleged to have taken place was or was not in fact fixed or paid. This section also casts the onus of proving the fact that the consideration alleged was fixed or actually paid on the vendee. It is only when the Court finds that the alleged consideration was not fixed or paid that the Court has to consider the question of the market price of the property for the purposes of the suit.

(Para 2)

**(b) Pre-emption — Pre-emption price — Evidence — Evidence of vendee and attesting witness cannot be ignored. AIR 1918 PC 154, Rel. on.**

(Para 4)

**(c) Registration Act (1908), S. 60 — Certification of registration — Evidentiary value of — Gwalior (Registration Act (Smt. 1971), S. 49).**

The certificate of registration has indeed an evidentiary value attached to it by S. 49, Gwalior Registration Act, Samvat 1971 which corresponds to S. 60, Indian Registration Act. It is admissible for the purpose of proving that the document has been duly registered and that the facts mentioned in the endorsement made under Ss. 27, 28, 47 and 48, Gwalior Registration Act have occurred as they are mentioned. It would thus be seen that where there is an endorsement by the Registrar upon a sale deed about the payment of money made in his presence by the vendee to the vendor and of the admission of the vendor of having already received an advance before executing the sale, it is of considerable evidential value and must prevail unless its effect is negatived by other circumstances appearing in the case. (Para 5)

Anno: Regi. Act, S. 60 N. 11.

**(d) Gwalior Pre-emption Act (Smt. 1992), S. 19 — Provisions of S. 49, Gwalior Registration Act are not abrogated — (Gwalior Registration Act (Smt. 1971), S. 49 — (Registration Act (1908), S. 60).**

Section 19, Gwalior Pre-emption Act which lays upon the vendee the burden of proving consideration, does not abrogate the provisions of S. 49, Gwalior Registration Act relating to the evidentiary value of the endorsement made under sections referred to therein on a sale-deed. Section 19, Pre-emption Act only means that in a suit for pre-emption the initial burden lies on the vendee to show the actual amount of sale consideration and when this is done, the onus lies on the plaintiff pre-emptor to show that the consideration entered in the sale deed is not the real consideration. This section cannot be so

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construed as to render the express provisions of S. 49, Registration Act absolutely nugatory and to cast on the vendee the burden of proving the facts stated in the endorsement aliunde by positive evidence. (Para 5)

Anno: Regi. Act, S. 60 N. 11.

**(e) Evidence Act (1872), S. 34 — Account books — Form of.**

No particular form of books of account is generally prescribed, although books are far more satisfactory when kept in the form of daily entries of debits and credits in a day book or journal. But the book should be such a regular and usual account book as explains itself and as appears on its face to create a liability in an account with party against whom it is offered, and not to be a mere memorandum for some other purpose. Hence mere loose sheets of paper are not admissible; and a single entry does not constitute an account book. The account book of an illiterate labourer, as well as those of a tradesman or banker are admissible in evidence, if within the statutory conditions, the purposes of which are to secure authenticity and credibility in respect to the evidence, rather than to prescribe the form of it. (Para 6)

Anno: Evid. Act, S. 34 N. 2.

**(f) Evidence Act (1872), Ss. 59, 61, 63(5) and 65 — Contents of lost document — Proof by oral evidence.**

The effect of Ss. 59, 61, 63(5) and 65, read together is that the contents of a lost document may be proved by oral evidence, when such evidence is admissible as secondary evidence. (Para 8)

Anno: Evid. Act, S. 59 N. 1; S. 61 N. 1; S. 63 N. 7; S. 65 N. 5.

**(g) Evidence Act (1872), S. 114 — Official acts.**

In the absence of anything to suggest to the contrary, it must be presumed that the registering authority, while registering the sale deed performed the official act of registration in a regular manner. (Para 8)

Anno: Evid. Act, S. 114 N. 29.

In No. 29 of 2005: Patankar, for Appellant; Bhagwan Swarup, for Respondent.

CASE CITED:

(A) ('18) AIR 1918 PC 154: 56 Ind Cas 723 (PC)

DIXIT J.: These two appeals arise out of a pre-emption suit in which a decree for pre-emption in respect of certain lands for Rs. 9115/- has been passed by the Court of District Judge Bhind in favour of the plaintiff Fuljarilal. The Appeal No. 29 of 2005 is by the plaintiff and is concerned solely with the question of the amount for which the plaintiff Fuljari Lal is entitled to exercise his right for pre-emption. The other appeal is by the defendant Ram Swarup with regard to the costs of the suit decreed against him. On 30-5-46, one Bhando Lal sold a piece of land situated in Bhind to Ram Swarup by a registered sale deed which contained a recital of a consideration of Rs. 9115/-. After the sale of the house by Bhando Lal to Ram Swarup, the plaintiff Fuljari Lal brought a suit for pre-emption alleging that the sale was really for Rs. 6000/-, the amount which was actually paid before the Registrar and that the recital in the sale deed that Bhando Lal had received Rs. 3115/- from Ram Swarup on the previous day was fictitious. The plaintiff claimed



to be entitled to exercise his right of pre-emption in respect of the land for a sum of Rs. 6000/- only. The defendant asserted in his written statement that the sale was in fact for Rs. 9115/-. The lower Court found that the consideration for the sale was Rs. 9115/- and that the plaintiff had the right to pre-empt the property for this amount.

(2) In the appeal preferred by Fuljari Lal, the appellant prays that the decree of the lower Court be modified by reducing the amount for which the appellant is entitled to exercise his right of pre-emption to Rs. 6000/-. Under S. 19, Gwalior Pre-emption Act, 1902, if there is no agreement between the parties with regard to the consideration for a pre-emptible sale, the Court has to determine in the first instance whether the amount for which the sale is alleged to have taken place was or was not in fact fixed or paid. This section also casts the onus of proving the fact that the consideration alleged was fixed or actually paid on the vendee. It is only when the Court finds that the alleged consideration was not fixed or paid that the Court has to consider the question of the market price of the property for the purposes of the suit. In the present case, the evidence as to the consideration for which the property was purchased by Ram Swarup from Bhando Lal consists of (1) the statements of Ram Swarup that the land was sold to him for Rs. 9115/- that on 29-5-46 he paid to Bhando Lal Rs. 3115/- and obtained a receipt from him of the payment and that on the next day he paid Rs. 6000/- to Bhando Lal before the Registrar and also gave back the receipt for the payment of Rs. 3115/- to Bhando Lal in the presence of the Registrar, (2) the entries in Ram Swarup's account books of the payment of Rs. 3115/- to Bhando Lal on 29-5-46 and of Rs. 6000/- on 30-5-46, (3) the endorsement on the sale deed that a sum of Rs. 6000/- was paid before the Registrar and that Bhando Lal admitted before the Registrar that he had already received from Ram Swarup Rs. 3115/- and had given him a receipt for this amount and this receipt was returned to Bhando Lal on the registration of the sale deed, (4) the depositions of the attesting witnesses to the sale deed, namely Sukhwasi Lal and Lal Chand that Bhando Lal was paid Rs. 6000/- before the Registrar, and he admitted having already received Rs. 3115/- and that the receipt for this amount was returned to him on the registration of the deed, (5) and the statement of Mr. Shyam Swarup Johari, the Registrar who gave evidence as to the facts mentioned in the endorsement in the sale deed.

(3) This evidence is challenged by the learned counsel for the appellant on the ground that Ram Swarup is interested in the transaction and his statement that Rs. 3115/- were paid by him to Bhando Lal on 29-5-46 is not supported by the entry in his account book. It was said that Ram Swarup's account books were not regularly kept and that in that account book the amount of Rs. 3115/- said to have been paid to Bhando Lal is still shown as due from Bhando Lal. It was argued that the receipt alleged to have been obtained for the payment of Rs. 3115/- was not produced; the witnesses who attested the receipt were also not examined by the plaintiff and the contents of this receipt which is said to have been lost could not be proved by oral evidence in accordance with the provisions of Ss. 59, 63, 64 and 65, Evidence Act. It was said that these factors and the fact that Ram Swarup did not give any notice to the plaintiff of the intended sale indicated that the payment of Rs. 3115/- to Bhando Lal on 29-5-46 recited in the sale deed was fictitious.

(4) I am unable to accede to the contention of the learned counsel for the appellant. The evidence of Ram Swarup cannot be ruled out of consideration simply because he was a party to the transaction. Likewise the evidence of Sukhwasi Lal and Lal Chand cannot be ignored merely because they attested the sale deed. As observed by the Privy Council in — *Idris v. Jane Skinner*, AIR 1918 P. C. 154 (A).

"In cases of this kind, (that is, in cases of pre-emption) the persons engaged in the transactions and notably the vendors and the vendees are necessarily essential witnesses and in the absence of the contradiction to disregard their testimony because they were interested parties, is to carry the vigilance with which the Court ought always to regard interested testimony beyond all reasonable and trustworthy limits. There appears to be no reason on record in the evidence to impute collusion and dishonesty to any of these witnesses, and as their evidence is wholly unanswered it must in their Lordships' opinion prevail".

(5) Here, Ram Swarup said in his evidence that on 29-5-46 he paid to Bhando Lal Rs. 3115/- as earnest money for the sale and expenses of the registration and obtained a receipt from him and that this receipt was returned to Bhando Lal the next day on the completion of the registration of the deed. Bhando Lal was also examined as a witness of the plaintiff. He said that he had lost the receipt for Rs. 3115/- and was not, therefore, able to produce it. It is true that the witness was not asked either by the plaintiff or by the defendant whether he did receive the amount of Rs. 3115/- on 29-5-46. But then there is nothing in his statement to destroy the evidentiary value of the endorsement by the Registrar on the sale deed that Bhando Lal admitted before him the receipt of Rs. 3115/- on 29-5-46 and that the receipt for the payment was returned by Ram Swarup to Bhando Lal in his presence on the completion of the registration. Mr. Shyam Swarup Johari who registered the deed and other witnesses Sukhwasi Lal and Lal Chand also deposed that this admission was made by Bhando Lal before the Registrar and a receipt of the payment of Rs. 3115/- was returned by Ram Swarup to Bhando Lal after the registration. It was the duty of the appellant to put question to Bhando Lal to elicit the fact that he did not admit before the Registrar the receipt of Rs. 3115/- from Ram Swarup on 29-5-46. The certificate of registration has indeed an evidentiary value attached to it by S. 49, Gwalior Registration Act Samvat 1971 which corresponds to S. 60, Indian Registration Act. It is admissible for the purpose of proving that the document has been duly registered and that the facts mentioned in the endorsement made under Ss. 27, 28, 47 and 48, Gwalior Registration Act have occurred as they are mentioned. It would thus be seen that where there is an endorsement by the Registrar upon a sale deed about the payment of money made in his presence by the vendee to the vendor and of the admission of the vendor of having already received an advance before executing the sale, it is of considerable evidential value and must prevail unless its effect is negated by other circumstances appearing in the case. The onus was, therefore, clearly on the appellant to rebut the endorsement and to show that Bhando Lal did not admit before the Registrar the receipt of Rs. 3115/- on 29-5-46. It must be noted that S. 19, Gwalior Pre-emption Act which lays upon the vendee the burden of proving consideration, does not abrogate the provisions of S. 49, Gwalior Registration Act relating to the evi-



dentiary value of the endorsement made under sections referred to therein on a sale deed. Section 19, Pre-emption Act only means that in a suit for pre-emption the initial burden lies on the vendee to show the actual amount of sale consideration and when this is done, the onus lies on the plaintiff pre-emptor to show that the consideration entered in the sale deed is not the real consideration. This section cannot be so construed as to render the express provisions of S. 49, Registration Act absolutely nugatory and to cast on the vendee the burden of proving the facts stated in the endorsement aliunde by positive evidence. As the appellant made no attempt to rebut this endorsement, it must be held that Bhando Lal admitted before the Registrar the receipt of Rs. 3115/- on 29-5-46 and also received back from Ram Swarup a receipt for the payment which he had given to Ram Swarup.

(6) Learned counsel for the appellant laid considerable stress on the fact that Ram Swarup's account books were not regularly kept, that in the account books, the account of Rs. 3115/- alleged to have been paid to Bhando Lal is still shown as due from him and that in the account books, entries were not made from day to day as transaction took place. In support of this contention, learned counsel for the appellant relied on the evidence of the plaintiff's witness Shri Ram who examined the accounts and said that the accounts were not regularly kept. In my opinion, there is no force in this contention. It is not clear from the evidence of Shri Ram that he is an expert in accounts. He also does not depose that books of accounts in order to be regular must be kept in some particular prescribed form. As noted in Jones "On Evidence".

"No particular form of books of account is generally prescribed, although books are far more satisfactory when kept in the form of daily entries of debits and credits in a day book or journal .... but the book should be such a regular and usual account book as explains itself and as appears on its face to create a liability in an account with the party against whom it is offered, and not to be a mere memorandum for some other purpose. Hence mere loose sheets of paper are not admissible; and a single entry does not constitute an account book,..... The account book of an illiterate labourer, as well as those of a tradesman or banker are admissible in evidence, if within the statutory conditions, the purposes of which are to secure authenticity and credibility in respect to the evidence, rather than to prescribe the form of it."

(7) Counsel for the appellant says that the respondent vendee's account books are not regularly kept in the course of business as at one place there is no entry of any transaction done during one fortnight. It is difficult to see how there could be any such entry if no transaction was done during the period. As regards the entry in the account books about the payment of Rs. 3115/- on 29-5-46, it is true that it is in the words "Bando Lal Baniya Bhind Walw ke nam", thus showing that the amount is due from Bhando Lal. But so is the entry relating to the payment of Rs. 6000/- on 30-5-46 before the Registrar to Bhando Lal, which is not disputed. Both the entries, however, mention that the payment is in respect of the purchase of a land. In these circumstances the words of the entry in the account books of Ram Swarup about the payment of Rs. 3115/- to Bhando Lal cannot be taken as decisive of the fact that the payment was not towards the purchase of the land.

(8) It is then argued that the receipt for the payment of Rs. 3115/- alleged to have been passed by Bhando Lal in favour of Ram Swarup was not produced and that other evidence to prove the existence of the receipt and its contents was not admissible. There is no force in this contention. The effect of Ss. 59, 61, 63 (5) and 65, Evidence Act, read together is that the contents of a document may be proved by oral evidence, when such evidence is admissible as secondary evidence. In the present case Ram Swarup, who had himself taken the receipt and seen it, deposed to the contents of the receipt and said that it was returned to Bhando Lal in the presence of the Registrar. Mr. Johari the Registrar and attesting witnesses Sukhwasi Lal and Dal Chand corroborate the fact of the return of the receipt to Bhando Lal. Mr. Johari's statement is that the receipt referred to in the endorsement on the sale deed must have been produced before him. Mr. Johari no doubt, added that he could not recall all the details about the registration & made it clear that he was not testifying to the facts mentioned in the endorsement from his memory. In saying that the receipt must have been produced before him, Mr. Johari only stressed the fact that he used to perform regularly the registration proceedings and that if the receipt had not been produced before him, seen by him and returned in his presence to Bhando Lal, he would not have made the endorsement on the sale deed which he did. I think in the absence of anything to suggest to the contrary it must be presumed that Mr. Johari, performed the official act of the registration in a regular manner and saw the receipt before it was returned to Bhando Lal in his presence.

The attesting witnesses do not say that they actually saw the receipt. But Sukhwasi Lal says that the receipt was read out at the time of the registration. The existence of the receipt and its return to Bhando Lal having been thus established, no adverse inference can be drawn against Ram Swarup from the fact that it was subsequently lost by Bhando Lal and could not be produced in evidence by Bhando Lal. Learned Counsel for the respondent sought to explain the return of the receipt to Bhando Lal by saying that after the registration of the sale deed evidencing the payment of the consideration of Rs. 9115/- and the existence of a receipt for Rs. 3115/- Ram Swarup might have thought it unnecessary to retain it with him. I cannot regard this explanation as altogether untenable, especially when the learned counsel for the appellant was unable to suggest the significance that should be attached to the fact of the return of the receipt to Bhando Lal in the face of the evidence that it was produced before the Registrar and was seen by him and that Bhando Lal admitted before the Registrar that he had already received from Ram Swarup Rs. 3115/-.

(9) On a consideration of the evidence on record I am led to the conclusion that the respondent has succeeded in discharging the initial burden that lay on him to show that the consideration for the sale was Rs. 3115/-. The burden was not heavy. For, it is obvious that with the aid of S. 49, Gwalior Registration Act, a vendee is able to discharge the burden with a quantum of evidence much less than that which would otherwise be required. It was open to the pre-emptor appellant to prove in rebuttal that the amount of Rs. 3115/- was never paid to the vendor Bhando Lal or that if it was paid, the amount was subsequently refunded to Ram Swarup. But he has not done so. The evidence of his witness



Ram Chandra is simply this, that he was at first intended to be one of the attesting witnesses to the sale deed but when Dal Chand became available he was not required and that on 30-5-46 Sukhwasi Lal told him that the sale was for Rs. 3000/- a statement not asserted even by the appellant himself. The witness further said that he had heard the parties to the transaction talk amongst themselves that the receipt for Rs. 3115/- was obtained to defeat any right of pre-emption that might be set up. If this was the intention of the defendant, he would not have talked about it loudly enough to enable the witness to hear and know of his intention nor would he have returned the receipt to Bhando Lal. According to the other witness Balmukund, he had offered to purchase the land for Rs. 6000/- and that his was the highest offer which Bhando Lal had received from any one for the purchase of the land. In my opinion this sort of evidence is not evidence of the fact that Ram Swarup did not as a matter of fact pay Rs. 3115/- to Bhando Lal on 29-5-46. Such being the state of evidence on record, I am of the view that the finding of the learned District Judge that the sale was for a consideration of Rs. 9115/- must be upheld and the plaintiff Fuljari Lal's appeal must be dismissed.

(10) The defendant's appeal as regards costs rests on the contention that as the plaintiff has failed in the lower Court in the matter of the price to be paid, he is not entitled to receive any costs from the defendant. This contention must also be rejected. There could have been some force in the appeal if in the suit the issue between the parties had been only with regard to the consideration for the sale. But the defendant Ram Swarup chose to resist the suit also on the grounds of non-joinder of parties and waiver on the part of the plaintiff of his right of pre-emption. On both these issues he failed miserably. There is, therefore, no justification for disallowing the plaintiff his costs in the trial Court.

(11) In our opinion, the decision of the trial Court is correct. Both the appeals are, therefore, dismissed with costs. The plaintiff-appellant was permitted by this Court to defer the deposit of the consideration amount of Rs. 9115/- till the disposal of his appeal. He should now deposit it within three months' time together with the respondent's costs in this Court after deducting his own costs in the trial Court and in this Court in the appeal preferred by the defendant. In case of default in the payment within three months, the plaintiff's suit shall stand dismissed with costs throughout.

(12) **CHATURVEDI J.:** I agree.

C/R.G.D.

Appeals dismissed.

**A.I.R. 1953 M.B. 180 (Vol. 40, C.N. 66)**

**(INDORE BENCH)**

**CHATURVEDI J.**

Shrikrishna Nandlalji and another, Appellants  
v. Dhanna Ladaji and others, Respondents.

Second Appeal No. 203 of 1950, D/- 1-10-1951.

**Civil P. C. (1908), S. 107 — Appellate Court**  
**— Powers of, in matters of evidence and proof.**

The Indian Evidence Act has adopted the requirements of the prudent man as an appropriate concrete standard by which to measure proof and in civil proceedings a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision. If a Court requires a standard of proof higher

than that laid down by the Evidence Act the appellate Court must interfere. (1947) 1 All ER 582; AIR 1949 PC 32 and AIR 1948 PC 20, Rel. on. (Paras 4, 5, 6)  
Anno: C.P.C., S. 107 N. 14.

S. M. Samvatsar, for Appellants; M. P. Avadhoot, for Respondents.

**CASES CITED:**

(A) ('49) AIR 1949 PC 32: ILR (1949)

Mad 487 (PC)

(B) (1947) 1 All ER 582: 1947 AC 484

(C) ('48) AIR 1948 PC 20: 1947 All LJ 613 (PC)

**JUDGMENT:** This is second appeal by the defendant decree-holder arising from a suit filed by the plaintiffs objectors under O. 21, R. 63 in Execution Case No. 13 of 1946. An objection had been brought by Dhanna and Pusaji that cattle and house attached in the execution of the decree did not belong to the judgment-debtor, Gendi Bai but belonged to them. The objection about house was allowed but the objection about cattle was disallowed. Pusaji is the son-in-law of Gendi Bai the judgment-debtor and he with his brother Dhanna brought this suit for a declaration that cattle belonged to him. The trial Court dismissed the suit but the District Judge Mandleshwar in appeal reversed the finding and set aside the decree and decreed the suit. The defendants have filed this second appeal against the decree and judgment of the District Judge.

(2) As the question involved in this second appeal is question of fact I am not inclined to interfere.

(3) Mr. Samvatsar, learned counsel for the appellant, contends that the view of the trial Judge as to where credibility lies is entitled to great weight as the conclusion was arrived at by it after having had the advantage of seeing and hearing the witnesses. He places reliance on the observations of their Lordships of the Privy Council in — 'Veeraswami v. Narayya', AIR 1949 PC 32 (A). It is true that the appellate Court should bear in mind that it has not enjoyed the opportunity of seeing and hearing the witnesses, but it has nowhere been laid down that, the Judge of the first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. The principles which should guide an appellate Court in deciding whether to reverse the trial Judge on a question of fact were stated by Lord Thankerton in — 'Watt v. Thomas', (1947) 1 All ER 582: 1947 AC 484 (B); and the two judgments of the Privy Council reported in — 'AIR 1949 PC 32 (A)' and — 'Prem Singh v. Deb Singh', AIR 1948 PC 20 (C), are based on this judgment. The third principle laid down by Lord Thankerton at page 587 of the All E. R. is in the following words:

"The appellate Court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses and the matter will then become at large for the appellate Court."

(4) Applying this principle to the facts of this case I find that the trial Judge has measured the evidence adduced by the plaintiffs by a standard required only in criminal proceedings and has forgotten that there is a strong and marked difference as to the effect



of the evidence in civil and criminal proceedings. In civil cases, it cannot be said that the benefit of every reasonable doubt must necessarily go to the defendant.

(5) The Indian Evidence Act has adopted the requirements of the prudent man as an appropriate concrete standard by which to measure proof and in civil proceedings a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision. If a Court requires a standard of proof higher than that laid down by the Evidence Act the appellate Court must interfere. In this case, the plaintiffs had produced licences to graze cattle Exs. P/3, P/4, P/5 and P/6 issued from 1-7-1945 to 1-7-1946. The attachment of cattle took place on 13-10-1946. The licences for grazing cattle were issued in the name of Pusaji and that shows that the authorities were confident that Pusaji was the owner of the cattle. The licences were issued much before the attachment and therefore the licences are not tainted with any suspicion. This circumstance which alone outweighs other considerations, in this case, has entirely been ignored by the trial Court. The second circumstance is that the cattle were attached in the house which has been held to be of Pusaji. These two circumstances ought to have been considered by the trial Court and if the evidence adduced by the plaintiff is read along with the aforesaid circumstances then the conclusion is irresistible that the cattle belong to Pusaji and not to Gendi Bai. There is no reason why so many witnesses would come to depose in the Court that Pusaji purchased cattle from them and the trial Court has not recorded that the witnesses were inimical to the defendant or partial towards Pusaji. Thus, it is clear that the trial Court had left its decision fairly open to attack and the appellate Court has rightly set aside the finding of fact.

(6) That Pusaji was son-in-law to Gendi Bai is a circumstance which warns the Judge that Pusaji's evidence must be received with caution. But this does not mean that it must be rejected altogether and in this case the adverse presumption has been rebutted, and the initial suspicions seem to be unfounded. I, therefore, come to the conclusion that the Judgment of the learned First Appellate Court is sound and does not warrant any interference.

(7) I, therefore, disallow the appeal with costs.

C/D.R.R.

Appeal disallowed.

**A.I.R. 1953 M.B. 181 (Vol. 40, C.N. 67)**  
**(GWALIOR BENCH)**

**DIXIT J.**

Bhawani Sahay, Applicant v. Mt. Sugandho, Non-Applicant.

Civil Revn. No. 46 of 1951, D/- 3-9-1951.

(a) Civil P. C. (1908), O. 21, R. 29 — "Such Court" — More than one Judge in same Court — Suit pending before one — Execution before another — Former can stay execution.

Anno: C.P.C., O. 21, R. 29 N. 2.

(Para 3)

(b) Civil P. C. (1908), O. 21, R. 29 — It is not correct to say that Stay order can be ordered only by Court executing decree.

(Para 4)

Anno: C.P.C., O. 21, R. 29 N. 2.

Motilal Gupta, for Applicant.

#### CASES CITED:

(A) ('86) 13 Cal 111

(B) ('97) 20 Mad 366

(C) ('28) AIR 1928 Cal 222: 55 Cal 512

(D) ('31) AIR 1931 Bom 247: 132 Ind Cas 507

ORDER: This is a revision application against the order of the lower Court passed in Civil Suit No. 768 of 49 staying under O. 21, R. 29 the execution proceedings of a decree pending in the Court of City Civil Judge, Lashkar. One Ganesh Ram, who is now dead and whose legal representative Musammam Sugandho is the non-applicant in the petition before me, filed a suit for partition against Bhawani Sahay on 17-12-49 in the Court of Sub-Judge, Lashkar. In the re-organisation of the Courts that took place in 1948, the Court of Sub-Judge was replaced by the Court of City Civil Judge, First Class, Lashkar and the plaintiff's suit is now pending in the Court of City Civil Judge, Lashkar. At present, suits up to the valuation of Rs. 200/- instituted in the Court of City Civil Judge, Lashkar are being tried by Mr. Ram Krishan Gupta as Additional Civil Judge, Lashkar. Mr. Gupta is also the Civil Judge, First Class, Gwalior. But he is trying the suit out of which this revision petition arises as Additional City Civil Judge, Lashkar. On 4-11-47, the defendant in the suit Bhawani Sahay had obtained from the Gwalior State Judicial Committee a decree in his favour and against Ganesh Ram for demolition of a wall alleged to have been constructed by Ganesh Ram on a piece of land jointly owned by him and Bhawani Sahay. The suit, in which the Gwalior Judicial Committee, in the exercise of its revisional powers, passed the decree, was also instituted in the Court of Sub-Judge, Gwalior. The execution proceedings of that decree were started by Bhawani Sahay, the decree-holder, on 1-12-49 in the Court of City Civil Judge, Lashkar. These execution proceedings were stayed by the order of the lower Court which is under revision.

(2) Learned counsel for the applicant contends that O. 21, R. 29 has no applicability to the present case as the Court in which the plaintiff non-applicant has sued, is not the Court which had passed the decree in favour of the petitioner and that in any case the order staying the execution of the decree can only be made by the Court in the execution proceedings and not in the suit proceedings.

(3) I am unable to accept the contention of the applicant. The suit, in which the Judicial Committee ultimately passed the decree in favour of Bhawani Sahay, was instituted in the Court of Sub-Judge, Gwalior, and at the time of making the application for the execution of that decree, the City Civil Judge, Lashkar would have had jurisdiction to try Bhawani Sahay's suit. It is clear that under S. 37, Civil P. C., the Court of Civil Judge, Lashkar must be regarded as the Court which passed the decree in favour of Bhawani Sahay. The plaintiff non-applicant's suit was also instituted in the Court of the Sub-Judge, Gwalior and is now pending before the City Civil Judge, Lashkar. It is true that the plaintiff non-applicant's suit is being tried by Mr. Gupta as an Additional City Civil Judge and the execution proceedings of the decree in favour of Bhawani Sahay are not pending before him, but before the City Civil Judge. This fact does not, in my opinion, take away the jurisdiction of Mr. Gupta to pass an order under O. 21, R. 29 to stay the execution proceedings pending before the City



Civil Judge, Lashkar. Order 21, R. 29 simply refers to the Court in which a suit is pending against the holder of a decree of such Court.

It has no reference to the personality of the Judge presiding over such Court. If there are two or more Judges attached to a Court, each one of them exercises the powers and jurisdiction of one and the same Court and not of the different Court. It cannot, therefore, be maintained that the Court of Additional City Civil Judge, Lashkar presided over by Mr. Gupta in which the plaintiff non-applicant's suit is pending is different from the Court of City Civil Judge, Lashkar presided over by another Judge where the execution proceedings are pending. For the purpose of O. 21, R. 29, it is not necessary that the execution proceedings should be pending before the same Judge in whose Court the suit is pending. It is sufficient if the suit is pending in any Court against the holder of a decree of such Court. In my opinion, the Additional City Civil Judge Mr. Gupta had, therefore, jurisdiction to pass an order under O. 21, R. 29.

(4) As to the contention of the petitioner that the application for stay of execution decree ought to have been made not to the Court of Additional City Civil Judge in which the suit is pending, but ought to have been made to the Court of City Civil Judge, Lashkar in which the execution proceedings are pending, I think on a plain reading of O. 21, R. 29, it is clear that it is the Court in which the suit is pending that has jurisdiction to pass an order under O. 21, R. 29. It is true that R. 29 is one of the rules of O. 21 which deals with the execution of decree and order. But this fact alone cannot, in my opinion justify the conclusion that under this rule, the stay of the execution of a decree can be ordered only by the Court executing the decree. There is no indication whatsoever in the rule itself that the application for stay of execution must be made to the Court in execution proceedings. On the other hand, it is clear from the wording of R. 29 that it is the Court in which the suit is pending that has jurisdiction to stay execution of the decree. I am aware of the decisions in the cases of — *O. Steel & Co. v. Ichchamoyi*, 13 Cal 111 (A); — *Lingum Krishna v. K. Sivaramayya*, 20 Mad 366 (B); — *Mahesh Chandra v. Jogenlal*, AIR 1928 Cal 222 (C) in which an application under O. 21, R. 29 was made to the Court in execution proceedings and it was held that an appeal lay against the order of stay passed in execution proceedings. The point before me did not arise in those cases, which cannot for that reason be regarded as authorities to support the view that an application under O. 21, R. 29 must be made to the Court in the execution proceedings. On the other hand in the case of — *Narsidas v. Manahar Singh*, AIR 1931 Bom 247 (D), the question, whether under O. 21, R. 29 an application for the stay of execution of a decree must be made in the execution proceedings or in the suit proceedings, was considered and it was held by a Division Bench of the Bombay High Court that the Court in which the suit is pending has jurisdiction to pass an order under that Rule. I think, therefore, that Mr. Gupta before whom the plaintiff non-applicant's suit is pending had jurisdiction to pass the order staying the execution of the decree.

(5) No other point was urged on behalf of the petitioner.

(6) For the above reasons, I dismiss this petition. There was no appearance on behalf of the non-applicant and there will be no order as to the costs of this petition.

C/G.M.J.

Petition dismissed.

**A.I.R. 1953 M.B. 182 (Vol. 40, C.N. 68)**  
**(INDORE BENCH)**

**KAUL C. J. AND MEHTA J.**

Dayaram Laxman, Appellant v. State.

Criminal Appeals Nos. 134 and 138 of 1951, D/- 11-1-1952.

**Penal Code (1860), Ss. 96, 97 — Girl removed forcibly by her husband and companions against her will — People interested in rescuing her, are entitled to use minimum force in rescuing her.**

While using minimum force in rescuing the girl, if accidentally a stone hits some one of the captors on the head and unfortunately results in an injury to the base of the skull it could not be said that the person who threw the stone exceeded his right of private defence. (Paras 10, 12, 13)  
Anno: Penal Code, S. 96 N. 1; S. 97 N. 1.

N. V. Karanjkar, for Appellant (in Cri. A. No. 134 of 1951); P. R. Sharma, Government Advocate, for the State.

KAUL C. J.: These two criminal appeals — Criminal Appeal No. 134 of 1951 preferred by Dayaram and No. 138 of 1951 preferred by Gopal — may conveniently be disposed of by one common judgment. They arise thus:

(2) Misarbai a girl aged about 20 years was married to Rajaram s/o Dewa of Jagatpura. In January 1950, she went to the house of her sister who was married to Gopal of Karai Kasba. It appears that once the girl was in Gopal's house he would not let her return to her husband's house. Thereupon her husband Rajaram, along with his cousin Bhagwan Patel, his sister's husband Rajaram s/o Hira and four or five others including one Santokhsingh came to Karai Kasba in two bullock carts. They left the bullock carts at the house of Santokhsingh's brother who lived in that village. This was on the night between 5th and 6th April 1950. The next morning when Misarbai came to the river to fetch water she was seized by her husband Rajaram s/o Dewa who along with his other companions forcibly carried her away. They directed one of their companions Lalchand to bring the bullock carts which had been left behind. By the time the news of this forcible abduction of Misarbai reached Gopal and he arranged for the rescue of the girl. Misarbai's captors had taken her beyond village Nagziri which adjoins Karai Kasba. They were overtaken by a party of rescuers which included the present two appellants Gopal and Dayaram. This party consisted in all of six or seven persons. The two parties met and it is alleged that Gopal's party set upon Misarbai's captors. They threw stones on their opponents and also caused some injuries with lathis. During this clash Rajaram s/o Hira was hit with a stone on the head which though it left no external mark of injury resulted in a fracture at the base of the skull. He dropped down and became unconscious. Gopal's party succeeded in rescuing the girl. Besides Rajaram s/o Hira, Bhagwan Patel and Rajaram s/o Dewa also received some minor injuries. Misarbai's husband and his companions thereupon lifted Rajaram s/o Hira



into one of the bullock carts and took him to the Police Station Balwada where a first information report of the occurrence was made by Bhagwan Patel at 3-30 P. M. the same day i.e., 6-4-1950. The report ran as follows:

“बयान करता है कि व मुकाम बलवाड़ा तारीख ६-४-१९५० व वक्त ३॥ दिन को मय हमराई राजाराम वल्द देवा, लालचंद वल्द देवला, भारुड़, साकिन जगतपुरा ने हाजिर स्टेशन होकर जबानी रिपोर्ट किया कि हम लोग राजाराम की औरत लेने कल श्याम को करी कस्बा गाड़ी से गये थे। औरत को लेकर आज सुबह आ रहे थे कि नागझिरी गांव पार करने के बाद में भीलट बाबा के ओटले पर के रास्ते के पास आये होंगे कि पीछे से दयाराम गोपाल भारुड़ व ५, ६ आदमी नागझिरी के जिनके नाम जानता नहीं हूं वो लोग गवली समान थे इनके पास लठ थे इन्होंने गाड़ी में पड़ा हुआ मजरूका राजाराम वल्द हीरा भारुड़ साकिन जगतपुरा को पत्थर मट्टी से मारा जिससे राजाराम वहीं बेहोश होकर गिर पड़ा था। दाहीने कान की फेंपड़ी फट गई थी कनपटी दीमाग में से खूब खून बह रहा था। कतई बातचीत रास्ते भर नहीं की वो पिपलदा के आगे अरे बापरे २ ऐसा बोला था। बाद में फिर सांस जोर २ से लेना शुरू की जो अभी तक उसी रफ्तार से सांसे ले रहा है। मुझे भी इन लोगों ने व राजाराम वल्द देवा को लाठी से मारा है। रिपोर्ट करता हूं।”

Shortly after at about 3-45 P. M. Rajaram s/o Hira expired. A case under S. 302/34, I. P. C., was accordingly registered. As the Station Officer was away at the moment Head Constable Shankarlal started the investigation. He went to the place of occurrence and arrested Gopal and Dayaram. They went to Nagziri but as Bhagwan Patel could not identify any person of that village as being among the culprits no other arrests were made.

(3) After a Panchanama was prepared the dead body of Rajaram s/o Hira was sent to Burwah where an autopsy of the corpse was made by the Sub-Assistant Surgeon, Shiv Shaktilal. According to him Rajaram's death was due to coma caused by the compression of the brain.

(4) The next day investigation of the crime was taken over by Circle Inspector Kartarchand into his own hands. As a result of his investigation 7 persons including the present two appellants were challaned and in due course after the usual Magisterial inquiry were committed to the Court of Session.

They all pleaded not guilty. The learned Additional Sessions Judge of Mandleshwar acquitted them of the charge under S. 302/149, I. P. C. He convicted Gopal for an offence under S. 304, I. P. C., with respect to injuries caused to Rajaram s/o Hira and sentenced him to seven years' rigorous imprisonment. For injuries caused to Rajaram s/o Dewa he was convicted under S. 323/149, I. P. C., and sentenced to nine months' rigorous imprisonment.

(5) Dayaram was convicted under S. 325/149, I. P. C., for injuries caused to Rajaram s/o Hira and sentenced to four years' rigorous imprisonment and for injuries caused to Rajaram s/o Dewa he was convicted under S. 323/149, I. P. C., and sentenced to nine months'

rigorous imprisonment. Both the sentences were in each case to run concurrently.

(6) The main witnesses in the case are Bhagwan Patel P. W. 4, Rajaram s/o Dewa P. W. 7, Siva Gawali P. W. 9 and Misarbai P. W. 8. On the evidence before him the learned Additional Sessions Judge held:

1. That Misarbai was being forcibly carried away by her husband and his companions when she was rescued by a party of six or seven persons including the two appellants Gopal and Dayaram.
2. They were the members of an unlawful assembly which had as its common object the rescue of Misarbai by use of force; and
3. There was no occasion for exercise of right of private defence inasmuch as the appellants and their companions could have resort to public authorities to secure the release of Misarbai.

(7) Dissatisfied with this decision the present appeals have been preferred.

(8) It was contended by Mr. Karanjkar learned counsel for Dayaram that even if his client and his companions inflicted the injuries for causing which they have been punished, they did so in exercise of right of private defence of person of Misarbai. He argued that Misarbai's husband had no right to forcibly seize the girl and carry her away from Karai Kasba against her will. Dayaram and his companions accordingly could not be held guilty of any offence if they inflicted some injuries upon the woman's captors in their attempt to rescue her. This contention is not without force.

(9) There could be no doubt that the learned Additional Sessions Judge came to a correct conclusion when he held that Rajaram s/o Hira was forcibly carrying away his wife against her will. This is abundantly proved by the fact that after the parties met Misarbai went to Karai Kasba. It was pointed out that the nature of the injuries inflicted in the present case though they resulted in loss of one life cannot be said to be serious or disproportionate to the requirements of the situation. According to Bhagwan Patel as the appellants approached them they shouted 'catch them and seize the woman.' "They began to hurl stones at us." A stone thrown by Gopal hit Rajaram s/o Hira on the head. He fell down. As he attempted to rise he was assaulted with lathis. Gopal caught hold of Misarbai's hand and rescued her. He is definite that Dayaram did not strike Rajaram s/o Hira. The other witnesses also gave evidence on the same lines.

(10) Once it is held that the girl was being carried away forcibly against her will those who attempted to rescue her were entitled to use sufficient force to achieve that purpose. If in doing so they inflicted some injuries they can well claim the benefit of the plea of the right of private defence.

(11) Under S. 96, Penal Code, nothing is an offence which is done in the exercise of the right of private defence. Under S. 97, I. P. C., every person has, subject to the restrictions contained in S. 99, a right to defend his own body and the body of any other person, against any offence affecting the human body.

(12) It was not disputed by the learned Government Advocate that the present appellants and their companions had a right to rescue the woman provided they did not transgress the limitations imposed by S. 99, I. P. C. With his usual fairness the learned Govern-



ment Advocate made no attempt to support the judgment of the lower Court which held that the accused had no right of private defence inasmuch as they could have resort to public authorities. Obviously if a woman is being forcibly carried away against her will in the manner that Misarbai was abducted from Karai Kasba, those interested in her could not be reasonably expected to wait till the matter had been reported to the Police and action taken by the public authorities. It is true that she was being carried away by force by her own husband. But that would not affect the right conferred by S. 97, I. P. C.

(13) Once it is held that there was a right of private defence, it cannot be said that the present appellants or their companions were members of an unlawful assembly. The only question which the learned Government Advocate attempted to raise was that the right of private defence was exceeded. I am unable to accept this contention. I have given above what was stated by one of the chief prosecution witnesses Bhagwan Patel in his evidence. We know that the stone which Gopal is said to have thrown and which hit Rajaram s/o Hira on the head did not leave any external mark of injury. Dr. Shiv Shaktilal has said that it was possible that the fracture found at the base of skull could have been caused by such a stone. It is said that lathis were used by the party of Misarbai's. The injuries caused by lathis are of a minor character. The only severe injury received by any member of the complainant's party was that by Rajaram s/o Hira who was hit by a stone said to have been hurled by Gopal. In the circumstances in which the rescuers were placed it was only natural for them to use stones for achieving their object. If accidentally a stone hits someone on the head and unfortunately resulted in an injury to the base of the skull it cannot be said that the person who threw the stone exceeded his right of private defence. Accordingly disagreeing with the view taken by the learned Additional Sessions Judge we hold that the injuries inflicted by Gopal and Dayaram the present appellants upon the captors of Misarbai were inflicted in the exercise of right of private defence and they are not guilty of any offence.

(14) The appeals are allowed. The conviction of the appellants in each of these appeals is set aside. Both the appellants will be set at liberty.

(15) MEHTA J.: I agree.

C/R.G.D.

Appeals allowed.

A.I.R. 1953 M.B. 184 (Vol. 40, C.N. 69)

(INDORE BENCH)

KAUL C. J. AND CHATURVEDI J.

Ramchandra and others, Appellants v. Keshav Khanderao and others, Respondents.

Second Appeals Nos. 130 and 131 of 1949, D/- 28-11-1951.

(a) Madhya Bharat High Court of Judicature Act (8 of 1949), S. 23 — Appeal under — Concurrent findings of fact — Principles as to when findings will be set aside elaborately discussed — Civil P. C. (1908), S. 100. A I R 1947 PC 19; 14 Cal 296 (PC); AIR 1940 P. C. 192; AIR 1937 Lah 644 and AIR 1948 PC 20, Ref. (Para 10)

(b) Hindu Law — Joint family — Nucleus of ancestral property — Acquisitions by member — Presumption as to.

The mere existence of a nucleus of ancestral property will not by itself raise a presumption that the subsequently acquired properties of a member are joint family properties. The law is that where a nucleus of joint family property is proved or admitted, a presumption arises that the whole of the property of the joint family is joint including all acquisitions by a member of the joint family. The presumption however can be rebutted. AIR 1937 Bom 446 and AIR 1938 Mad 841, Rel. on. (Para 18)

Where the intention to keep the self-acquisitions separate from the joint family property is clear the mere failure to keep separate accounts in respect of the self-acquisitions cannot raise a presumption of blending. (Para 19)

(c) Hindu Law — Partition by way of family arrangement — Reopening of — Powers of Court.

Once separation is proved, the Court cannot go into the question whether the partition effected was on an equitable or unequitable basis. The High Court cannot reopen a family arrangement arrived at whatever its basis might have been. (Para 20)

(d) Evidence Act (1872), S. 35 — Pawti Book — Evidentiary value of.

The Pawti Book is not Government record of rights and as it is not kept in a Government Office but remains with the holder or the Zamindar its evidentiary value is very little as compared to a Khatoni or Khasra record or a mutation order. (Para 24) Anno: Evi. Act, S. 35 N. 1, 12.

(e) Limitation Act (1908), S. 28 and Arts. 142 and 144 — Exclusion of co-owner from joint possession for statutory period — Effect.

If a co-owner who has been excluded from joint possession of the lands sleeps over his rights or suffers his rights to be barred by limitation, the practical effect is the extinction of his title in favour of the party in possession, and there cannot be a revival of the title of which there has been a statutory extinguishment. (Para 26) Anno: Lim. Act, S. 28 N. 6.

(f) Hindu Law — Joint family — Coparcener — Right of.

If there is a joint family and a joint estate, the youngest child would acquire an interest by birth without contributing any labour. (Para 27)

(g) Records of Rights — Land mutated in name of one member of joint family — Presumption.

The entry of the names of particular members of a joint family in Revenue records as being proprietor of the property, does not lead, by any means, to the inevitable conclusion that the property is not the property of the joint family to which they belong. This is very often a mere matter of form. (Para 27)

(h) Hindu Law — Partition — Partial partition — Separation of one brother does not necessarily raise a presumption that other brothers have also separated. AIR 1924 PC 126 and AIR 1927 Oudh 149, Rel. on. (Para 29)

(i) Evidence Act (1872), S. 17 — Admission — Gratuitous admission — Withdrawal of.

When a person makes a gratuitous admission that the maker has no right in



the property in certain estate there is nothing to prevent him from withdrawing the said admission unless there is some obligation not to withdraw the gratuitous admission made by him. AIR 1939 All 348, Rel. on. (Para 30)

Newaskar, (in No. 131 for Mahadeo and Raghunath), and Waghmare (in No. 130 for Ramchandra and Anant), for Appellants; Bharucha (for No. 1 Sadashiv); Fadnis (for Nos. 1 and 2, Sadashiv and Dattatraya) and Kulkarni (for No. 3 Laxmibai), for Respondents. Respondent No. 4 Keshav (Plaintiff No. 1) present in person.

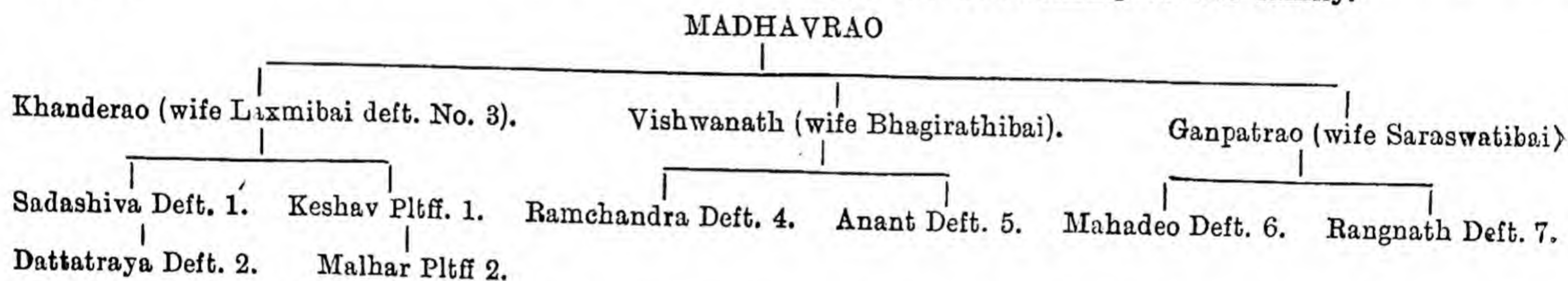
#### CASES CITED:

- (A) ('47) AIR 1947 PC 19: ILR (1947) Kar PC 85 (PC)
- (B) ('86-87) 14 Cal 296: 14 Ind App 7 (PC)
- (C) ('40) AIR 1940 P C 192: ILR (1940) Kar PC 380 (PC)
- (D) ('37) AIR 1937 Lah 644:173 Ind Cas 165
- (E) ('48) AIR 1948 PC 20: 1947 All LJ 613 (PC)
- (F) ('38) AIR 1938 Mad 841: ILR (1938) Mad 696
- (G) ('37) AIR 1937 Bom 446: ILR (1937) Bom 708
- (H) ('33) AIR 1933 Oudh 482: 146 Ind Cas 1005
- (I) ('34) AIR 1934 PC 182: 13 Pat 589 (PC)
- (J) ('26) AIR 1926 PC 100: 53 Ind App 220 (P C)

- (K) ('51) C. S. A. No. 6 of 2005, D/- 21-4-1951 (Madh. B.)
- (L) ('24) AIR 1924 PC 126: 51 Ind App 163: 5 Lah 92 (PC)
- (M) ('27) AIR 1927 Oudh 149: 2 Luck 459
- (N) ('39) AIR 1939 All 348: 182 Ind Cas 801

CHATURVEDI J.: These two appeals Nos. 130 and 131 are filed under S. 23, Madhya Bharat High Court of Judicature Act (Act No. 8 of 1949) from a judgment and decree dated 22-12-1948 of a learned Single Judge (Mehta J.) passed in Civil First Appeals Nos. 9 and 10 of 1948 affirming the decree and judgment of the learned District Judge, Caroth dated 12-8-1947 in Original Suit No. 1 of 1945 by which he disallowed the claims of defendants 4 to 7 for partition of joint family property.

(2) The suit for partition of joint family property was filed by Keshav Khande Rao Karnik plaintiff 1 and (his minor son) against his elder brother Sadashiv Khande Rao Karnik deft. 1 (and his minor son) and against the mother of plaintiff 1 and defendant 1 Laxmibai (deft. 3). The other collaterals were also impleaded as defendants 4 to 7 on their application. The plaintiff Dr. Keshav admitted that defendants 4 to 7 are members of the Joint family, but defendant 1 and his mother defendant 3 did not admit that they remained members of the joint Hindu family and had any right to the joint family property. The following pedigree will show the relationship of the family.



(3) The claim of the plaintiffs for the partition was originally against defendants 1 to 3 on the ground that Khande Rao, the father of plaintiff 1 and defendant 1 and husband of defendant 3, died in the year 1916 at Mahidpur leaving the joint family property in dispute, which was managed for some time by defendant 3 and then by defendant 1. In May 1944 the dispute about family property was entrusted to 3 arbitrators Messrs Chitale, Samvatsar and Dighe but as the decision of the arbitrators could not be filed in time, the suit was instituted on 18-12-1944. Soon after, defendants 4 and 5 (who are the sons of Vishwanath) and defendants 6 & 7 (who are the sons of Ganesh or Ganpat Rao) applied to the Court claiming shares in the property in the suit on the ground that they were also members of the joint Hindu family. According to them the common ancestor of the family Madhav Rao had left a house and other moveable property worth about Rs. 5000/- which passed to his three surviving sons Khande Rao, Vishwanath, and Ganpat Rao. The family property in the suit had grown out of this ancestral nucleus and this property was liable for partition and defendants 4 to 7 were thus entitled to their shares in this property.

(4) The learned District Judge at first framed 4 issues and the first issue was in the following words:

"Whether the defendants 4, 5, 6 and 7 are the members of a joint Hindu family and whether they have a right to demand the partition of the suit property."

(5) The learned District Judge then held that defendants 5 and 4 i.e. sons of Vishwanath remained members of the joint Hindu family and were entitled to a share in the ancestral property but defendants 6 and 7 i.e. sons of Ganpat Rao have got no such right because their father (Ganpat Rao) had separated from Khande Rao long ago. The learned District Judge passed a preliminary decree in this suit to this effect. Defendants 6 and 7 then came to this Court in appeal and defendants 4 and 5 filed cross-objections and defendants 1 and 3 filed Cross-appeal.

(6) This preliminary decree was set aside by Rege J. who framed the following 5 issues for decision and remanded the case to the Court of the District Judge.

- "(1) Did Madhavrao at his death leave a house and Rs. 5000/- worth of jewellery?
- (2) Whether this formed nucleus for the acquisition of the property in suit or any part of it.
- (3) Is the property in suit the self-acquisition of Khande Rao?
- (4) What is the extent of the property available for partition?
- (5) What are the respective shares of the contending branches of the family in the property?"

(7) After recording the evidence adduced by the parties on these issues and after carefully weighing it the learned District Judge came to the conclusion that Madhav Rao at his death in Samvat 1953 (1896 A. D.) had left a house and jewellery worth Rs. 5000/- but that the jewellery or ornaments were given to the wives of three



brothers Khande Rao, Ganpat Rao, & Vishwanath at the time of their marriages and remained with them and the house remained intact till Khande Rao's death in 1916, and thus nothing of the ancestral nucleus was utilised for the acquisition of property in suit which was the self-acquired property of Khande Rao who had established himself in Samvat 1935 as a pleader at Mahidpur with an income of Rs. 150-200 per month and had himself purchased the property in suit. The Learned Dist. Judge further held that Ganpat Rao had separated from Khande Rao seven or eight years before Khande Rao's death in 1916 and defendants 6 and 7 Mahadeo and Rangnath (who are appellants in C. S. A. No. 131 of 1949 before us) cannot claim any partition. As regards defendants 4 and 5 Ramchandra and Anant (who are appellants in C. S. A. No. 130 of 1949 before us) it was held that that their father Vishwanath till his death in 1913 lived jointly with Khande Rao who had brought up both Ramchandra and Anant and afterwards they remained joint with defendant 1 till 1934 but as there was no ancestral property left they could claim no share in the self-acquired property of Khande Rao.

(8) In Civil First Appeals 9 and 10 of 1948 the learned Judge on the Single Bench (Mehta J.) concurred in these findings holding that Khande Rao had acquired these properties at Mahidpur from 1907-1911, when Ganpat Rao and Vishwanath were dependent or protegee of Khande Rao, that Ganpat Rao had separated and Vishwanath was a lad of 14-15 years and both of them were not in a position to contribute anything towards the acquisition and that there was no possibility of these properties having been acquired by joint labour or joint exertion. The learned Judge therefore came to the conclusion that the sons of Ganpat Rao and Vishwanath cannot claim a share in the separate and self-acquired property of Khande Rao.

(9) From this judgment there are two appeals:— (1) C. S. A. No. 130 of 1949 is preferred by the sons of Vishwanath (appellants Ramchandra and Anant) who are represented by Mr. Wagmare; (2) C. S. A. No. 131 of 1949 is filed by the sons of Ganpat Rao (appellants Mahadeo and Rangnath) who are represented by Mr. Newaskar.

(10) We first take C. S. A. No. 131 of 1949 the appeal of sons of Ganpat Rao (appellants Mahadeo and Rangnath). Mr. Newaskar contends that though there are concurrent findings of facts against him still S. 100, C. P. C., is not binding on us as it is an appeal under S. 23, Madhya Bharat High Court of Judicature Act (Act No. 8 of 1949). It is true that to these appeals S. 100, C. P. C., will not apply as it is not an appeal from a decree passed in an appeal from any Court subordinate to this Court. This however does not warrant our departing from the general rule which forbids a review of the evidence for the third time where there are concurrent findings of two Courts on a pure question of fact. This general rule has been fully explained by their Lordships of the Privy Council in — *Bibhabati Devi v. Ramendra Narayan*, AIR 1947 P. C. 19 (A) and it should not be taken to be confined to the Privy Council appeals only. Unless it is shown with absolute clearness that some blunder or error is apparent in the way in which the learned Judges have dealt with the fact a review of evidence third time will not be justified. It is only when there had been any principle of evidence not properly applied or if there had been written documents referred to on which the appellants could show that the Courts below had been led into error — *Thakur Harihar*

*Bakhsh v. Uman Pershad*, 14 Ind App 7 (PC) (B), or, when the existence of a document does not appear from the judgment of the First Appellate Court to have been appreciated by it, and no effect whatever is given to the statutory presumption arising from the document — *Shankar Rao v. Sambhu*, AIR 1940 PC 192 (C) that the evidence can be re-examined. In fact, the question that has to be determined in such appeals is not what conclusion we would have arrived at if the matter had for the first time come before us, but whether it has been established that the judgments of the two Courts below are clearly wrong. In appeals from the decree of a Judge on the Single Bench the onus lies heavily on the appellants to show that the conclusion arrived at by the Learned Judge is legally erroneous — *Diwan Chand v. Gujranwala Sugar Mills Co. Ltd.*, AIR 1937 Lah 644 (D). Then we have, also to pay respect to the opinion which a Judge who has watched and listened to the witnesses has formed as to their credibility. In — *Prem Singh v. Deb Singh*, AIR 1948 PC 20 (E) their Lordships of the Judicial Committee laid down that where a question of fact has been tried by a Judge, an appellate Court should not come to a different conclusion on the printed evidence unless it is satisfied that any advantage enjoyed by the trial Judge by reasons of having seen and heard the witnesses could not be sufficient to explain or justify the trial Judge's conclusion. In deciding these two appeals in my opinion we should follow the principles enunciated above.

(11) Now it is well established in this case that Madho Rao the common ancestor, was in the service of the Holkar State and was during his lifetime regarded as a man of some substance. He died on Posh Sudi 4 Samvat 1953 (i.e. on 7-1-1897). Before his death, Madho Rao had suffered from a stroke of paralysis for about four or five years (Vide statement of witness Khande Rao D. W. 1). A year before Madho Rao's death i.e. on 23-1-1896 his eldest son Khande Rao had shifted to Mahidpur for his practice. Khande Rao was not legally trained and during those times no training was needed for a pleader or a Public Prosecutor in Holkar State. It is admitted before us that he had ordinary education upto 5th standard. But within few years he established a good practice. The Hindu Gains of Learning Act was not enacted in Indore till 1936 and the principles were in applicable as Khande Rao had received no more than an ordinary education. His brother Ganpat Rao, soon after Madho Rao's death i.e. about 1899, was appointed a Thanedar in Mahidpur on a salary of Rs. 12 per month and another brother Vishwanath, a minor, aged 12 years, came to Mahidpur within two years of his father's death and was brought up by Khande Rao.

(12) It is not disputed that Madhav Rao left one house, ornaments and some moveable property. What it exactly was it is difficult to say. The learned District Judge has drawn certain inference from a letter (Ex. D-1.) written by Khande Rao to his brother Ganpat Rao in the year 1915 in which he mentions that the ancestral property is worth about Rs. 5000/- and that Ganpat Rao is entitled to Rs 1666/-.

(13) One thing that strikes me after a perusal of this letter is that Khande Rao, who tries in this letter to work out precise mathematical calculations for the expenditure incurred for the maintenance of the families of Ganpat Rao and Vishwanath, does not mention in this letter what the ancestral property exactly consisted of. A perusal of this letter however leads me to con-



clude that whatever it was the ancestral property remained with Khande Rao and he was managing the joint family funds as Karta of the family. At one place he writes.

बडलारजित इस्टेट अंदाजे ५००० की है। उसमें हर एक के हिस्से में १६६६ रुपये आते हैं। इसमें इस हिसाब के अलावा तुम्हारे तरफ खेती लागत व कपडा मिला १००० रुपया रहते हैं। यह वजा जाते तुम्हारे बाकी रु० ६६६ रहते हैं। ऊपर के तपसील में बताया अनुसार २४०० रुपये तुम्हारे तरफ लेना है उसमें वजा जाते बाकी १७३४ रु० लेना निकलते हैं वह ब्याजसहित चाहिये।

(14) In this letter he clearly mentioned that Khande Rao was maintaining the family of Ganpat Rao. He does not mention anything about house. But he mentions that as regards ornaments the prices will be determined later on:

जेवर की नक्की कीमतें वगैरा हम या तुम बाद में करेंगे। यदि लिखे हुवे जेवरों के अलावा कोई रकम कम जादा बडलारजीत हो तो देख लें।

(15) He also states that some ornaments during his father's time were pledged and that he paid the pledge-money. It is clear that he paid the money from the ancestral nucleus & not from his own pocket. He writes:

पिता के वक्त जेवर रुपये ५०० के गिरवे थे। ५८१ रुपये में आसाडी वाले इन्होंने मारफत छुड़ाई। मगलीया वाले ढोर के ४२४ रु० आये बाकी १५७ रु० रहे। इसमें इन्दोर से एक भैंस व एक बैलजोड़ी आये। मिलके बराबर हुवे।

(16) At one place he also mentions in this letter that he is not indebted to anybody and that he has not derived any benefit from the ancestral nucleus.

बडलारजीत इस्टेट से मेरा कोई संबंध नहीं।

(17) This letter is also important to show that there was ancestral nucleus available to Khande Rao and that it was with him till 1915. Whether it was in cash or in securities in 1915 we do not know but it is certain that the ancestral nucleus was worth Rs. 5000/- and it did not include either the ornaments or the Indore house. The learned trial Judge has neither analysed the contents of the letter Ex. D-1 nor discussed them in the judgment. He has however taken it for granted that Ex. D-1 mentioned that the ancestral nucleus was worth Rs. 5000/- and consisted only of ornaments & a house in Indore. It is true and the fact is supported by the evidence of Laxmibai, respondent 3, Bhagirath Bai, and Gajanan that the ornaments were given away to the wives of the three brothers at the time of their marriages and remained with them. The house in Indore was sold after the death of Khande Rao. It appears that Khande Rao had been supporting the two brothers from the ancestral nucleus and that the portion of Ganpat Rao in it had been exhausted and by 1915 Khande Rao had given Rs. 1734 more from his own pocket and had informed him of this fact.

(18) Then it is not contested that the property in dispute was purchased by Khande Rao during 1907-1911. At that time Vishwanath was a minor and Ganpat Rao was out of service. The only earning member was Khande Rao. There is no evidence that the later acquisitions of property by Khande Rao were in any way connected with

the ancestral nucleus. It is natural for a member of a joint Hindu family to keep his self-acquired property separate from the joint family property meeting the expenses of the joint family from the joint family property. Therefore it cannot be presumed that the separate earnings of the member were spent on the maintenance of the joint family and that the income from the joint family property was utilised in whole or part towards acquisitions made by him — 'Vythinatha Iyer v. Varadaraja Iyer', AIR 1938 Mad 841 (F). In such case the acquisition of Khande Rao cannot be deemed in law to be joint family property unless he had desired them to be so treated. The mere existence of a nucleus of ancestral property will not by itself raise a presumption that the subsequently acquired properties of a member are joint family properties. The law is that where a nucleus of joint family property is proved or admitted, a presumption arises that the whole of the property of the joint family is joint including all acquisitions by a member of the joint family — 'Babu Bhai Girdharlal v. Ujamlal Hargovind Das', AIR 1937 Bom 446 (G). The presumption however can be rebutted.

(19) Except for the agricultural holdings in Baraphater and Dhuleet which I shall deal later on, other property was purchased in the name of Khande Rao alone (Vide D. 1/9 and 1/10). Even the house occupied by Ganpat Rao from 1910 to 1930 was purchased by Khande Rao (Ex. D. 1/5). (After discussion of evidence the judgment proceeds:—) From all the surrounding circumstances and especially from Khande Rao's letter to his brother Ex. D-1 it is clear that Khande Rao wanted to keep his self-acquired property separated from Ganpat Rao. In such a case the mere failure of Khande Rao's keeping separate accounts of earning will not raise a presumption of blending, so far as the family of Ganpat Rao is concerned.

(20) Then there is ample evidence that Ganpat Rao had separated from his brother Khande Rao. The date is uncertain. (After discussion of the evidence the judgment proceeds:—) In the presence of this overwhelming evidence the learned Judge of first instance has disbelieved the evidence of Hameed Khan D. W. 1 on which Mr. Newaskar has very much relied before us. As the objection is to the weight of evidence and not to its admissibility we decline to interfere. Once separation is proved, we cannot go into the question whether the partition effected was on an equitable or unequitable basis. We cannot now re-open a family arrangement arrived at in 1908-1909, whatever its basis might have been.

(21) Mr. Newaskar has drawn our attention to a sentence in Laxmibai's testimony which may mean that there was no division. But taking into consideration the whole tenor of that deposition it can only mean that there was partition without drawing up any formal deed.

(22) Ganpat Rao then had separate agricultural holdings in Parabatheda in his own name (Ex. D-1/18). Whether they were purchased by Ganpat Rao, or, by Khande Rao for Ganpat Rao is immaterial after so many years. The fact however remains that this property was regarded as separate and after Ganpat Rao's death in 1929 the land was mutated in favour of the sons of Ganpat Rao and in January 1935 was sold to somebody as the appellants did not pay arrears of rent (Exs. D. 1/16 and D1/17). If it had been a joint family Khata, Sadashiv might have tried to pay the rent and save the family property.



(23) The third circumstance to be borne in mind is that just after Khande Rao's death, Ganpat Rao's wife with her two sons and two daughters went away to her brother's place at Depalpur and never returned. After her death there, all the four children of Ganpat Rao were brought up at Depalpur. Ganpat Rao remained alive for a period of twelve years thereafter but the children never came to Mehidpur. Appellant Mahadeo came to Mahidpur only during his Janoo and marriage. The ancestral house in Indore appears to have been sold at the time of Janoo of the appellants Mahadeo and Rangnath. Mahadeo admitted that he had filed a suit against defendant 1 Sadashiv for the sale of the house but abandoned it. According to Laxmi Bai the house was sold by herself and Ganpat Rao for the Janoo of Mahadeo and Rangnath. In a Hindu family that importance is not attached to a son's marriage as to that of a daughter's marriage and the fact remains that the marriage expenses of the two daughters of Ganpat Rao had to be borne by their maternal uncle. That clearly shows that Ganpat Rao had long severed his connection with the family of Khande Rao and Ganpat Rao's sons cannot now claim to be coparceners in the family.

(24) The only point for consideration then remains is about the agricultural holdings at Dhulet and Baraphatter. We have already seen that the Parabatkhedda land was in the sole name of Ganpat Rao. Lands in Chitawad (Ex. D. 1/12) and Lakhakhedi (Ex. D. 1/11) were in the sole name of Khande Rao. But in the Khatowni of Baraphatter of Fasli year 1317 (1906-1908) the names of three brothers Khande Rao, Ganpat Rao and Vishwanath were entered as holders of the property (Ex. D. 4/2). Then after the death of Vishwanath in 1913 and Khande Rao in 1917, the mutation order dated 11-7-1917 (Ex. D. 4/3) showed that till that time the agricultural holdings in Baraphatter and Dhulet remained in the joint names of the three brothers. Except a general statement of the witnesses that all the property was purchased by Khande Rao from the earnings he had from his legal practice, there is no definite evidence that Baraphatter and Dhulet lands were purchased by Khande Rao from his self-acquired property. The Pawti Book D-1/14 produced by defendant 1 is not Government record of rights and as it is not kept in a Government Office but remains with the holder or the Zamindar its evidentiary value is very little as compared to a Khatoni or Khasra record or a mutation order. A Pawti Book must necessarily be in the name either of the Lambardar or of the seniormost of the joint-holder who pays the revenue.

(25) The presumption is that from 1906 to 1917 the Baraphatter and Dhulet lands remained in the joint names of the three brothers. No evidence from Revenue Records of a period previous to 1917 has been adduced to rebut this presumption.

(26) The entries in the Khasra of Baraphatter for the Fasli year 1335 (1925-1926) Ex. D. 4/6 are not free from suspicion and according to the Ameen, Mr. Gangadhar Gokhale, the interpolations are in different ink and seem to be unauthorised. We therefore cannot rely upon them. But from clear entries in Khatoni of Baraphatter for the Fasli year 1335 (1926) Ex-D. 4/7 and in the Patta Bandobast of village Baraphatter (Ex. D. 1/13) it transpires that in 1335 Fasli year i.e., 1926 A.D. the names of Sadashiv and Keshav had been mutated and they alone were shown as holders of these lands. Ganpat Rao was at that time alive and did not object to it. There is no evidence that he had been, after his separation, in the

participation of rents and profits from these lands. He seems to have abandoned his share in favour of other co-owners. From 1926 to 1944 (when the suit was filed), during the period of 18 years, the appellants did not even once try to exercise their possessory or proprietary rights in these lands. From the circumstances, it is easy to infer an ouster, if anybody sleeps over his rights or suffers his rights to be barred by limitation, the practical effect is the extinction of his title in favour of the party in possession, and there cannot be a revival of the title of which there has been a statutory extinguishment. It follows therefore that the appeal of the sons of Ganpat Rao must fail. I now proceed to consider C. S. A. No. 130, the appeal by Ramchandra and Anant, sons of Vishwanath.

(27) The appeal of the sons of Vishwanath must receive considerations entirely different from that of the sons of Ganpat Rao; for, Vishwanath till his early death in 1913 remained joint, in the same house with Khande Rao, and helped him in agricultural operations. He remained joint in food, estate and worship. At one place it is stated by Laxmibai respondent 3 in her deposition that Vishwanath remained separate for one year before his death. But she explained that Vishwanath was in the same house but would cook his food separately. All the material for cooking food as well as the cereals etc. were provided by her. Vishwanath's wife and children even then continued taking their meals jointly with Khande Rao's family. It appears therefore that till his death he remained joint in mess and estate. He was living exactly as a junior member of the Hindu joint family, had food and lodging and when the time came for him to be married a bride was found for him and his necessary expenditure incurred out of the common purse. He was looking after the agricultural operations and was also helping the family in day to day living. Several witnesses however have stated that he was lazy and was addicted to intoxicating drugs like Bhang and Ganja and that his exertions were of very little account implying that they would not entitle him to any share in the property. It is well settled law however that the quantum of labour cannot be the decisive factor in such cases. If there is a joint family and a joint estate, the youngest child would acquire an interest by birth without contributing any labour. As regards lands in Baraphatter and Dhulet I have already stated above that from 1906 to 1917 these lands remained in the joint name of three brothers. And it was not before 1926 that the names of Sadashiv and Keshav were mutated and they alone were shown as holders of the lands. Dhulet land had subsequently gone out of the family but Baraphatter land is still in the possession of the family. The mutation effected in favour of Sadashiv and Keshav in the year 1926 cannot in any way affect the interests of the appellant Ram Chandra and Anant, for, the entry of the names of particular members of a joint family in Revenue records as being proprietor of the property, does not lead, by any means, to the inevitable conclusion that the property is not the property of the joint family to which they belong. This is very often a mere matter of form: — '*Jot Singh v. Jangu Singh*', AIR 1933 Oudh 482 (H). It has been held by their Lordships of the Privy Council in — '*Kamakhaya v. Abhiman*', AIR 1934 P. C. 182 (D), that entries in a survey record or Khewat raise a presumption of correctness but it may be rebutted. Then in — '*Nirman Singh v. Lal Rudra Pratap Singh*', AIR 1926 P. C. 100 (J), it has been held that mutation proceedings are in the nature



of fiscal enquiries for the purposes of ascertaining which of the several claimants for the occupation of certain denominations of immovable property may be put into occupation of it with greater confidence that the revenue for it will be paid. Their Lordships further held in this case that orders in mutation proceedings are not evidence that the successful appellant was in possession as sole legal owner in a proprietary sense to the exclusion for example, of all claims of the other members of the family as co-owners. The Revenue authorities have no jurisdiction to pronounce upon the validity of such a claim and these proceedings could not be the foundation of any proprietary right or interest. This ruling has been followed by us in a Gwalior case — 'Mst. Droupad Kuwar v. Mulloo', C. S. A. No. 6 of 2005 (K).

(28) Thus Ramchandra and Anant remained proprietors in Baraphatter and Dhulet lands even after mutation had been effected in favour of Sadashiv and Keshav.

(29) The separation of Ganpat Rao in 1908-1909 does not raise any presumption that Vishwanath had also separated: — 'Hari Baksh v. Babulal', AIR 1924 P. C. 126 at p. 133 (L), and — 'Dy. Commr. v. Sheonath', AIR 1927 Oudh 149 (M). The view formerly taken in some cases that where one brother separates from the other, and the rest continue to live as joint family, it must be presumed that there has been a complete separation of all the brothers, but that those who continue joint have re-united cannot now be regarded as good law (vide para 458 pp. 559-560 Mayne on Hindu Law and Usages 1950 Edn.) The family of the two brothers Khande Rao and Vishwanath will be held to have remained joint, legally as well as actually, after 1908-1909. After Vishwanath's death in 1913 his family remained in the same house jointly with Khande Rao. The ancestral nucleus was with Khande Rao and the portion of Vishwanath in it in 1915 according to Ex. D. 1 amounted to Rs. 586 (1666-1080-586). Then there was the ancestral house in Indore. Thus it is clear that in 1915 at least (1) the ancestral nucleus, (2) the house in Indore, and, (3) the lands in Baraphatter and Dhulet were in joint possession of the family. The appellants Ramchandra and Anant, sons of Vishwanath remained in the same house jointly with Khande Rao's family till 1934. According to Laxmi Bai (respondent 3) Ramchandra used to help her in agricultural operations and in day to day family work. When Ramchandra appellant became an earning member it was settled that he along with his mother and brother would separate in mess but would remain in one of the houses of the family. There is a letter dated 4-4-1934 from appellant Ramchandra to Sadashiv (Ex. D. 1/7) which states:

"Yesterday you put before me two measures to secure our love as it is, in future, (1) to pay Rs. 15/- to you as lodging expenses and live in joint and suffer other expenses myself, or, (2) to lodge independently ..... Will it be cause of interruption to our love if I accept, second measure? The first measure will be very inconvenient to me ..... you read over to me the old accounts which I never wished to learn. I have nothing to say against this. I never dreamt to cross swords for the property and would never dream. If at all I have claim on my forefather's property I gladly forfeit.... Lastly I request you to be good enough to give me the building in front not as a claim but as a donation in token of pure love. I ask for it because I am serving in this State and I must

have some immovable property in the State for being local subject."

(30) It is contended that after this letter Ramchandra appellant cannot ask for partition as he had forfeited all his rights. This contention does not seem to be well founded. It was a gratuitous admission that his rights had been extinguished. There is nothing in this letter to prevent him from withdrawing the said admission and the law is well-settled that when a person makes a gratuitous admission that the maker has no right in the property in certain estate there is nothing to prevent him from withdrawing the said admission unless there is some obligation not to withdraw the gratuitous admission made by him: — 'Izhar Fathma Bibi v. Mt. Ansar Fatma Bibi', AIR 1939 All 348 (N). It is also to be noted that Ramchandra had no authority on behalf of his younger brother to forfeit his rights. There is evidence on the record that after shifting to the new house Ramchandra appellant and Sadashiv respondent had strained relations. Ramchandra appellant in 1941-1943, according to his version, occupied some lands in Barapatter and was after some time dispossessed by Sadashiv respondent.

(31) That shows that he continued to exercise his rights in joint family property and I am clear in my mind that he was entitled to demand partition at least in lands in Baraphatter. The learned trial Judge has arrived at a right conclusion that Ramchandra and Anant appellants remained members of the joint family but his conclusion that there was no joint family property appears to be erroneous. The conclusion of the Learned Judge about ornaments is also sound. Bhagirath Bai, mother of the appellants Ramchandra and Anant, admits in her deposition that she had ornaments given to her at the time of her marriage and that she had taken them to her father's house but they were taken away by her father who squandered them. The appellants cannot therefore lay any claim to other ornaments. It is then reasonable to infer that the portion of the appellants in the ancestral nucleus (Rs. 586/-) must have been spent on their upbringing and education.

(32) Lands in Dhulet have gone out of the family and the ancestral house in Indore was sold either by Sadashiv or by Ganpat Rao and Laxmi Bai. The evidence about this transaction is not very clear but the selling away of the ancestral house definitely deprived the appellants of any residential accommodation after their leaving the house in which they had been living ever since Vishwanath came to Mahidpur. That it was not the intention of Khande Rao who brought up Vishwanath and his sons is clear from the evidence and the way in which Vishwanath's family received treatment at his hands. It appears to me that on behalf of the Karta of the family, after Khande Rao's death, there was reckless disregard of the appellant's interests in parting with the agricultural holdings in Dhulet and the ancestral house in Indore. But the appellants are not now entitled to open up past accounts or to claim relief against past inequality of enjoyment of the family property. From the beginning the parties had remained under the impression that the whole property including the self-acquired property of Khande Rao was joint family property, and, from Khande Rao's time till 1934, the fruits of this property were enjoyed by the appellants as members of a joint family. In fact, from the way and the manner in which the profits of the self-acquired property were dealt with, it is not difficult to infer that Khande Rao had clothed it with some of the legal qualities and incidents of joint family property. This claim was however never made in the



defence presented, nor before us in arguments, and so it is no use discoursing the evidence about a plea which was never put forward. But I hope that Sadashiv, Keshav and Laxmi Bai will feel their moral responsibility in providing suitable residential accommodation to the appellants in one of the family houses left by Khande Rao. Legally, the appellants can claim only one half of the share in lands in Baraphatter.

(32) The result is that we allow the Civil Second Appeal No. 130 to this extent that the appellants will be entitled only to one half share in the family lands in Baraphatter. Their appeal about other properties is dismissed. Considering the near relations of the parties the parties will bear their own costs throughout. The decree of the learned trial Court will be amended accordingly.

(34) We dismiss Civil Second Appeal No. 131 with Costs.

(35) KAUL C. J.: I agree.

C/K.S.

Order accordingly.

A.I.R. 1952 M.B. 199 (Vol. 40, C.N. 70)

(INDORE BENCH)

MEHTA J.

Sunder w/o Nandram, Appellant v. Gopal Chensingh and another, Respondents.

Civil Misc. Appeal No. 45 of 1951. D/- 31-1-1952.

**Guardians and Wards Act (1890), S. 25 — Custody of child of tender year — Paramount consideration — Respective rights of parents.**

The paramount consideration in the matter of a custody of a minor of tender years is the interest of the child rather than the rights of the parents. If the mother is a suitable person to take charge of the child, it is quite impossible to find an adequate substitute for her for the custody of a child of tender years and consequently the mother is preferable to the father in such case. (Para 5)

After all an order under S. 25 allowing the minor to remain with his mother instead of with his father is of a temporary character & if at any time it should appear that the guardian is not giving that care and attention to the child which is expected of her and is not giving the child proper education it will always be open to the father to move the Court for a proper order. (Para 4)

Anno: Guardians and Wards Act, S. 25 N. 7, 8.

D. P. Vaidya and R. M. Mujumdar, for Appellant; V. R. Newaskar and S. G. Tambe, for Respondent 1.

CASES CITED:

(A) (48) AIR 1948 Oudh 266: 1948 Oudh WN 126

(B) (41) AIR 1941 Bom 103: ILR 1941 Bom 455

JUDGMENT: This is an application under S. 25, Guardians and Wards Act by one Gopalji son of Chensingh for the custody of his minor daughter Rewabai who is aged 3 years.

(2) The minor Rewabai lives with her natural mother Sunderbai. Gopalji and Sunderbai were husband and wife and Rewabai was the offspring of this marriage. However on 9-7-1949 Sunderbai got divorce from her husband Gopal and she contracted Natra with one Nandram.

The plaintiff claimed the custody of the child being the natural father and guardian of the child. The application is opposed by Sunderbai on the ground that the child is only 3 years old and there is mutual attachment and affection between her and her child and the child would suffer great mental shock if the child is forcibly removed from her custody. She contends that the child lives happily with her and this application by Gopalji is not bona fide. She alleges that in Criminal Case under S. 438, Criminal P. C., started by her the Court had passed an order of maintenance of Rs. 15/- P. M. in favour of the child and in order to avoid this payment this application is made.

(3) In my opinion the paramount consideration in a case like this is the welfare of the minor. The minor was brought up by the mother and both are extremely fond of each other and the minor daughter is happy with her mother and at least temporarily so long as Rewabai is of tender age of 3 years, she should not be removed from the custody of her mother. There are certain considerations which induced me not to handover the custody of Rewabai to her natural father. Gopalji after his divorce with his first wife Sunderbai had married again and to force the innocent child of 3 to live with her step-mother would be harsh and the step-motherly treatment which would be meted to the poor minor would not be for her welfare. In an Oudh case reported in — 'Shushila Ganju v. Mr. Kunwar Krishna', AIR 1948 Oudh 266 (A) an application under S. 25, Guardians and Wards Act was made by husband and the custody of the minor child was with her mother and the Court held that in an application under S. 25 the sole criterion for disposing of the case is the minor's welfare. It is only if Court is of opinion that it will be for the welfare of the ward to return to the custody of his guardian that it can pass an order for such return. It appears to me in the case before me that father does not care for the minor child and that the welfare of the minor will not be promoted by her being placed under the guardianship of her father and in my opinion the application was filed by the father merely in order to escape the payment of arrears of maintenance.

(4) After all an order under S. 25 allowing the minor to remain with his mother instead of with his father is of a temporary character and if at any time it should appear that the guardian is not giving that care and attention to the child which is expected of her and is not giving the child a proper education it will always be open to the father to move the Court for a proper order.

(5) In — 'Saraswathibai Shripad v. Shripad Vasanji', AIR 1941 Bom 103 (B), Beaumont C. J. held that the paramount consideration in the matter of a custody of a minor of tender years is the interest of the child rather than the rights of the parents. Human nature being much the same all the world over, if the mother is a suitable person to take charge of the child, it is quite impossible to find an adequate substitute for her for the custody of a child of tender years and consequently the mother is preferable to the father in such case. Orders as to the custody of a child being always of a temporary nature those interested in the minor are at liberty to apply to the Court at any time for the change of minor's custody. Having regard to these authorities cited above and the fact that the



girl is of tender age I think that at present the personal care of the mother as regards the minor is the paramount consideration for some time. The minor girl aged 3 should be allowed to live with her natural mother and she should not be forced to stay with her step-mother where she might meet with step-motherly treatment.

(6) No doubt the father is nevertheless entitled to have access to his child and in order that the child is not antagonised against the father and should have soft corner for the father, the father should be allowed to have access to see his minor daughter and the parties to make arrangement by which the father should be allowed to see the child at least twice in a week. If the parties do not make any arrangement the Court will make the arrangement.

(7) The result is that I allow the appeal, set aside the order of the lower Court and direct that for the present Rewabai who is a girl aged three should be allowed to remain in the custody of her natural mother Sunderbai. Pleader's fee be taxed at Rs. 20/-.

C/G.M.J.

Appeal allowed.

**A.I.R. 1953 M.B. 191 (Vol. 40, C.N. 71)**  
**(GWALIOR BENCH)**

**DIXIT AND CHATURVEDI JJ.**

The State, Appellant v. Karan Singh Gujar, Respondent.

Criminal Appeal No. 70 of 1951, D/- 27-8-52.

**(a) Penal Code (1860), S. 215 — Deprivation of property.**

The deprivation of the property is not confined to one resulting from an act of theft. A person who commits criminal misappropriation of a property also deprives the owner of the possession of the property. (Para 4)

Anno: Penal Code, S. 215 N. 1.

**(b) Penal Code (1860), S. 215 — "By any offence."**

From the mere fact that the accused took the complainant during night-time to the jungle and did not point out to him the actual place where his buffaloes were, but himself went alone and returned with buffaloes, it cannot be inferred that some person had committed criminal misappropriation in respect of them. AIR 1938 All 440, Distinguished. (Para 4)

Anno: Penal Code, S. 215 N. 1.

**(c) Penal Code (1860), S. 215 — "Unless he uses all means" — Evidence Act (1872), Ss. 101 to 103.**

The burden of proving that the accused used all means in his power to cause the offender to be apprehended and convicted of the offence is on the accused. AIR 1933 Cal 599, Rel. on. (Para 5)

Anno: Penal Code, S. 215 N. 1; Evidence Act, Ss. 101 to 103 N. 3.

Mungre Govt. Advocate, for the State; Prabhu Dayal Gupta, for Respondent.

**CASES CITED:**

(A) ('33) AIR 1938 All 440: 39 Cri LJ 808

(B) ('33) AIR 1933 Cal 599: 34 Cri LJ 1015

**DIXIT J.:** This is an appeal from the decision of the Additional District Magistrate Guna acquitting the respondent Karan Singh of an offence under S. 215, I. P. C.

(2) It was alleged by the prosecution that on 4-10-50 a report was lodged with the police by Godi and Bhallu that on 30-9-50 their twelve buffaloes had strayed from a jungle where they had been taken for grazing; that some two or three days after this report the respondent Karan Singh met Godi and Bhallu in a jungle and promised them to trace the buffaloes on a payment of Rs. 600/-. It is said that accordingly after about ten or eleven days Karan Singh took Godi and Bhallu to a place in the jungle at about 3 in the morning and leaving the complainant at this place, he went away and returned shortly afterwards with two buffaloes and took from Godi and Bhallu Rs. 600/- and that after the receipt of this amount, he again went away and returned with the remaining buffaloes. The learned Magistrate acquitted the accused on the ground that the prosecution had failed to prove as a positive fact that the buffaloes had been stolen and they had also failed to show that the accused did not use all the means in his power to cause the offender to be apprehended and convicted.

(3) Mr. Mungre learned Government Advocate for the State concedes that there is no evidence to show that the buffaloes had been stolen. But he contends that there is sufficient evidence to show that although the buffaloes strayed, some person committed criminal misappropriation in respect of them and thus deprived Godi and Bhallu of the possession of the buffaloes. In order to show that some person committed criminal misappropriation, Mr. Mungre relies solely on the circumstances that the accused took Godi and Bhallu to the jungle at night and that after taking them there, the accused did not point out to them the actual place where the buffaloes were, but himself went alone & returned first with two buffaloes, then demanded the amount of Rs. 600/- and again went alone and brought the remaining buffaloes. Mr. Mungre relies on the decision of the Allahabad High Court in — 'Yusuf Mian v. Emperor', AIR 1938 All 440 (A).

(4) In my opinion, this appeal must be rejected. It is quite true that for an offence under S. 215, I. P. C., it is not necessary to prove as a positive fact that the property was stolen. The section says that the property for the recovery of which gratification has been taken or promised must be one of which the owner has been deprived of by any offence punishable under the Penal Code. It is clear from this that the deprivation of the property is not confined to one resulting from an act of theft. A person who commits criminal misappropriation of a property also deprives the owner of the possession of the property. The question, therefore, that arises for consideration is whether there is evidence to show that after the buffaloes had strayed, some person detained them by committing an act of criminal misappropriation. In my opinion, there is no such evidence. From the mere fact that the accused took Godi and Bhallu during night-time to the jungle and did not point out to them the actual place where the buffaloes were, it cannot be inferred that some person had committed criminal misappropriation in respect of them, if, as the evidence shows and as has been found by the trial Magistrate, the buffaloes had strayed, it is possible to conceive that they failed to return to their owner in the ordinary course either because they were entrapped in the jungle or because they were impounded by somebody in a place or because some person had



committed criminal misappropriation in respect of them and detained them.

There is nothing in the present case to indicate that the failure of the buffaloes to return to their owners was not and could not have been due to any of the first two causes. If, therefore, as is possible the buffaloes could not return to their owners on account of the first two causes, it cannot be said that the owners were deprived of the property by an offence punishable under the Code. If in these circumstances, the accused used his efforts to drive the buffaloes from a place from where they could not get out except with the aid of human agency or secured their release from a place of impoundment without letting the complainant know of the place, it cannot be said that he adopted this course because some person had committed criminal misappropriation in respect of the buffaloes. The manner in which the accused returned the buffaloes does not prove the fact that the owners had been deprived of the buffaloes by any offence punishable under the Penal Code. It is obvious that the act of the accused in taking the complainants to the jungle at night, in not disclosing them the place where the buffaloes were and in bringing first two buffaloes and then bringing the remaining buffaloes after the receipt of Rs. 600/- was only to ensure that the complainant paid the amount of Rs. 600/- which they had promised. The Allahabad case cited by the learned Government Advocate is distinguishable on the facts of that case. In the Allahabad case the accused took the complainant to the jungle and pointed out a bullock which had strayed tied to a tree. From the fact that the bullock was tied to a tree, the learned Judge of the Allahabad High Court inferred that the person who tied it up in the jungle deprived the owner of possession of the bullock by committing criminal misappropriation. No such inference can be drawn for the simple reason that there is no material whatsoever, even to suggest why the buffaloes failed to return to their owners in the ordinary course.

(5) Before concluding, it must be observed that the learned Magistrate was not right in thinking that in a prosecution under S. 215, it must be proved by the prosecution itself that the accused person did not use all means in his power to cause the offender to be apprehended. As is clear from the wording of S. 215, I. P. C., the burden of proving that the accused used all means in his power to cause the offender to be apprehended and convicted of the offence, is on the accused. (See — '*Arman Ulla v. Jainulla*', AIR 1933 Cal 599 (B)).

(6) For the above reasons I would dismiss this appeal.

(7) CHATURVEDI J.: I agree.

B/D.H.

Appeal dismissed.

A.I.R. 1953 M.B. 192 (Vol. 40, C.N. 72)

(GWALIOR BENCH)

CHATURVEDI J.

Jagannath Harlal, Applicant v. State.

Criminal Reference No. 75 of 1951, D/- 24-4-1952.

Evidence Act (1872), S. 92 — Proviso (2) — (Criminal P. C. (1898), Ss. 516A and 517).

Cattle seized from accused put in safe custody of supurdgidar pending trial —

Supurdginama stipulating that supurdgidar will produce them when so ordered by Court — No provision in it that supurdgidar will be paid expenses for keeping cattle — Oral understanding that in case supurdgidar had to incur expenditure Court would ask owner of cattle to suitably compensate him and that income derived from milk obtained from cattle would be set off against expenditure incurred by supurdgidar — Such oral agreement not being inconsistent with terms of supurdginama can be proved under proviso (2) to S. 92, Evidence Act.

Anno: Evi. Act, S. 92 N. 25; Cr.P.C., S. 516A N. 2 S. 517 N. 10.

Munnalal Pancholi, for Applicant; Govt. Advocate, for the State.

ORDER: This is a reference from the Sessions Judge, Goona arising under the following circumstances:

One Jagannath was prosecuted and during the course of proceedings some cattle were seized from him, and were delivered to one Mehendra Singh as Supardgidar. When Jagannath was acquitted the Court ordered Mahendra Singh to deliver the cattle to him. Mahendra Singh claimed Rs. 203/- for feeding the cattle. On Nazir's report the Magistrate ordered that Rs. 128/12/- be paid to Mahendra Singh by Jagannath as expenses for feeding the cattle. Jagannath went in revision to the Sessions Judge, Goona who is of the opinion that there was no contract either express or implied with Jagannath to pay this expense to Mahendra Singh. The learned Sessions Judge, therefore, recommended that the Magistrate's order be set aside and he should be asked to make an inquiry into the actual expenditure that was incurred by the Supardgidar, in keeping the cattle after deducting the cost of milk that was utilised by the Supardgidar.

(2) A notice was sent to the Supardgidar Mahendra Singh but he did not appear today. I have heard arguments of Mr. Pancholi on behalf of Jagannath and Government Advocate on behalf of the State. I am of opinion that the terms of Supardgidars should govern the question in this case. This Supardginama stipulated that Supardgidar will produce the cattle as soon as the Court orders him to do so. There is nothing in the contract to show that Supardgidar would be given any expenditure for keeping she-buffaloes; but I agree with the Sessions Judge that there was some understanding that in case the Supardgidar had to incur any expenditure, on principles of justice and equity, the Court would ask the owner of the cattle to suitably compensate him and that the income derived from the milk obtained from the cattle would be set off against the expenditure incurred by the Supardgidar. This will not be inconsistent with the terms of Supardginama within the meaning of proviso 2 of S. 92, Evidence Act.

(3) Under the circumstances I accept the reference and exercising my powers under S. 561A, in order to secure the ends of justice, I set aside the order of the Magistrate dated 26-2-1951 and direct him to institute an inquiry into the matter and dispose of the question according to law in the light of the observations made above.

C/K.S.

Case remanded.



A.I.R. 1953 M. B. 193 (Vol. 40, C. N. 73)

(INDORE BENCH)

ABDUL HAKIM KHAN AND  
CHATURVEDI JJ.

Laxmibai, Appellant v. Pushpabai, Respondent.

S. A. No. 397 of 1949, D/- 14-12-1951.

**Hindu Law — Adoption — Custom of Jain widow adopting son without husband's authority.**

The custom of sonless Jain widow adopting a son to her deceased husband without a prior authority from him is so well known and well established by judicial decisions that it is no longer necessary to prove and plead it and except in case of Madras and the Punjab, in the rest of India, the onus would now lie upon those who deny the existence of this custom. AIR 1948 PC 60, Foll. (Para 4)

Roshanlal Khabya, for Appellant; S. R. Joshi, for Respondent.

## CASES CITED:

(A) ('34) 1934 Indore LR 77

(B) ('48) AIR 1948 PC 60: ILR (1947) All 748 (PC)

CHATURVEDI J.: This is second appeal of the plaintiff Laxmibai who instituted a suit for recovering Rs. 2,150/-/- (advanced from 30-12-1944 to 14/2/1945 to the minor's natural father) plus Rs. 357-6-0 as interest total Rs. 2497/6/- from the share of deceased minor Narendra Kumar. It was averred that the minor boy Narendra Kumar s/o Champalal was adopted by the respondent on 27-11-1943 according to the custom prevalent amongst Oswal Jain Mahajans, and soon after the adoption, the real father of the minor, Champalal, fearing dissipation of the property of the minor by the adoptive mother, started the guardianship Case No. 65/44 in the District Judge's Court and on 22-9-1944 a partition suit was filed by him as next friend of the minor in the Indore State High Court for partition of the property.

During the pendency of the suit, on 26-4-45, the minor Narendra Kumar expired, and the suit was ordered to abate on 18-6-1945. For carrying on the partition suit the plaintiff had advanced Rs. 2,150/-/- to Champalal from time to time during the period from 30-12-44 to 14-2-1945 and the plaintiff prayed that a decree for Rs. 2497-6-0, be passed in favour of the plaintiff to be realised from the share of Narendra Kumar in the property of Mangilal deceased in the hands of the defendant respondent Pushpabai.

(2) The defendant resisted the suit on the ground that there was no adoption and that there was no dissipation of the properties and that it was not necessary for the next friend and natural father of the minor to incur any costs. A suit could have been filed in 'forma pauperis'. It was further alleged that if any sum was borrowed by Champalal it was borrowed by him in his personal capacity and the minor's estate cannot be held liable for it. It was denied that the alleged costs incurred in litigation were not necessities of the minor within the meaning of law; and it was added that the plaintiff had no right to be reimbursed from the property left by the minor.

(3) The first issue was about the factum of adoption. The trial Court did not express any opinion on the point; but held that the deceased Mangilal had not given any permission to his widow to adopt and on the basis of — '1934

Indore L R 77' (A) held that in Madhyabharat, Mitakshara as administered by the Benaras School prevails and a widow cannot adopt without the express authority of her husband or without the consent of her 'sapindas'. The trial Court, therefore, held that the adoption, even if it took place, was not valid.

(4) The first appellate Court reversed this finding; after discussing the evidence it came to the conclusion that adoption of the minor Narendra Kumar by the respondent did not take place and cited — 'Prem Raj v. Mt. Chand Kunwar', AIR 1948 PC 60 (B) for the proposition that the custom of sonless Jain widow adopting a son to her deceased husband without a prior authority from him was so well known and well established by judicial decisions that it was no longer necessary to prove and plead it and that except in case of Madras and the Punjab, in the rest of India, the onus would now lie upon those who deny the existence of this custom. As regards the dictum of their Lordships of the Privy Council we have no doubt that the principle of law enunciated is the correct one and the finding of fact arrived at by the first appellate Court is binding on us in second appeal.

(5) The four main issues, which are necessary for the disposal of this appeal then are:

"(2) Whether the defendant dissipated the minor's property as alleged in para 3 of the plaint? and

(3) Whether the plaintiff advanced a loan of Rs. 2150/- between Dec. 1944 and Feb. 1945 to the minor's real father Champalal for the litigation as stated in paras 5 and 6 of the plaint.

(4) Whether the costs of the litigation were the necessities of the minor within the meaning of law as pleaded in para 5 of the plaint.

(7) What relief the plaintiff is entitled to?"

(6) The Courts below have held that there is no evidence of any dissipation of the property and this is a concurrent finding of fact. As there was no dissipation the suit on behalf of the minor was uncalled for and the two Courts below held that the costs of the suits were not 'necessaries' of the minor within the meaning of S. 68, Contract Act. On these grounds the suit and the first appeal have been dismissed. As regards the third issue, the trial Court found that only Rs. 1225/- are proved to have been paid by the plaintiff to Champalal, real father of the minor.

(7) The real question which we put before the counsel to be considered in this case is: Whether as far as the lender is concerned she advanced the loans to the natural father of the minor, Champalal, in his personal capacity, or, whether she intended to secure for these advances the direct liability of the minor's estate. It seems the plaintiff opened in her account books a ledger folio (Khata Ex. P. 1) for recording the accounts of the money advanced. It was headed खाता चम्पालाल छगलाल महाजन को Chhogalal is brother of Champalal.

The accounts were throughout continued under the same heading right down to the very end. There is no reference in these accounts to the minor or the minor's estate and this absence of any reference to the minor or minor's estate in the accounts is a strong argument in support of the view that the plaintiff and Champalal Chhogalal dealt with each other on the footing that it was the latter alone that



were regarded as the borrowers. Our attention has not been called to any other document that may show that Champalal Chhogalal were not pleading their own credit, but only the credit of minor's estate in respect of these transactions. We are, therefore, constrained to hold that these transactions bound the borrowers alone and not the minor's estate. The form of 'Khata' is definitely against the possibility of the parties to it having had any other liability in mind than that of Champalal and his brother Chhogalal.

(8) Para. 6 of the plaint, also supports the same inference. It runs as follows:

"Champalal had no means to spend the necessary amount and the minor was incapable of contracting and incurring a loan; hence loan worth Rs. 2150/-/- was given to Champalal himself personally and through his brother by the plaintiff as shown in the copy of the 'Khata' attached herewith."

(9) Mr. Khabya, learned counsel for the appellant, has addressed to us much argument about the application of this money to suit proceedings. He contends that Rs. 900/- were paid to Rai Sahib A. P. Bhargava on 23-12-45 who was conducting the partition suit in the High Court. We have carefully gone through the deposition of Mr. Bhargava who stated

"चंपालाल की मेरे सामने लक्ष्मीबाई से ऐसी बात नहीं हुई कि रुपया जायदाद से वसूल हो जायगा। इसलिये कोर्ट फीस भर दो।"

Asked why he did not file a suit in 'forma pauperis' R. S. Bhargava replied:

"नादारी का सवाल ही पैदा नहीं हुआ क्योंकि चंपालाल ने कहा था कि पैस का इन्तजाम कर लेंगा।"

(10) From the statement it is clear that firstly there was no idea of making the minor's estate liable and secondly there was no necessity of incurring any costs for the suit; the suit could have been, if deemed necessary, filed in 'forma pauperis'. Champalal had taken a risk unnecessarily and the plaintiff had advanced him money without having the least idea of making the minor's estate liable for the money. Any person of ordinary prudence would not have advanced money to Champalal in the known circumstances of the case. Champalal could have waited for being appointed guardian of the minor by the District Judge's Court before filing partition suit.

It may also be added here that Champalal, though natural father of the minor, was not his guardian; as the guardianship of an adopted son, who is minor, passes on his adoption from his natural father and mother to his adoptive father and mother (Hindu Law, page 590, Mulla). Many rulings cited by Mr. Khabya relating to the expenses undertaken by the natural guardian of the minor for the minor's "necessaries" do not apply to the facts of the case. The facts of this case, as stated above, are peculiar and we do not think any purpose will be served by discussing rulings which have no material bearing on the question before us.

(11) For reasons stated above, we dismiss the appeal with costs.

(12) KHAN J.: I agree.

C/V.R.B.

Appeal dismissed.

A.I.R. 1953 M. B. 194 (Vol. 40, C. N. 74)

(GWALIOR BENCH)

CHATURVEDI J.

Deena Nath, Applicant v. Makhanlal, Opponent.

Criminal Revn. No. 89 of 1952, D/- 6-11-1952.

(a) Criminal P. C. (1898), S. 439 — Revision of discretionary orders.

Ordinarily if the discretion exercised by the Magistrate is not arbitrary or capricious there will be no interference by the High Court. (Para 2)

Anno: Cr. P. C., S. 439 N. 17.

(b) Criminal P. C. (1898), S. 344 — Stay of criminal proceeding pending civil suit.

The discretion to be exercised by Courts in ordinary stay of criminal proceedings cannot be crystallised into a hard and fast rule, and largely depends on the circumstances of each case. The only point of importance is whether the criminal complaint has been filed before or after the civil suit. If it is filed afterwards an intention to prejudice the civil litigation may often be suspected, especially when there has been long delay i.e. a delay of two years in filing the complaint from the date of occurrence. (Para 3)

Anno: Cr. P. C., S. 344 N. 11.

Harihar Niwas, for Applicant; Anand, for Opponent.

ORDER: This is a revision by the complainant who had lodged a complaint on 3-7-1951 against the accused non-applicant for offences under Ss. 420 and 384, I. P. C., in the Court of first class Magistrate Morar. The allegations in the complaint were that on 1-5-1949 the accused came to Morar, and administered some intoxicating drug to the complainant and got his signatures on a Hundi worth Rs. 79,000/- on the stamps of Uttar Pradesh Government. It is alleged that the complainant filed the report in police station, Morar against the accused on the evening of 1-5-1949. It is further alleged that a notice was given to the accused on 3-5-1949. After having done this it is very strange that the complainant waited for two years for filing a complaint. The police did not take any action on the report. Presumably they did not regard the report as genuine one and so did not challan the accused. Then when the accused came to the Court on 23-11-1951, he filed an application stating that a civil suit had been filed on 14-4-51 in Bulandshahr for the recovery of the sum due on the Hundi and he prayed that the criminal case should be stayed till the decision of the civil suit. The 1st Class Magistrate Morar granted this application and stayed proceedings in the criminal Court. This order has been upheld by the Sessions Judge in revision. Against this order the complainant had come up to this Court.

(2) The ordinary principle in revision is this that if the discretion exercised by the Magistrate is not arbitrary or capricious there will be no interference by this Court. After hearing the arguments of the learned counsel I have come to the conclusion that the Magistrate's order was neither arbitrary nor capricious and the revision must be dismissed.

(3) The discretion to be exercised by Courts in ordinary stay of criminal proceedings can-



not be crystallized into a hard and fast rule, and must largely depend on the circumstances of each case. The only point of importance is whether the criminal complaint has been filed before or after the civil suit. If it is filed afterwards, an intention to prejudice the civil litigation may often be suspected, especially when as in the present case, there had been long delay i.e., a delay of two years. In a case of Hundi worth Rs. 79,000/- if the complainant felt a genuine grievance he would surely have made the complaint much earlier. An intention to prejudice the civil litigation can hardly be anything but matter of inference and I am satisfied that it can be alleged with some force in this case. I am also satisfied that in the civil suit at Bulandshahr in his written statement filed on 5-7-51 the complainant had raised the same contention that he was given intoxicating drugs by the accused and in that state he signed the Hundi. Considering that the evidence of the witness produced by the defendant in the civil case is being recorded, I feel that the Magistrate did the right thing in staying the criminal proceedings in his Court. I therefore dismiss the revision.

C/K.S.

Revision dismissed.

A.I.R. 1953 M. B. 195 (Vol. 40, C. N. 75)  
(INDORE BENCH)

CHATURVEDI J.

Haji Mulla Sulaimanjee Haji Uysfali, Appellant v. Ganpatlal Jogannath and another, Respondents.

Second Appeal No. 255 of 1950, D/- 8-11-51.

(a) Houses and Rents — Madhya Bharat Sthan Niyamtran Vidhan (5 of 1950), S. 4, Cl. (a) — Pending case — Payment of arrears of rent made — Notice charges not paid — No default in payment of rent within Sec. 4 (a) occurs. (Para 2)

(b) Houses and Rents — Madhya Bharat Sthan Niyamtran Vidhan (5 of 1950), S. 4 (g) — निवास — Meaning — Place hardly 5 to 8 feet broad rented as shop — Claim for residential purposes — Concurrent finding that place was not required for residence — Binding in second appeal — Civil P. C. (1908), Ss. 100-101 — Words and Phrases — “निवास” (Para 7)

S. D. Sanghi, for Appellant; Samvatsar, for Respondents.

CASES CITED:

(A) ('21) AIR 1921 Bom 34: 45 Bom 1236

(B) ('22) AIR 1922 Bom 222: 46 Bom 632

**JUDGMENT:** This is landlord plaintiff's second appeal who had instituted a suit on 19-1-1948 against the defendants tenants for ejectment from a shop on the ground floor of a house No. 79 in Hathipala Road, Indore, for arrears of rent and mesne profits. The House Rent Control Order of 1943 was at that time in force and did not apply to Shops. Plaintiff had given a notice to quit on 12-12-1947 asking the defendants to vacate the shop on 31-12-1947. The defendants resisted the suit on the ground that the M. O. of Rs. 48/-/- was sent to the plaintiff for arrears of rent but he had refused to accept it, that he is willing to deposit the rent in the Court and that the suit was premature as there was an oral agreement that the lease would continue for a period of two years. He also stated that the place is suitable for residence and should

fall within the definition of the word 'house' and according to the provisions of the Rent Control Order cannot be vacated. Issues were framed on the pleadings, but in May 1948 change in the Indore House Rent Control Order of 1943 was effected. The new law applied to non-residential premises and the definition of the 'house' was widened. Defendant amended his written statement and added:

“नये रेंट कंट्रोल आर्डर के मूजिव दाविया दुकान खाली नहीं हो सकता।”

The plaintiff on this, filed a reply to the application for amendment on 11-8-1948 in the written statement in the following words:

“दावा दाखील होने के बाद रेंट कंट्रोल आर्डर में जो संशोधन हुए है कानून से लागू नहीं हो सकते.

अगर कोर्ट ने यह ठहराया कि ये संशोधन इस मामले को लागू हो सकते हैं तो उस हालत में भी वादी का कहना है कि वादी को दाविया जगह अपनी खुद की केमली के रहने व व्यापार करने वास्ते बड़ी जरूरत है और इसलिए हाल का दावा पेश करना हुआ था उसी मकान का दाविया हिस्सा छोड़कर बाकी का हिस्सा जो वादी के पास है वो उनको बहुत कम पडता है और बड़ी तंगी भुगतनी पडती है।”

Three additional issues were framed and evidence was adduced by the parties on 9-2-1950 the present Madhya Bharat Sthan Niyamtran Vidhan (स्थान नियंत्रण विधान) came into force. Again issues were re-cast and for the purposes of this second appeal only the following first two issues are relevant:

1. Has there been a failure on the part of the tenant to pay the arrears of rent and the notice charges within one month from date of service of notice?

2. Whether the plaintiff landlord genuinely requires the accommodation for his own residence and whether the plaintiff has no other place to live in Indore?

ISSUE NO. 1:

(2) It is not disputed that an M. O. of Rs. 48/-/- was sent and the plaintiff declined to receive the payment. The issue had been rightly decided against the plaintiff and in favour of the deft. Mr. Sanghi contends that notice charges (only seven annas) were not sent by the defendant and that should furnish sufficient ground of ejectment. I do not think this contention has any force. The emphasis in the Act of 1950 is on the payment of arrears of rent and not on the payment of notice charges. In this case, the tenant in 1947 could not have dreamt that the Act of 1950 will make the payment of notice charges also compulsory. The money was sent in 1947 and I have no compunction in holding that the defendant made no default in payment within the meaning of sub-cl. 3 (A?) of S. 4 of the Madhya Bharat Sthan Niyamtran Vidhan (Act 5 of 1950).

ISSUE NO. 2:

(3) The application of the plaintiff on 11-8-48 begins with the words:

“अगर कोर्ट ने यह ठहराया कि ये संशोधन लागू हो सकते हैं तो उस हालत में वादी का कहना है।”

This shows that the plaintiff had to state this new ground in order to come within one of the grounds specified in S. 4, without which a decree



could not have been passed in a pending case (vide S. 12). This, from the context of the case, could not have been a genuine ground; but the plaintiff was compelled to state it in order to obtain a decree of ejectment under the Act of 1950. The artificiality of the ground stated is apparent.

(4) The two Courts below have held that the place was required by the plaintiff for the purposes of a shop or for carrying on business and not for his residence. This is a concurrent finding of fact binding on me in second appeal.

(5) The words in the statute are:

(५ग) यह कि भूमी स्वामी को स्वयं के निवास के लिए उस स्थान की वास्तविक रूप से आवश्यकता है और उस नगर अथवा नगरी में उसके रहने के लिये कोई अन्य स्थान नहीं है।

The word निवास is a Sanskrit word derived from the verb वस (ubhayapadi) meaning "to dwell". The word "dwell" is stronger than "reside" (Halsbury Vol. 11, page 817, 1952 Reprint) and refers to a place of permanent abode (Vol. 8 page 189). The word 'निवास' means 'dwelling place' or 'residence'. There is no authorised English translation of the Madhya Bharat Act, but the first portion of S. 4 ग has been taken from S. 3 ग of the Accommodation Control Ordinance Gwalior State (Samvat 2004) where in the English and Hindi version were as follows:

“(३ग) यह कि भूमि स्वामी को अपने निजी निवास के लिए उस स्थान की वास्तविक रूप से आवश्यकता है।”

“(3g) that the landlord genuinely requires accommodation for his own residence.”

Section 4 (g) of the Madhya Bharat Act corresponds to S. 13 (3) (VIa) of the C. P. and Berar House Rent Control Order 1949 which runs as follows:

“VI that the landlord needs the house or a portion thereof for the purpose of (a) his bona fide residence, provided he is not occupying any other residential house of his own in the city or town concerned.”

(6) The corresponding provisions in S. 13(1)(g) of the Bombay Rent Control Act of 1947 is different from the above and is in the following words:

“13(1g) that the premises are reasonably and bona fide required by the landlord for occupation by himself or by any person for whose benefit the premises are held.”

The word 'occupation' in the above provision is of wide import for 'occupation' may be for business or for residential purposes — 'Rustomji Dinshaw v. Dosibai Rustomji', AIR 1921 Bom 34 (A); — 'Nowroji Hormasji v. Srinivas Prabhu', AIR 1922 Bom 222 (B). The Madhya Bharat Act had however deliberately left out the word 'occupation' and has adopted the word निवास (residence) and has further elucidated the point by the additional clause:

“और उस नगर अथवा नगरी में उसके रहने के लिये कोई अन्य स्थान नहीं है।”

(7) The place in dispute in this case is hardly 5 to 8 feet broad (एक चरमा) and could not have been needed for residence. It was rented as a shop and could have been required only for carrying on business. As it was not needed for residential purposes within the meaning of S. 4 ग of Madhya Bharat Sthan

Niyantran Vidhan no interference is called for in the judgments of the Courts below. I therefore dismiss the appeal with costs.

B/V.B.B.

Appeal dismissed.

A.I.R. 1953 M. B. 196 (Vol. 40, C. N. 76)

(GWALIOR BENCH)

DIXIT J.

Baijnath and others, Applicants v. The State.

Criminal Revn. No. 88 of 1952, D/- 29-8-1952.

Evidence Act (1872), S. 78 — Proof of Government Notifications.

Notifications issued by the State Government under the authority of an Act must be produced and proved in accordance with the provisions of Evidence Act before the Court can take judicial notice thereof. (Para 3)

Anno: Evidence Act, S. 78 N. 2.

Munnalal Srivastava, for Applicants; Mungre, Govt. Advocate, for the State.

CASES CITED:

(A) The State v. Bachu Lal (MB)

(B) (53) AIR 1953 Madh-B 84: 1953 Cri LJ 605: (Cri Revn. No. 1 of 1952)

ORDER: The applicants before me were tried by the Sub-Divisional Magistrate, Pichhore of an offence under S. 46(1), "Ayat Niryat Kar Vidhan" (Import Export Taxation Act) and found guilty. They were each sentenced to imprisonment till the rising of the Court and to a fine of Rs. 50/-. The learned Magistrate also passed an order confiscating to the State the carts said to have been employed by the applicant in the commission of the offence. In appeal the learned Sessions Judge of Guna affirmed the convictions and sentences but set aside the order of the trial Magistrate with regard to the forfeiture of the carts. The applicants have now come up in revision to this Court.

(2) The charge against the applicants was that on the morning of 20-12-50 they exported from village Nand Pura in Madhya Bharat to Jhansi in Uttar Pradesh in four carts 47 maunds and nine seers of Tilli and one maund of Urad without a permit in that behalf from the competent authority and thus contravened Notification issued under S. 9 of the Act and published in the Madhya Bharat Gazette dated 14-8-48. It is said that under this Notification the export of Urad and Tilli without a permit was prohibited.

(3) The convictions and sentences of the applicants must be set aside for the sole reason that the Notification of which they are alleged to have committed a breach was never produced in the case and has not been proved. It has already been pointed out by a Division Bench in the case of — 'The State v. Bachu Lal', (A) and also by a Single Bench in — 'Panna Lal v. The State', AIR 1953 Madh-B 84 (B) that judicial notice of notifications such as the one in the present case cannot be taken. Such notifications must be produced and proved in accordance with the provisions of the Evidence Act. I must observe that I cannot view with the equanimity the tendency prevailing in the lower Courts of just taking it for granted that a notification of which the accused persons are alleged to have contravened exists.



(4) For the above reasons this petition is accepted and the convictions and sentences awarded to the applicants are set aside. The amount of fine, if already paid, be refunded to them.

C/K.S.

Convictions set aside.

**A.I.R. 1953 M. B. 197 (Vol. 40, C. N. 77)**

**(GWALIOR BENCH)**

**SHINDE C. J. AND DIXIT J.**

Jamnabasad Mukhariya, Applicant v. Lachhiram Ratanmal Jain and others, Opponents.

Misc. Case No. 2 of 1953, D/- 9-3-1953.

†(a) **Constitution of India, Arts. 226, 227 and 329(b) — Jurisdiction of High Court to interfere with decision of Election Tribunal — (Representation of the People Act (1951), S. 105).**

Article 329(b) of the Constitution excludes the jurisdiction of the Courts with regard to matters forming a part of the whole procedure whereby a candidate is returned to the legislature. But it does not take away the jurisdiction of the High Court in regard to proceedings before the Election Tribunal set up under the Representation of the People Act. The effect of Art. 329 (b) is that so far as calling in question any election is concerned, it can be done only "by an election petition" by presenting to "such authority" and "in the manner" prescribed by a law of the appropriate Legislature. AIR 1952 SC 64 and AIR 1952 Madh-B 97 (FB), Ref.

(Para 6)

Section 105, Representation of the People Act, which gives finality to every order of the Tribunal cannot be taken as preventing the High Court from setting aside a decision of the Tribunal given without or in excess of its jurisdiction. (1951) 1 All ER 268; (1874) 5 PC 417 and AIR 1940 PC 105, Ref.

(Para 6)

†(b) **Constitution of India, Arts. 226 and 227 — High Court when can interfere with decision of Election Tribunal.**

Though it is not open to the High Court to exercise its powers under Art. 226 or Art. 227 so as to interfere with a decision of the Election Tribunal merely upon the ground that the decision is erroneous either in respect of facts or in point of law, it has the power to examine and correct any decision of the Tribunal on the ground of jurisdiction, fraud or violation of the principles of natural justice.

(Para 8)

(c) **Constitution of India, Art. 226 — Inferior Tribunal.**

The Election Tribunal set up under the Representation of the People Act has a limited jurisdiction and authority and as such it is a Tribunal inferior to a Court of general jurisdiction viz., the High Court.

(Para 9)

The expression 'inferior Tribunal' is now used to denote Courts of special or limited authority constituted "on such principles that their proceedings must show jurisdiction." The inferior or superior character of a Court or Tribunal is not determined by the position or the status of the persons constituting it. It depends on the powers and jurisdiction conferred on the Tribunal or the Court by

the statute establishing it. (1910) 2 KB 859, Rel. on. AIR 1945 PC 83, Dist. (Para 9)

(d) **Constitution of India, Art. 226 — Certiorari if can be issued to quash erroneous decision of inferior Tribunal within its jurisdiction — (Civil P. C. (1908), S. 9).**

A writ of certiorari cannot be granted to quash the decision of the inferior Court within its jurisdiction on the ground that the decision is wrong.

(Para 14)

If a certain state of facts has to exist before an inferior Tribunal has jurisdiction to do certain things, the Tribunal must, to enable itself to obtain jurisdiction, find that those facts exist. The Tribunal cannot give itself jurisdiction by a wrong decision on them and the superior Court may by means of proceedings for certiorari, inquire into the correctness of the decision. The decision as to those facts is collateral because, though the existence of jurisdiction depends thereon, it is not the main question which the Tribunal has to decide. If on the other hand the Tribunal is given jurisdiction to determine certain facts and those facts form a part of the very issue which the Tribunal has to decide and the Act constituting the Tribunal gives it the power to come to a final decision on that matter then the decision of the Tribunal cannot be treated as one going to its jurisdiction and cannot, therefore, be questioned in any court. AIR 1952 SC 179; AIR 1952 SC 192 and AIR 1952 SC 319, Rel. on.

(Para 14)

Anno: C. P. C., S. 9 N. 3.

(e) **Representation of the People Act (1951) S. 97.**

The right of the returned candidate or any other party to give evidence under S. 97 is no doubt conditioned by certain requirements. But the jurisdiction of the Tribunal in no way depends on the existence of any of the facts stated in S. 97.

(Para 12)

The Tribunal has jurisdiction to determine finally whether a person desiring to give evidence has or has not satisfied the conditions laid down in S. 97 of the Act and the question of the fulfilment of those conditions is not collateral to any main question which the Tribunal has to decide but is the very issue which the Tribunal has to enquire. It follows, therefore, that even though the applicant may think that the Tribunal arrived at erroneous decision, he would not be entitled to say that the decision of the Tribunal was one given without jurisdiction or that the Tribunal gave itself or deprived itself of jurisdiction by a wrong decision. (Para 14)

(f) **Representation of the People Act (1951), S. 86 — Trial of election petition when commences.**

The trial of an election petition does not commence either with its presentation to the Election Commission or with the appointment of a Tribunal. Nor does it commence with the publication of an election petition under S. 90. The trial of an election petition commences when after the filing of a reply thereto and of a recriminatory petition, if any, the points in controversy between the parties are settled and their investigation begins.

(Para 15)



(g) Representation of the People Act (1951), Ss. 97 proviso, 86 (5) — Notice of recrimination, validity.

The giving of a notice of recrimination to the tribunal is an act required to be done before the commencement of the trial. That being so, under S. 86(5) and S. 97 a notice of recrimination to the Tribunal in order to be valid must be given to the Chairman.

It is incumbent on the applicant to deliver the notice within time to the Chairman of the Tribunal by presenting the notice personally or by sending it by registered post so to reach him within time in the ordinary course of post. (Para 15)

Obiter: Held on facts that the presentation of the notice to a member of the Tribunal who was not authorised either by the Act or by the Chairman himself, to receive the notice was not a valid presentation of the notice. (Para 15)

Anand Bihari Misra, for Applicant; Shivdayal, for Opponent (No. 1 Lachhiram); Ramsahai, opponent No. 2 in person; K. A. Chitale, Advocate-General amicus curiae.

#### CASES CITED :

- (A) ('52) AIR 1952 Madh-B 97: MLR 1952 (Civil) 1 (FB)
- (B) ('52) AIR 1952 SC 64: 1952 SCR 218
- (C) (1951) 1 All ER 268
- (D) (1874) 43 LJ PC 39: 5 PC 417
- (E) ('40) AIR 1940 PC 105: 67 Ind App 222 (PC)
- (F) ('45) AIR 1945 PC 83: 1945-2 Mad LJ 314 (PC)
- (G) (1910) 80 LJ KB 185: 1910-2 KB 859
- (H) ('52) AIR 1952 SC 179: 1952 SCR 519 (SC)
- (I) ('52) AIR 1952 SC 192: 1952 SCR 583 (SC)
- (J) ('52) AIR 1952 SC 319: 1952 SCR 696 (SC)
- (K) (1888) 57 LJ QB 513: 21 QBD 313
- (L) (1841) 113 ER 1054: 1841-1 QB 66
- (M) (1857) 27 LJ QB 5: 8 El & Bl 529
- (N) ('10) 12 Bom LR 737: 34 Bom 659
- (O) (1851) 15 Jur 1037

DIXIT J.: This is an application under Arts. 226 and 227 of the Constitution of India for an order to quash a determination of the non-applicant tribunal, whereby it determined that as the applicant had failed to give to the Tribunal a notice of his recriminatory petition within the prescribed time, he was not entitled to give evidence in support of it, and for a direction to the tribunal to receive the evidence that may be tendered by the applicant to prove that the election of the opponents Ramsahai and Sunnulah would have been void if they had been the returned candidates and a petition had been presented calling in question their election.

(2) The matter for our consideration arises in this way. At the general election of the Madhya Bharat State Assembly held in January 1952, seven persons were nominated as candidates for election to fill two seats in the Bhelsa constituency. The applicant Jamnaprasad and the non-applicant No. 7 Chaturbhuj were declared duly elected. A petition was shortly afterwards lodged with the Election Commission under S. 81, Representation of the People Act, 1951 (hereinafter referred to as "the Act") by one of the unsuccessful candidates, namely, Lachhiram opponent No. 1, praying for a declaration that the election of

the returned candidates was void and that the non-applicants Ramsahai and Sunnulah have been duly elected. The election petition is being tried by a tribunal consisting of Mr. Dongre, the District Judge of Dhar as the Chairman and Mr. Surajbhan, the District Judge of Gwalior and Mr. Bhagwan Swaroop, an Advocate of this Court as members of the Tribunal.

On the publication of the election petition under S. 90 of the Act in the Official Gazette of 21-8-1952, the applicant Jamnaprasad gave notice to the Tribunal of his intention to lead evidence to prove that the election of Ramsahai and Sunnulah would have been void if they had been the returned candidates, by presenting before Mr. Surajbhan — a member of the Tribunal — at Gwalior a recriminatory petition addressed to the Chairman of the Tribunal. The recriminatory petition was filed on 4-9-1952. Mr. Surajbhan received it and then forwarded it to Mr. Dongre the Chairman of the Tribunal by registered post. Mr. Dongre received the notice on 11-9-1952. At the hearing of the election petition the non-applicant Lachhiram took the objection that the recriminatory petition had not been presented within time to the proper authority, namely, the Chairman of the Tribunal. Thereupon the Tribunal framed an issue as to whether the notice of "recrimination" under S. 97 of the Act had been presented to the proper authority within time.

After hearing the parties on this issue, the Tribunal came to the conclusion that as under the proviso to S. 97 read with S. 86(5) of the Act notice of "recrimination" was required to be given to the Chairman of the Tribunal within fourteen days from the date of publication of the election petition under S. 90, the presentation on 4-9-1952 of the recriminatory petition by the applicant Jamnaprasad to Mr. Surajbhan a member of the Tribunal did not constitute a valid notice to the Chairman of the Tribunal and that when the notice was received on 11-9-1952 by the Chairman per registered post, the time limit prescribed in the proviso to S. 97 for giving notice had already elapsed. The Tribunal, therefore, did not permit the applicant to give any evidence in support of his recriminatory petition.

(3) In this petition, challenging the correctness of the decision of the Tribunal, the applicant states that inasmuch as the trial of an election petition commences when it is presented to the proper authority and as the giving of a notice to the Tribunal under S. 97 of the Act is a matter to be done after the commencement of the trial, sub-s. (5) of S. 86 cannot be applied in construing the meaning of the word 'tribunal' used in S. 97; that in relation to S. 97 'tribunal' means the Chairman and all the members of the Tribunal; that when a copy of the election petition was served on the applicant under Section 90, the applicant was also given a notice in writing that the petition would be heard on 13-10-1952 at 11 A.M., in Gwalior in the Court Room of the District Judge, Gwalior, and that he should appear on this date either in person or through his pleader and file his reply to the petition on or before the date of hearing and that in the event of there being a change in the place of the trial the applicant would be able to obtain the necessary information from the



Court of District Judge Gwalior; that after the receipt of this notice there was no change in the place of the trial; that on 4-9-1952 Mr. Surajbhan one of the members of the Tribunal alone was in the Court of District Judge in Gwalior and the Chairman and the other members were not to be found in Gwalior; and that in these circumstances the recriminatory notice presented before Mr. Surajbhan on 4-9-1952 should be "considered to have been validly presented to the proper authority". The applicant's grievance is that the Tribunal has acted without jurisdiction in deciding that the notice of recrimination was not given in time to the proper authority and that "in passing the impugned order the Tribunal has failed to exercise jurisdiction vested in it".

(4) In the returns filed on behalf of the non-applicants Lachhiram and Ramsahai, the petition is opposed firstly on the ground that under Art. 329(b) of the Constitution the Election Tribunal has exclusive jurisdiction to determine whether a notice of recrimination has or has not been validly given and that, therefore, the decision of the Tribunal on merits cannot be challenged before this Court under Art. 226 and Art. 227 of the Constitution of India. Secondly it is stated that on merits the decision of the Tribunal is in accordance with law; that under S. 86(5) of the Act the Chairman of Tribunal is deemed to be the 'tribunal' as respects any matter to be done before the commencement of the trial and as the receipt of the notice of recrimination is a matter anterior to a trial which commences in law only at the stage where the examination and determination of a cause is undertaken by a Tribunal, the notice presented by the applicant to Mr. Surajbhan was not a valid notice to the Tribunal; that the applicant was fully aware of the fact that the office of the Chairman of the Tribunal was in Dhar; and that the fact that the applicant was informed that the election petition would be heard in Gwalior was not relevant in determining the place where matters required to be done before the commencement of the trial should be done.

(5) The first question that this case raises, is of some importance. It is whether this Court can enquire into the validity and correctness of the proceedings or orders of the Election Tribunal constituted under the Representation of the People Act, 1951. The question turns upon the construction of Art. 329(b) of the Constitution and S. 105 of the Act. Article 329(b) is:

"Notwithstanding anything in this Constitution, no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

Section 105 of the Act is as follows:

"Every order of the Tribunal made under this Act shall be final and conclusive."

(6) The meaning and scope of Art. 329(b) has been explained by the various High Courts including this Court, and the Supreme Court in cases where nomination papers of candidates seeking election were rejected by the returning officers. I am not going to refer to all these cases. But I should like to refer to this Court's decision in — *'Shankar Rao v. State of Madhya*

*Bharat'*, AIR 1952 Madh B 97 (A) and to the decision of the Supreme Court in — *'Ponnuswami v. Returning Officer, Namakkal'*, AIR 1952 S C 64 (B). In the first case a Full Bench of this Court held that Art. 329(b) of the Constitution means that notwithstanding anything contained in Arts. 225, 226, 227 and 228 and other Articles of the Constitution, no election can be called in question by invoking the powers of the High Court under these Articles and that the word 'election' in Art. 329(b) means the whole procedure whereby a person is elected to the Parliament or to the State Legislature in accordance with the provisions of the Act and that the acceptance or rejection of a nomination paper forms a part of the election. It was also observed by this Court that Ss. 105 and 170 of the Act did not by themselves in any way affect the jurisdiction of the High Court under Art. 226 or Art. 227 and that the jurisdiction of the High Court to enquire under Arts. 226 and 227 into the validity of any election was taken away not by the Act but by Art. 329 itself.

In 'the case of Ponnuswami (B)' the Supreme Court also held that the word 'election' had been used in Part XV of the Constitution in the wide sense, that is to say, to connote the entire procedure to be gone through to return a candidate to the legislature; that Art. 329(b) ousted the jurisdiction of the Court in regard to electoral matters and was enacted to lay down the only mode in which an election could be challenged and to provide that any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special Tribunal and should not be brought up at an intermediate stage before any Court. It is thus plain from the meaning put by the Supreme Court on the word 'election' that Art. 329(b) excludes the jurisdiction of the Courts with regard to matters forming a part of the whole procedure whereby a candidate is returned to the legislature.

The learned Advocate-General appearing as amicus curiae suggested that the words "notwithstanding anything in this Constitution" and the words "in such manner as may be provided for by or under any law made by the appropriate legislature" must be read as meaning that the jurisdiction of the High Court is taken away not only with regard to matters forming a part of the whole procedure whereby a candidate is returned but also in regard to the proceedings and orders of the Election Tribunal set up under the Act to try an election petition calling in question an election. As I understood him, he said that as the Constitution created the right of calling in question an election and prescribed a remedy under a statute specially enacted for enforcing that right, that procedure and remedy and no other must be followed; that if, therefore, the special statute, namely, the Representation of the People Act, 1951, provides that every order of the Tribunal made under the Act shall be final and conclusive, then this Court has no power under Art. 226 or Art. 227 to determine whether the order of the Tribunal is valid or correct.

It is quite true that the words "notwithstanding anything in this Constitution" which occur in Art. 329(b) override all other provisions of the Constitution. But it appears to me that the argument of the learned Advocate-General does not give due weight to the words



"election" and "by an election petition" which occur in Art. 329(b). The words "in such manner as may be provided for by or under any law made by the appropriate legislature" on which the learned Advocate-General laid considerable stress have to be read with the preceding words "except by an election petition presented to such authority". The effect of Art. 329(b) is that so far as calling in question any election is concerned, it can be done only "by an election petition" by presenting to "such authority" and "in the manner" prescribed by a law of the appropriate legislature. The word 'election' must now be read in the sense indicated by the Supreme Court in the case of Ponnuswami.

It is no doubt true that the Supreme Court explained the meaning of the word 'election' while dealing with the question whether rejection of a nomination paper is a part of election. But there is nothing in the decision of the Supreme Court to justify the view that the word 'election' would include proceedings and orders of an Election Tribunal and that "calling in question an election" could cover calling in question the working of the machinery set up for "calling in question an election". There is, however, a strong probability that very different language would have been used by the Constituent Assembly if "election" as used in Art. 329(b) had been intended to bear what I cannot help calling the artificial meaning for which the learned Advocate-General contends.

The learned Advocate-General drew our attention to the observation of the Supreme Court in the case of Ponnuswami that the words "notwithstanding anything in this Constitution" give to Art. 329(b) "the same wide and binding effect as a statute passed by a sovereign legislature like the English Parliament" and said that inasmuch as the Representation of the People Act is the law contemplated in Art. 329(b), S. 105 of that Act must be taken to have the same binding effect so as to exclude the jurisdiction of this Court to question the validity of proceedings and orders of the Election Tribunal. As I read the observation which is to be found at the end of para 14 of the judgment of the Supreme Court in 'the case of Ponnuswami (B)', I think it refers to the binding effect of the provisions of Art. 329(b) and not to the binding effect of any law contemplated by it. In that observation their Lordships of the Supreme Court did not import that the Representation of the People Act, 1951, had also the same binding effect "as a statute passed by a sovereign legislature like the English Parliament". Even assuming that the Representation of the People Act, 1951, has the binding effect suggested by the learned Advocate-General, I do not think that the provision in S. 105 of the Act that "every order of the Tribunal made under the Act shall be final and conclusive" can be taken as preventing this Court from setting aside a decision of the Tribunal given without or in excess of its jurisdiction.

In this connection I need only refer to what Lord Goddard, C. J., has said with regard to statutes passed by the English Parliament making the decisions of a Court or individual or a statutory authority final and conclusive. In — '*R. v. Northumberland Compensation Appeal Tribunal*', (1951) 1 All E R 268 (C) he said at p. 273:

"Many statutes have taken away certiorari in respect of the matters with which those

statutes have dealt, but that never debarred the Court from granting certiorari if it was a question of jurisdiction. If an inferior Court had wrongly given itself jurisdiction, certiorari would lie to quash its order, because it had no jurisdiction to make it. The taking away of certiorari by statute no doubt prevented the Court from inquiring into what I may call the merits of the determination, but it did not prevent the Court from inquiring whether or not the inferior Court had any jurisdiction to make the order. Many cases are found in the reports where certiorari had been taken away, the statute providing that the decision of the inferior Court was not to be removed into any Court by writ of certiorari or otherwise, and yet the Courts granted certiorari in respect of those very matters on the ground of jurisdiction."

(6) The proposition that where a statute lays down that orders made or proceedings taken under it shall be final and conclusive, the finality cannot be attached to proceedings and orders coram non iudice also follows from the decisions of the Privy Council in — '*Colonial Bank of Australasia v. Willan*', (1874) 5 P C 417 (D) and in — '*Secretary of State v. Mask & Co.*', AIR 1940 PC 105 (E). In the former case Sir James Colville in delivering the judgment of the Privy Council pointed out that:

"There are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen's Bench will grant a writ of certiorari, but some of those authorities establish, and none are inconsistent with, the proposition that in any such case that Court will not quash the order removed, except upon the ground either of a manifest defect of jurisdiction in the Tribunal that made it, or of manifest fraud in the party procuring it."

(7) In '*AIR 1940 PC 105 (E)*' the Privy Council observed as follows:

"It is settled law that the exclusion of the jurisdiction of the Civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is excluded the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been applied with or the statutory Tribunal has not acted in conformity with the fundamental principles of judicial procedure."

(8) I am, therefore, inclined to think that while it would not be open to this Court to exercise its powers under Art. 226 or Art. 227 so as to interfere with a decision of the Tribunal merely upon the ground that the decision is erroneous either in respect of facts or in point of law, this Court has the power to examine and correct any decision of the Tribunal on the ground of jurisdiction, fraud or violation of the principles of natural justice. Indeed, the learned Advocate-General thought at first he was disposed to say that the jurisdiction of this Court under Art. 226 or Art. 227 of the Constitution to review a decision of the Tribunal was completely barred, conceded later on that this Court was not prevented from inquiring whether or not the Tribunal had any jurisdiction to make the order challenged.

(9) During the course of their arguments the learned Advocate-General and Mr. Shivdayal learned counsel for the opponent Lachhiram



contended that a writ in the nature of certiorari could not be made in respect of an order passed by the Election Tribunal as it was not an inferior Tribunal. Learned Counsel relied especially on the fact that under S. 86 of the Act a Judge of a High Court could be appointed a chairman of the tribunal and on the Privy Council decision reported in — 'Goonesinha v. O. L. de Kretser', AIR 1945 PC 83 (F). There is no force in the contention that the Election Tribunal is not an inferior Tribunal. The Tribunal is a creature of the Representation of the People Act and its jurisdiction is strictly controlled by the Act which brings it into existence. It has to function within the four corners of the Act. It is a tribunal of limited jurisdiction and authority. That being so, it is clearly a tribunal inferior to a Court of general jurisdiction. It may be mentioned that the expression "inferior Court" came into use as a means to distinguish between the Superior Court and other Courts over which the Superior Court exercises a supervisory jurisdiction by writs of mandamus, certiorari or prohibition or other writs but the expression is now used to denote Courts of special or limited authority constituted "on such principles that their proceedings must show jurisdiction". The inferior or superior character of a Court or tribunal is not determined by the position or the status of the persons constituting it. It depends on the powers and jurisdiction conferred on the tribunal or the Court by the statute establishing it. On the question of the subordination of all tribunals of limited jurisdiction to the High Court, there is a significant decision of the Kings Bench Division in the 'King v. Assessment Committee of the Metropolitan Borough of Shoreditch; Ex parte Morgan', (1910) 2 K B 859 (G). Farwell L. J., observed as follows at page 880:

"The existence of the provisional list is a condition precedent to their jurisdiction to hear and determine, and as the claimant is entitled to require them to hear and determine, they cannot refuse to take the steps necessary to give rise to such jurisdiction; if they do, their refusal may be called in question in the High Court. No tribunal of inferior jurisdiction can by its own decision finally decide on the question of the existence or extent of such jurisdiction; such question is always subject to review by the High Court, which does not permit the inferior tribunal either to usurp a jurisdiction which it does not possess whether at all or to the extent claimed, or to refuse to exercise a jurisdiction which it has and ought to exercise. Subjection in this respect to the High Court is a necessary and inseparable incident to all tribunals of limited jurisdiction for the existence of the limit necessitates an authority to determine and enforce it: it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure — such a tribunal would be autocratic, not limited — and it is immaterial whether the decision of the inferior tribunal on the question of the existence or non-existence of its own jurisdiction is founded on law or fact; a Court with jurisdiction confined to the city of London cannot extend such jurisdiction by finding as a fact that Piccadilly Circus is in the ward of Chepe."

(10) In our country having regard to the provisions of Arts. 226 and 227 of the Constitution, the High Court must be regarded as a superior Court to whom all tribunals of limited jurisdiction are subordinate. The Privy Council decision reported in 'AIR 1945 PC 83 (F)' is not an authority for the proposition that where a Judge of the High Court is the chairman or a member of the Tribunal then the Tribunal becomes a superior Court to whom another superior Court cannot issue a writ of certiorari. In that case the Privy Council affirmed an order of the Chief Justice of the Supreme Court of Ceylon refusing to issue a writ of certiorari, to quash an order passed by a Judge of the Supreme Court as the Election Judge on the ground that the order was passed by the Election Judge as a Judge of the Supreme Court and that the cognizance of election petition was under an Order-in-Council an extension of, or addition to, the ordinary jurisdiction of the Supreme Court. The Ceylon case is not in point here.

(11) This brings me to the question whether the Election Tribunal had jurisdiction to hold that the notice of recrimination given by the petitioner was not presented in time to the proper authority and whether by so holding the Tribunal gave itself jurisdiction which it did not possess or deprived itself of jurisdiction which had been entrusted to it by the Act. Learned counsel for the petitioner made no attempt to show how the decision of the Tribunal which he was attacking was without jurisdiction or how by that decision the tribunal assumed a jurisdiction which it did not possess. He, however, urged that the tribunal had divested itself of jurisdiction by a wrong decision. The learned Advocate-General and Mr. Shivdayal who adopted the arguments of the Advocate-General relying on the Supreme Court's decisions in — 'Parry & Co. Ltd., Dare House Madras v. Commercial Employees Association Madras', AIR 1952 S C 179 (H); — 'Veerappa Pillai v. Raman and Raman Ltd.', AIR 1952 S C 192 (I); — 'Ebrahim Aboobakar v. Custodian General of Evacuee Property, New Delhi', AIR 1952 S C 319 (J) contended that the question whether the applicant had or had not presented in time the notice of recrimination to the proper authority was not a matter of jurisdiction of the Tribunal and that, therefore, even if the Tribunal's decision was erroneous it could not be said that it was made without jurisdiction or that by that decision the Tribunal assumed a jurisdiction not given to it or refused to exercise the jurisdiction vested in it.

(12) When one considers the provisions of S. 97 of the Representation of the People Act, it seems plain that the contention put forward on behalf of the applicant is untenable. Under that section the returned candidate or any other party after fulfilling certain conditions is entitled to give evidence to prove that the election of a particular candidate would have been void if he had been the returned candidate and a petition had been presented calling in question his election. The conditions are: that the returned candidate or such other party must give a notice to the Tribunal of his intention to give evidence within fourteen days from the date of publication of the election petition under S. 90; he must also give the security referred to in Ss. 117 and 118; and the notice must be accompanied by the statement and



list of particulars required by S. 83 in the case of an election petition and the notice must be signed and verified in like manner. The question whether the notice is to the Tribunal or whether it has been given in proper form and within the time prescribed or whether the security has been furnished are all matters for the decision of the Tribunal. The jurisdiction of the Tribunal to decide these questions is inherent in its very constitution as an Election Tribunal under the Act. It cannot, therefore, be maintained that the decision of the Tribunal on these questions is one without jurisdiction.

Now, it must be remembered that the questions whether the notice is in proper form, or to the proper authority and within the prescribed time are a part of the very issue which the Tribunal has to decide in seeing whether the returned candidate or any other party concerned is entitled to give evidence. They are not what have been called collateral facts which have to be decided first by the Tribunal to enable itself to obtain jurisdiction before it proceeds to decide any main issue or to decide whether it shall or shall not do certain things. Having decided that the party desiring to give evidence has fulfilled the conditions laid down in s. 97 of the Act, the Tribunal is not required to take any further decision. If the party concerned has satisfied those conditions, then the Tribunal in exercise of the jurisdiction conferred on it under s. 90 of the Act records such evidence as may be tendered by that party. If on the other hand the party has failed to observe the preliminaries referred to in s. 97 then he is not entitled to give any evidence. The right of the returned candidate or any other party to give evidence under s. 97 of the Act is no doubt conditioned by certain requirements. But the jurisdiction of the Tribunal in no way depends on the existence of any of the facts stated in s. 97. It may seem rather fine distinction but I think there is a distinction between a jurisdiction which is in fact limited by certain requirements, and a case in which a person having satisfied certain conditions becomes entitled to do or not to do a particular thing. In the latter case the question whether the person has or has not fulfilled certain conditions is a part of the very issue which the Tribunal has to decide when the person claims the right to do a particular thing and the decision of the Tribunal on those questions is not one which goes to its jurisdiction.

In —‘*R. v. Income Tax Special Purposes Commissioner*’, (1888) 21 Q. B. D. 313 at p. 319 (K), which is the leading case usually cited on this question, Lord Esher M. R. stated the law in this way :

“When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction.

But there is another state of things which may exist. The legislature may entrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction.”

(13) Again in the Privy Council case —‘(1874) 5 P. C. 417 (D), after observing that absence of jurisdiction may be founded either on the character and constitution of the tribunal or upon the nature of the subject matter of the inquiry, or upon certain proceedings which have been made essential preliminaries to the inquiry, or upon a fact or facts to be adjudicated upon in the course of the inquiry, Sir James Colville proceeded to say :

“Objections founded on the personal incompetency of the judge, or on the nature of the subject-matter, or on the absence of some essential preliminary, must obviously, in most cases, depend upon matters which, whether apparent on the face of the proceedings or brought before the superior Court by affidavit, are extrinsic to the adjudication impeached. But an objection that the judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject-matter, he properly entered upon the inquiry but miscarried in the course of it. The superior Court cannot quash an adjudication upon such an objection without assuming the functions of a Court of Appeal, and the power to retry a question which the judge was competent to decide. Accordingly the authorities of which —‘*Reg. v. James Bolton*’, (1841) (1 Q. B. 66) (L) and —‘*Reg. v. St. Olave's Board of Works*’, (1857) 8 El & Bl. 529 (M) may be taken as examples, establish that an adjudication by a judge having jurisdiction over the subject-matter is, if no defects appear on the face of it, to be taken as conclusive of the facts stated therein, and that the Court of Queen's Bench will not on certiorari quash such an adjudication on the ground that any such fact, however essential, has been erroneously found.”

(14) These cases have been applied by the Supreme Court in —‘*AIR 1952 S. C. 319 (J)*’, and —‘*AIR 1952 S. C. 179 (H)*’, and also by other High Courts in several cases. The law to be gathered from the Supreme Court's decisions relied upon by the opponents and especially from the English cases referred to above, is



that, if a certain state of facts has to exist before an inferior Tribunal has jurisdiction to do certain things, the Tribunal must, to enable itself to obtain jurisdiction, find that those facts exist. The Tribunal cannot give itself jurisdiction by a wrong decision on them and the superior Court may by means of proceedings for certiorari, inquire into the correctness of the decision. The decision as to those facts is collateral because, though the existence of jurisdiction depends thereon, it is not the main question which the Tribunal has to decide. If on the other hand the Tribunal is given jurisdiction to determine certain facts and those facts form a part of the very issue which the Tribunal has to decide and the Act constituting the Tribunal gives it the power to come to a final decision on that matter then the decision of the Tribunal cannot be treated as one going to its jurisdiction and cannot, therefore, be questioned in any Court.

Here I must explain the decision of the Bombay High Court to which I referred during the course of the hearing of the petition. It is the case of —‘Sarafally Mamooji, In the matter of’; —‘34 Bom 659 (N)’. In that case in a Municipal Election petition, the Chief Judge of the Small Causes Court, unseated two of the successful candidates and found cause of objection against the candidate in whose favour were recorded the next highest number of votes. He declined to inquire further into the claims of any other candidates or to declare any other candidate elected, as, on his interpretation of s. 33 (2), Bombay Municipal Act, 1888, he was not enabled to do so. Macleod J., issued a mandamus holding that s. 33 empowered the Chief Judge to fill up any number of vacancies, created by setting aside the election of any number of the returned candidates, from the list of unsuccessful candidates and that the case fell within the general principle referred to in —‘Ex parte Milner (1851) 15 Jur. 1037 (O)’, that where an inferior tribunal improperly refused to enter upon a complaint, a mandamus would lie. The Bombay decision accords with the principles enumerated above. That was a case where by a wrong construction of s. 33, Bombay Municipal Act, the Chief Judge divested himself of the jurisdiction to decide the main question of the claim of other candidates that they were duly elected. The construction of s. 33 was not the main issue which the Chief Judge had to decide.

The case which is very much apposite here is the one to which I have already referred, namely, — ‘(1888) 21 QBD 313 (K)’. In that case a person claimed to be entitled under a statute to a refund of excess income-tax paid on proving certain facts to the satisfaction of the Commissioners for General Purposes. A certificate for refund was issued by the Commissioners but the Commissioners for Special Purposes refused to act upon it and order repayment of the amount saying that as the ‘facts’ necessary for a refund had not been proved, the Commissioners for General Purposes had no jurisdiction to give a certificate for repayment. It was held by the Court of Appeal that the Commissioners for General Purposes had been given jurisdiction to finally determine the requisite facts for a refund and that the Commissioners for Special Purposes could not question the decision of the Commissioners for General Purposes on those facts,

even if erroneous as without jurisdiction. I think the present case is clearly one where the Tribunal has jurisdiction to determine finally whether a person desiring to give evidence has or has not satisfied the conditions laid down in S. 97 of the Act and the question of the fulfilment of those conditions is not collateral to any main question which the Tribunal has to decide but is the very issue which the Tribunal has to enquire. It follows, therefore, that even though the applicant may think that the Tribunal arrived at erroneous decision, he would not be entitled to say that the decision of the Tribunal was one given without jurisdiction or that the Tribunal gave itself or deprived itself of jurisdiction by a wrong decision. It seems to me that the formula stated by Lord Esher M. R., in —‘(1888) 21 QBD 313 at p. 319 (K)’, and applied by the Supreme Court in —‘AIR 1952 S. C. 319 (J)’, makes it impossible for us to treat the petitioner’s complaint as going to jurisdiction of the Tribunal and on the rule laid down by the Supreme Court in the cases reported in —‘AIR 1952 S.C. 179 (H)’; —‘AIR 1952 S.C. 192 (I)’ & —‘AIR 1952 S. C. 319 (J)’, that a writ of certiorari cannot be granted to quash the decision of the inferior Court within its jurisdiction on the ground that the decision is wrong, the applicant’s prayer for an order of certiorari for quashing the decision of the tribunal must be refused.

(15) In view of what I have said above it is really unnecessary for me to express an opinion upon the question whether the Tribunal arrived at a right decision. For, even if the Tribunal has wrongly construed certain provisions of the Act and arrived at an erroneous decision, that would not entitle the applicant to say that the decision was given without jurisdiction. But it appears to me extremely difficult to maintain that the decision of the Tribunal is wrong or manifestly unjust or that in giving that decision the Tribunal has acted contrary to the principles of natural justice. The notice which was received by the Chairman on 11-9-1952 being admittedly not within time, the short point is whether the presentation of a notice to a member of the Tribunal at the place of the trial is a valid presentation to the Chairman under s. 97.

The applicant argues that as the trial of an election petition commences when it is presented to the Election Commission or at least when a tribunal is constituted, the word “tribunal” in s. 97 of the Act has not the meaning given to it by s. 86(5); that under s. 97 a notice need only be given to the Tribunal and not to the Chairman; & that if at the time of giving of a notice at the place of the trial only one member is present and the others are not, then the presentation of the notice to the member present would be a valid presentation of the notice for the purposes of s. 97.

In my opinion, this view is not correct. The fact that on presentation of an election petition to the Election Commission, if the petition is not dismissed under s. 85, an Election Tribunal is appointed for the trial of the petition, points with reasonable clarity to the inference that the trial of an election petition does not commence either with its presentation to the Election Commission or with the appointment of a Tribunal. Nor can it be



contended that it commences with the publication of an election petition under s. 90. Such a contention would not be in conformity with the natural meaning of the word "trial" which means a judicial examination and determination of issues between the parties, whether they be of law or fact by the Judge. I take this definition from the Oxford English Dictionary. On this definition it is clear that the trial of an election petition commences when after the filing of a reply thereto and of a recriminatory petition, if any, the points in controversy between the parties are settled and their investigation begins. The meaning of the word 'trial' suggested by the learned counsel for the applicant if accepted would render s. 86(5) of the Act wholly nugatory. In my opinion the giving of a notice of recrimination to the Tribunal is an act required to be done before the commencement of the trial. That being so, under ss. 86(5) and 97 a notice of the recrimination to the Tribunal in order to be valid must be given to the Chairman. As a matter of fact in the present case notice was given to the Chairman. Therefore, the question whether the notice was addressed to the proper authority does not arise.

Now though it is provided by s. 81 of the Act that an election petition shall be deemed to have been presented to the Election Commission when it is delivered to the Secretary of the Commission or to such other officer as may be appointed by the Election Commission in that behalf, by the person making the petition or by any person authorised by him in writing or when it is sent by registered post is delivered to the Secretary to the Commission or the officer so appointed, there is no analogous provision in the Act with regard to the presentation of a recriminatory petition. The Act nowhere says that a notice of recrimination shall be deemed to have been presented to the Chairman when it is left at the office of the Tribunal or at the place of the trial or when it is delivered to any member of the Tribunal or to any person authorised by the Chairman in that behalf. It is also not the case of the petitioner that the Chairman could have authorised a member of the Tribunal to receive the notice on his behalf and that in fact he did so authorise Mr. Surajbhan a member of the Tribunal. It was, therefore, incumbent on the applicant to deliver the notice within time to the Chairman of the Tribunal by presenting the notice personally or by sending it by registered post so to reach him within time in the ordinary course of post. The fact that the applicant was informed by a notice that the trial would be held in Gwalior on 13-10-1952 would at the most indicate that the office of the Tribunal would be in Gwalior on 13-10-1952 and that the Chairman and the members of the Tribunal would be in Gwalior on that date. The petitioner was not justified in reading into that notice an intimation to the effect that the office of the Tribunal was located in Gwalior for all time or that the Chairman of the Tribunal would be in Gwalior before 13-10-1952.

By the notifications published in the Gazette of 7-8-1952 page 323 and 21-8-1952 page 366 the applicant was left in no doubt that Mr. Dongre the District Judge of Dhar was the Chairman; that a copy of the election petition which was served on him was issued from

Mr. Dongre's office in Dhar and that Mr. Dongre was discharging his duties as Chairman of the Tribunal from his address in Dhar. It cannot, therefore, be maintained that the petitioner was not made aware of the address of the Chairman of the Tribunal or of the location of the office of the Tribunal and was misled by the Tribunal itself as to the place where the notice of the recrimination had to be served on the Chairman of the Tribunal. The petitioner should have delivered the notice of recrimination to the Chairman of the Tribunal at Dhar. The presentation of the notice to Mr. Surajbhan who was not authorised either by the Act or by the Chairman himself, to receive the notice was not a valid presentation of the notice. In my judgment the Tribunal came to a right decision in holding that the notice of recrimination was not presented within time to the Chairman of the Tribunal.

(16) For the above reasons the conclusion that I come to is that this application must be dismissed, leaving the parties to bear their own costs.

(17) SHINDE C. J. : I agree.  
A/K.S. Application dismissed.

# A.I.R. 1953 M. B. 204 (Vol. 40, C. N. 78)

## (INDORE BENCH)

DIXIT AND MEHTA JJ.

Vishwanath, Applicant v. Kanakmal, Non-Applicant.

Misc. Appln. No. 8 of 1952, D/- 7-2-1953.

Constitution of India, Art. 133 — Final order.

An order appointing a receiver is not a final order within the meaning of Art. 133.

AIR 1950 FC 77; AIR 1933 Pat 293, Rel. on.  
(Para 3)

Pandey, for Applicant; Waghmare, for Non-Applicant.

## CASES CITED:

- (A) ('50) AIR 1950 FC 77; 1950 SCJ 139 (FC)
- (B) ('49) AIR 1949 FC 1; 1947 FCR 180; 49 Cri LJ 625 (FC)
- (C) ('20) AIR 1920 PC 86; 47 Ind App 124 (PC)
- (D) ('33) AIR 1933 PC 58; 60 Ind App 76 (PC)
- (E) ('33) AIR 1933 Pat 293; 12 Pat 723
- (F) ('50) AIR 1950 Mad 215; 1949-2 Mad LJ 601
- (G) ('50) AIR 1950 FC 140; 1950 SCJ 567 (FC)
- (H) ('36) AIR 1936 All 495; 58 All 949 (FB)
- (I) ('43) AIR 1943 All 1; 204 Ind Cas 210 (FB)

ORDER: This is an application under Art. 133, Constitution of India, for leave to appeal to the Supreme Court from our decision dated 27-11-1951 in Civil Miscellaneous Appeal No. 42 of 1951, upholding an order made by the Additional District Judge, Indore, whereby he appointed a receiver of the mortgaged property in the plaintiff-non-applicant's suit to enforce four mortgages executed by the applicant.

(2) We have heard learned counsel for the parties. In our opinion, this application must be rejected because the order sought to be appealed from is not a final order and the proposed appeal does not involve any substantial question of law. The question as to what is a "final order" for the purposes of S. 109, Civil P. C. and S. 205, Government of India Act, 1935, has been considered in a number of cases. In — 'Mohammad Amin Brothers Ltd. v. Dominion of India', AIR 1950 FC 77 (A), it has been observed that:



"The expression 'final order' in Section 205, Government of India Act, has been used in contradistinction to what is known as 'interlocutory order' and the essential test to distinguish the one from the other has been discussed and formulated in several cases decided by the Judicial Committee. All the relevant authorities bearing on the question have been reviewed by this Court in their recent pronouncement in — 'Kuppuswami Rao v. The King', AIR 1949 FC 1 (B) and the law on the point, so far as the Court is concerned, seems to be well settled. In full agreement with the decisions of the Judicial Committee in — 'Firm Ram Chand Manjimal v. Firm Goverdhan Das Vishandas', AIR 1920 PC 86 (C) and — 'Abdul Rahman v. D. K. Cassim and Sons', AIR 1933 PC 58 (D), and the authorities of English Courts upon which the pronouncements were based, it has been held by this Court that the test for determining the finality of an order is whether the judgment or order finally disposed of the rights of the parties. To quote the language of Sir George Lowndes in — 'AIR 1933 PC 58' (D), "The finality must be a finality in relation to the suit. If after the order, the suit is still a live suit in which the rights of the parties have still to be determined, no appeal lies against it. The fact that the order decides an important and even a vital issue is, by itself, not material. If the decision on an issue puts an end to the suit, the order will undoubtedly be a final one, but if the suit is still left alive and have got to be tried in the ordinary way, no finality could attach to the order."

(3) The expression "final order" as used in Art. 133 has to be construed in the light of these observations. Mr. Pandey learned counsel for the petitioner while accepting the proposition that the true test of finality is whether the order finally disposes of the rights of the parties, argues that in the present case the order appointing a receiver is a final order inasmuch as it has affected the right of the applicant to remain in possession of the property during the pendency of the suit. We are unable to accept this contention. The appointment of a receiver is in the discretion of the Court, and is made whenever it appears to the Court that it would be just and convenient to appoint a receiver. The appointment of a receiver is not intended to affect, and does not in any way decide, the rights of the parties. The object of appointing a receiver in a mortgage suit is merely to protect the security. That being so, it cannot be maintained that an order appointing a receiver or refusing the appointment of a receiver is a final order within the meaning of Art. 133. This view is supported by the case of — 'Rajni Prasad v. Nrisingha Charan', AIR 1933 Pat 293 (E), where it was held that an order refusing the appointment of a receiver was not a final order under S. 109 (a), Civil P. C. This decision of the Patna High Court was followed by the Madras High Court in — 'Rayarappen Nayanar v. Madhavi Amma', AIR 1950 Madras 215 (F). The Madras case was no doubt reversed subsequently by the Supreme Court (see — 'Rayarappen Nayanar v. K. V. V. Madhavi Amma', AIR 1950 FC 140 (G)). But it was reversed on a different ground and not on the ground that an order removing or appointing a receiver affected the rights of the parties and, was, therefore, a final order. Learned Counsel for the applicant sought to

distinguish the Madras and Patna cases by saying that those cases dealt with an order refusing the appointment of a receiver. The appointment of a receiver being discretionary, and made by the Court not on a consideration of the rights of the parties to remain in possession of the property during the pendency of the suit but only on the consideration of preserving the property no distinction can be made between an order appointing a receiver or one refusing to appoint a receiver. Indeed, if as the learned counsel for the applicant contends, the appointment of a receiver affects the right of the party already in possession to continue in possession of the property while the suit lasts, it is clear that an order refusing the appointment of a receiver would also affect the right of the party claiming the appointment of a receiver and the dispossession of the other party during the pendency of the suit. It is thus clear that no distinction can be drawn between an order appointing a receiver and an order refusing the appointment of a receiver.

(4) Even if it is taken that in the present case the order appointing a receiver is a final order, the appeal intended to be filed therefrom does not involve any substantial question of law. The contention that O. 41, R. 1, sub-clause (1) has been interpreted differently in — 'Ram Swarup v. Anandi Lal', AIR 1936 All 495 (H) and, therefore, the case involves a substantial question of law may be disposed of by saying that the decision of the Allahabad High Court in — 'AIR 1936 All 495' (H) was doubted in — 'Mt. Tulsha Devi v. Shah Chironjee Lal', AIR 1943 All 1 (FB) (I) and subsequently sub-rule (1) of R. 1, O. 40 was amended in Allahabad so as to make it clear that a party to the suit is not included in the words "any person". Learned counsel for the applicant also raised the objection that the trial Court had no jurisdiction to try the suit and pass an order appointing a receiver. As to this, it is sufficient to say that the point was never raised while proceedings were pending in the Court below or in this Court. As the point was not raised and decided, it cannot be said that the order appointing a receiver rested upon a consideration and decision of that point and that a substantial question of law was involved in the case. Learned counsel for the applicant also advanced the argument that as this Court while maintaining the order of the lower Court appointing a particular person as a receiver, observed that the applicant was not precluded from stating his objections in the lower Court to the appointment of that person as a receiver, the order passed by this Court was not an affirming order. There is no substance in this contention. The result of our decision was to confirm the order of the lower Court as regards the appointment of a receiver and the selection of a particular person by the Court as a receiver. The direction given by us, namely, that if the applicant thought that the person selected should not have been appointed as a receiver or that he should have been asked to give security, the applicant was at liberty to put his objections in the trial Court in no way varied the order passed by the lower Court.

(5) The result is that this application is dismissed with costs.

A/V.S.B.

Application dismissed.



**A.I.R. 1953 M. B. 206 (Vol. 40, C. N. 79)**  
**(INDORE BENCH)**

**KAUL C. J. AND MEHTA J.**

Krishnakant Vyas and another, Applicants v. State, Opponent.

Criminal Misc. Case No. 44 of 1951, D/- 30-4-1951.

**Constitution of India, Arts. 134(1)(c) and 215 — Contempt of High Court — Nature of proceeding — Principles governing granting of certificate in criminal cases — Certificate refused.**

Article 134(1)(c) of the Constitution confers a wide discretion upon the High Courts. Under it an appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court if the High Court certifies that the case is a fit one for appeal to the Supreme Court. There is, however, nothing in the Constitution to indicate in what cases or classes of cases a certificate of fitness to appeal may be granted by the High Court.

In the absence of anything in the Constitution to guide the Courts in this matter, the question should be determined on general principles and such inferences as may be drawn as to the nature and scope of the discretion conferred upon the High Courts from the existing criminal law of the country. There is another Article in the Constitution, Art. 136, under which the Supreme Court may in its discretion grant a special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter, passed or made by any Court or tribunal in India. How the discretion conferred upon the Supreme Court will be exercised in criminal cases was indicated in the recent decision of that Court in — 'Pritam Singh's case', AIR 1950 SC 169. (Principles laid down in AIR 1950 SC 169, indicated).

(Paras 6, 7, 9)

Observations in AIR 1950 SC 169 may well furnish some guidance to the High Courts in granting of certificate applied for under Art. 134(1)(c). In granting a certificate for leave to appeal the High Court must be satisfied that there is reasonable ground for thinking that grave and substantial injustice may have been done by reason of some departure from the principles of natural justice. (Para 11)

The High Court when considering an application for grant of a certificate under Art. 134(1)(c) does not sit in judgment upon its own decision. It has, however, been authorised to grant a certificate of fitness to appeal to the Supreme Court in any case that it might consider appropriate. It would not be proper for any Judge to attempt to define in a few clear cut categories in what cases or classes of cases a certificate of fitness should be granted and thus to restrict the wide generality of the language advisedly used by the framers of the Constitution. Every case should be considered on its own facts and circumstances, but a certificate should not be granted unless there is something exceptional or special in the case calling for a review of the decision of the High Court by the Supreme Court. (Para 12)

The jurisdiction exercised by the High Courts under Art. 215 of the Constitution is criminal jurisdiction. It is true that the High Court exercises as special and summary jurisdiction in cases of contempt of itself. But from the earliest times it was never intended that the exercise of this jurisdiction should be made subject to a review by an appeal and there is a serious doubt whether a certificate of fitness can at all be granted in such a case except possibly under some extraordinary circumstances. High Court would not be justified in applying to petitions for grant of a certificate under Art. 134(1)(c) in cases of conviction for a contempt of itself, a standard of scrutiny different from that by which it judges applications for certificates of fitness in other cases.

(Paras 6, 13, 16)

Liability of an editor and printer when they are not connected with the work of the press at the relevant time when the contempt was published is not a question of general importance, since the law on the subject is well-settled. Similarly when the ground upon which the certificate is sought challenges a finding of fact, it is not a ground for granting certificate.

(Paras 20, 21)

M. B. Rege, for Applicants; Govt. Advocate, for the State.

#### CASES CITED :

- (A) ('50) AIR 1950 SC 169: 51 Cri LJ 1270
- (B) (1867) 36 LJ PC 51: 16 LT 752
- (C) (1887) 56 LT 615: 12 AC 459
- (D) ('09) 9 Cri LJ 226: 33 Bom 221
- (E) ('53) AIR 1953 Madh B 35: (Cri Misc Case No. 159 of 1950 MB)
- (F) (1852) 14 ER 19: 8 Moo PC 47
- (G) (1845-47) 5 Moo PC (NS) 466
- (H) (1899) 68 LJ PC 137: 1899 AC 549
- (I) (1889) 61 LT 502: 58 LJ Ch 706
- (J) (1896) 12 TLR 291
- (K) (1903) 72 LJ KB 839: (1903) 2 KB 432
- (L) (1906) 75 LJ KB 104: (1906) 1 KB 32
- (M) (1806) 13 Ves 237: 33 ER 283

**KAUL C. J.:** This is an application made by Krishnakant Vyas and C. M. Shah for a certificate under Art. 134(1) (c) of the Constitution.

(2) By an order of 23-4-1951 the petitioners Krishnakant Vyas and C. M. Shah along with one Shyamsundar Vyas were convicted for contempt of this High Court. Krishnakant Vyas and Shyamsundar Vyas were sentenced to one month's simple imprisonment each and C. M. Shah was ordered to pay a fine of Rs. 100/- or to undergo simple imprisonment for 15 days in default.

(3) The contempt in respect of which they were convicted and sentenced consisted in a story written by Shyamsundar Vyas which cast foul aspersions on the integrity of one of the Judges of this Court in discharge of his judicial functions. The story was published in a Hindi daily newspaper issued from Indore whereof Krishnakant Vyas is the Editor and C. M. Shah the Printer and Publisher. Krishnakant Vyas and C. M. Shah have expressed their intention to appeal to the Supreme Court against our order and made the present application for grant of a certificate that the case is a fit one for appeal to that Court.

(4) The applicants asked for a certificate on the following grounds:

1. That they were advised that this is a fit case for being taken in appeal to the Supreme Court as it involves questions of general im-



portance, viz., the liability of the Editor and Printer when they were not connected with the work of press at the relevant time.

2. That the judgment of this Hon'ble Court assumes (when holding that the petitioners did not express regret after the comment appeared in the Indore Samachar) that the petitioners knew or had reason to think that the story "हातीके दात" had reference to V. M. Mehta J. of the Madhya Bharat High Court.
3. That there is no ground for holding that the petitioners Krishnakant Vyas had knowledge of the comment in the Indore Samachar. The affidavit regarding this was filed at a very late stage and did not form subject of the rule.
- (5) There is also a prayer that Krishnakant Vyas be released on bail.

(6) It is admitted that the jurisdiction exercised by the High Court under Art. 215 of the Constitution is criminal jurisdiction and the matter in which the present application had been made is a criminal matter. Article 134 (1) (c) of the Constitution confers a wide discretion upon the High Courts. Under it an appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court if the High Court certifies that the case is a fit one for appeal to the Supreme Court. There is however nothing in the Constitution to indicate in what cases or classes of cases a certificate of fitness to appeal may be granted by the High Court.

(7) Before dealing with the specific grounds raised by the application I shall briefly consider the conditions which must be fulfilled before the High Court will be justified, in granting a certificate under Art. 134(1)(c). In the absence of anything in the Constitution to guide us in this matter the question should be determined on general principles and such inferences as may be drawn as to the nature and scope of the discretion conferred upon the High Courts from the existing criminal law of the country.

(8) In our country all offences must be investigated, inquired into, tried or otherwise dealt with according to the provisions of the Code of Criminal Procedure (S. 5). The Code contains comprehensive and detailed provisions about appeals in criminal cases. It is clear that except as provided by the Code or any other law for the time being in force the decisions of the High Courts in criminal matters are generally speaking final. This finality was, before the present Constitution came into force, subject to three exceptions:

1. An appeal could be entertained against the decision of the High Court by the Judicial Committee of Privy Council in exercise of the royal prerogative on behalf of the Crown.
2. There was a right of appeal in a limited classes of cases against the decisions of the High Courts of Calcutta, Bombay and Madras under Cl. 41 of the Letters Patent of the said High Courts; and
3. An appeal under S. 411A(4).

(9) For obvious reasons there can be no question of appeal to the Judicial Committee of the Privy Council. Article 134(1)(c) of the Constitution however gives a right of appeal to the Supreme Court in criminal matters. There is another Article in the Constitution Art. 136 under which the Supreme Court may in its discretion grant a special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any Court or tribunal in India. How the discretion conferred upon the Supreme Court will be exercised in criminal cases was indicated in the recent decision of that Court in — 'Pritam Singh v. The State', AIR 1950 SC

169 (A). It was observed that in granting special leave in criminal cases though the Supreme Court was not bound to follow the decisions of the Privy Council too rigidly, it was not inclined to depart from the principles laid down by the Judicial Committee which should govern the exercise of discretion of the Court in grant of special leave to appeal in such cases.

(10) These principles stated briefly and in very general terms are that there must be something which in the particular case deprives the accused of the substance of a fair trial and the protection of the Law, which in general tends to divert the due and orderly administration of Law into a new course which may be drawn into an evil precedent in future, — 'Reg v. Bertrand', (1867) 16 L. T. 752 (B) or if by a disregard of a form of legal process or by some failure of principles of natural justice or otherwise substantial and grave injustice has been done: — 'In re Dillet', (1887) 12 A C 459 (C).

(11) It was laid down in 'Pritam Singh's case (A)' that generally speaking Supreme Court will not grant special leave to appeal in criminal cases unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and the case in question presents features of sufficient gravity to warrant a review of the decision appealed against. It was further observed that the power with which the Supreme Court was invested under Art. 136 should be exercised sparingly and in exceptional cases only. I am of opinion that these observations may well furnish some guidance to the High Courts in grant of certificates applied for under Art. 134 (1)(c). The language of sub-cl. (c) of Art. 134(1) bears a close resemblance to that used in Cl. 41 of the Letters Patent of the High Courts of Calcutta, Bombay and Madras and it may be permissible to refer to decisions given under that clause in this connection. It was held by a Bench of Bombay High Court in — 'In re Bal Gangadhar Tilak', 33 Bom 221 (D) that before granting a certificate for leave to appeal the High Court must be satisfied that there is reasonable ground for thinking that grave and substantial injustice may have been done by reason of some departure from the principles of natural justice.

(12) The High Court when considering an application for grant of a certificate under Art. 134 (1)(c) does not sit in judgment upon its own decision. It has however been authorised to grant a certificate of fitness to appeal to the Supreme Court in any case that it might consider appropriate. As was observed by me in — 'State v. R. B. Rajkumarsingh', AIR 1953 Madh B 35 (E), it would not be proper for any Judge to attempt to define in a few clear cut categories in what cases or classes of cases a certificate of fitness should be granted and thus to restrict the wide generality of the language advisedly used by the framers of the Constitution. Every case should be considered on its own facts and circumstances, but a certificate should not be granted unless there is something exceptional or special in the case calling for a review of the decision of the High Court by the Supreme Court.

(13) It might possibly be urged that cases where a person is convicted and sentenced for contempt of Court are of a peculiar nature, inasmuch as the High Court exercises a special jurisdiction in dealing with these cases and its decisions in such matters are not subject to any appeal or revision in the High Court itself. This is a reason why an application for a certificate of fitness in such a case should not be subjected to the same strict scrutiny as in other cases. It is true that the High Court exercises a special and summary jurisdiction in cases of contempt of itself. But from



the earliest times it was intended that the exercise of this jurisdiction should be made subject to review by an appeal and I entertain serious doubt whether a certificate of fitness can at all be granted in such a case except possibly under some extraordinary circumstances. It was observed in the case of — *Rainy v. Justices of Sierra Leone*, (1852) 3 Moo P C 47 at p. 54 (F):

"It is the opinion not only of the members of the Committee who heard the petition, but also of the other members who usually attend here, to whom the petition has been submitted, and we have had the benefit of their judgment as well as our own, that we cannot interfere with such a subject. In this country every Court of record is the sole and exclusive judge of what amounts to a contempt of Court."

(14) That case was referred to as an authority by the Judicial Committee in the case of — *McDermott v. The Justices of British Guiana*, (1845-47) 5 Moo P C (N S) 486 (G).

(15) The question of competency of an appeal to the Privy Council in cases of conviction for contempt of Courts was raised in the last mentioned case. Lord Chelmsford who delivered the opinion of the Judicial Committee observed:

"There could be no appeal against an order of a Court of record committing a person for contempt, and that, in order to support the propriety of the leave to appeal, the appellant must show either that the Court was not a Court of Record, or that, if it was a Court of Record, yet that there was something in the order committing the appellant which rendered it improper, and therefore the subject of appeal."

(16) I do not think that the High Court would be justified in applying to petitions for grant of a certificate under Art. 134(1)(c) in cases of conviction for contempt of itself a standard of scrutiny different from that by which it judges applications for certificates of fitness in other cases.

(17) These observations should in my opinion be borne in mind in considering a matter like the one before us. I will now turn to the facts of this case and to the grounds on which a certificate of fitness is applied for.

(18) It was held by me that Shyamsundar Vyas was guilty of scandalising this Court by imputing to one of its Judges dishonesty and corruption in the discharge of his judicial functions and was thus guilty of a gross contempt of Court. This foul aspersion was cast upon a Judge of this Court in a story written by Shyamsundar Vyas which was published in a special issue (Dipawali Anka) of *Nai Duniya* a newspaper of which the applicant Krishnakant Vyas is the Editor and C. M. Shah the Printer and Publisher. In fairness to Mr. Rege learned counsel for the applicants, it may be said that he frankly conceded that if the present petitioners were technically guilty the story in question did not constitute contempt of Court. The plea put forward by Krishnakant Vyas was that "he was in mourning during the period of the offending article and did not come to *Nai Duniya* Office and thus he had nothing to do with its publication". In other words that the story was published in the *Nai Duniya* without the editor's knowledge. It has, however, been held by us that undoubtedly Krishnakant Vyas was aware of the contents of the offending story within a few days of its publication. His case was that according to the information received by him the name of Mehta J. had inadvertently crept into the publication; that this was "a slip of pen" I however came to the conclusion that even after Krishnakant Vyas was aware of the mistake — if it was a mistake indeed — he decided not to correct it but to leave it as it was. In view of this conclu-

sion I hold that the original want of knowledge of Krishnakant Vyas at the time the story was first published lost all significance and that in these circumstances the plea of want of knowledge could be given no weight either as a defence absolving him from the liability for contempt of Court or as a circumstance mitigating the punishment to which he must have made himself liable.

(19) I will now consider the grounds on which a certificate of fitness of the case for an appeal to the Supreme Court is applied for.

(20) The first ground mentioned is that the case involves a question of general importance, viz., the liability of the Editor and Printer when they are not connected with the work of the press at the relevant time. I am clear that there is no substance in this ground. The law on the subject is well settled. The editor is a person who prepares the newspaper for publication. The printer and publisher as the name implies is the person who actually carries on the work of printing and publishing. It was observed so far back as 1899 by Lord Morris in — *McLeod v. St. Aubyn*, (1899) A C 549 (562) (H):

"A printer and publisher intends to publish and so intending cannot plead as a justification that he did not know the contents."

(21) The same view was taken in — *American Exchange in Europe Ltd. v. Gilling*, (1889) 58 L J CH 705 (D):

"Neither the printer nor the publisher can escape the liability by alleging that he did not know that the contemptuous words were inserted in his newspaper." (See — *Cheshire v. Strauss*, (1896) 12 T L R 291 (J); — *R. v. Parke*, (1903) 2 K B 482 (K); — *Rex v. Davies*, (1906) 1 K B 32 (L) and — *Jones Ex Parte*, (1806) 33 E R 283 (M).

(22) These observations apply with equal force to an editor.

(23) The next ground challenges a finding of fact arrived at by this Court on material on record. I am clear that this cannot constitute a good reason for granting of a certificate.

(24) The third ground is also directed to disputing the correctness of the finding of this Court that Krishnakant Vyas in any case, even if we assume that he was originally not aware of the so-called mistake, which according to him had crept into the story became undoubtedly aware of it within a very few days of the publication of the offending story. This, like ground No. 2, cannot form the basis for grant of a certificate of fitness under Art. 134(1)(c).

(25) I am therefore of opinion that we will not be justified in the present case in granting the certificate of fitness applied for.

(26) The application is rejected.

(27) In view of the conclusion at which I have arrived there can be no question of releasing the petitioner Krishnakant Vyas on bail.

(28) I may mention before bringing this order to a close that though none of the grounds mentioned in the application related to the severity of the sentence passed a fair part of Mr. Rege's argument at the hearing was devoted to this subject. I have given my reasons for inflicting the sentence passed in the present case in my judgment of the main case and have nothing to add to what I said there.

(29) MEHTA J.: I agree.

A/R.G.D.

Application rejected.



\*A.I.R. 1953 M. B. 209 (Vol. 40, C. N. 80)

(INDORE BENCH).

(FULL BENCH)

SHINDE, C. J., DIXIT  
AND MEHTA JJ.

Udaybhan, Appellant v. Firm Shankar Lal  
Motilal, Respondent.

Second Appeal No. 354 of 1951, D/- 5-9-1952.

(a) Madhya Bharat High Court of Judicature  
Act (8 of 1949), S. 27 — M. B. High Court  
Rules, Ch. 1 Rule 1, (II) — Change in rule —  
Appeal to be heard by Single Bench — Right  
of appellant — (Constitution of India, Art. 133)  
— (Civil P. C., (1908), S. 109.)

In exercise of the powers vested by S.  
27, M. B. High Court of Judicature Act,  
1949, on 24-12-1951 the Rules of the M. B.  
High Court were altered so as to provide  
'inter alia' that an appeal from an appel-  
late decree of a District Court in which  
the value of the subject-matter in appeal  
or of the subject-matter in appeal and any  
cross-objection therein under O. 41, R. 22,  
Civil P. C., did not exceed Rs. 4000 could  
be heard and disposed of by a Judge sitting  
alone.

Held (1) that this new R. 1(II) of Chap-  
ter 1 of the Rules of Madhya Bharat High  
Court governed appeals arising out of cases  
instituted before 24-12-1951 that is, before  
the rule came into force. (Para 2)

(2) that on a consideration of the pro-  
visions of Art. 133, Constitution of India  
read with Ss. 109 and 110, Civil P. C., the  
appellant against whom a suit for recovery  
of Rs. 2893 had been filed had no right  
of appeal to the Supreme Court under sub-  
cl. (a) or sub-cl. (b) of Cl. (1) of Art.  
133 and that he would not be entitled to  
claim that leave to appeal under sub-cl.  
(c) must be given to him as a matter of  
right. That being so, the alteration in  
the rule about the jurisdiction of the Single  
Judge and the Division Bench did not affect  
any substantive right of the appellant to  
appeal to the Supreme Court. (Para 18)

\*(b) Madhya Bharat High Court of Judica-  
ture Act (8 of 1949), S. 23 — Powers and juris-  
diction.

When a new High Court is created then  
its powers and jurisdiction must be de-  
termined according to its own Constitution,  
and not the Constitution of the old Court,  
the pending cases of which have been  
transferred to the new Court for disposal.  
The Indore High Court having ceased to  
exist on the establishment of the Madhya  
Bharat High Court in 1948, the Constitu-  
tion of the Indore High Court and the Rules  
of that Court cannot be said to have sur-  
vived. Hence, it is not the Constitution  
of the Indore High Court, but the Madhya  
Bharat High Court of Judicature Act, 1949  
and the Rules framed by the M. B. High  
Court under that Act, that must be taken  
into consideration while considering the  
question of the powers and jurisdiction  
of the M. B. High Court, and the practice  
and procedure of the Court. (1949) Madh-B  
L. R. 8 (FB), and AIR 1951 SC 253, Rel.  
on. (Para 5)

(c) Madhya Bharat High Court of Judicature  
Act (8 of 1949), S. 27 — Extent of power to  
make rules.

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The power to make rules includes the  
like power to vary, rescind and amend  
those rules. It is thus within the power  
of the M. B. High Court to provide by rules  
framed under S. 27 whether the jurisdic-  
tion in appeals to it under S. 23, M. B.  
High Court of Judicature Act, 1949 read  
with Ss. 96 and 100, Civil P. C., is to be  
exercised by a single Judge or by a Bench  
of two or more Judges. Such a rule would  
be one not affecting the right of appeal  
but exclusively regulating the procedure  
of the hearing of the appeal. And, there-  
fore, if under the rules of the Court or  
under a statutory provision an appeal is  
to be heard by a particular number of  
Judges, it is not a vested right of any  
party. A litigant has no vested right in  
the procedure as such surrounding the  
hearing of appeal in the High Court. He  
has under S. 23, M. B. High Court of Judi-  
cature Act read with Ss. 96 and 100, Civil  
P. C., a right of appeal to the High Court  
and not to any particular Bench of the  
High Court. AIR 1937 All 19; AIR 1928  
Cal 640 (FB) and AIR 1950 Nag 177 (FB),  
Rel. on; AIR 1929 Mad 381 (SB); AIR  
1952 Punj 103 (FB) and AIR 1952 Pat 341  
(FB), Ref. (Paras 5, 7, 8)

(d) Constitution of India, Art. 133(1) — Dis-  
tinction between Cl. (a) or (b) and Cl. (c).  
AIR 1952 Punj 103 (FB) and AIR 1952 Pat  
341 (FB), Dissented from.

There is a real distinction between an  
appeal under sub-cl. (a) or (b) of Cl. (1)  
of Art. 133 and under Sub-cl. (c). An ap-  
peal under Sub-cl. (a) or (b) is one as  
of right, for a party becomes entitled to  
appeal under either of these sub-clauses  
'ex facto' when certain facts and conditions  
are found to exist after investigation.  
There is no such right of appeal under sub-  
cl. (c). An appeal under sub-cl. (c) of Art.  
133(1) depends solely on the volition and  
discretion of the High Court. It is a mis-  
nomer to say that the appellant has a right  
of appeal under that sub-clause. A per-  
son cannot be said to have a right  
to do anything when he cannot do it except  
with the permission of some other person  
or authority. AIR 1950 Nag 177 (FB),  
Foll; AIR 1952 Punj 103 (FB) and AIR  
1952 Pat 341 (FB), Dissented from.

(Para 9)

(e) Constitution of India, Art. 133(1) — "An  
appeal shall lie to the Supreme Court — (Civil  
P. C., (1908), S. 109).

The expression "an appeal shall lie to  
the Supreme Court" as used in S. 109, Civil  
P. C., or in Art. 133 of the Constitution of  
India means in the context of those pro-  
visions no more than this: that if a person  
has obtained the requisite certificate, he  
can go to the Supreme Court in appeal and  
the Supreme Court shall have jurisdiction  
to entertain the appeal. A distinction has  
to be drawn between "the power of appeal  
to the Supreme Court" and "the authority  
of the High Court to grant leave to do so."  
That expression has no reference at all to  
the grant or refusal of leave to appeal  
under those provisions. From the fact a  
person acquires a right of appeal to the  
Supreme Court after having obtained a cer-  
tificate under sub-cl. (c) of cl. (1) of Art.  
133 it cannot reasonably be inferred that  
he is entitled to claim that leave to appeal



under this sub-clause must be given to him as a matter of right. AIR 1927 PC 242, Expl.; AIR 1952 Punj 103 (FB), Criticised.

(Para 13)

Newaskar, for Appellant, Waghmare, for Respondent, K. A. Chitale, amicus curiae.

#### CASES CITED:

- (A) (51) AIR 1951 Madh-B 1: ILR (1952) Madh-B 15
- (B) (1905) 74 LJ PC 77: 1905 AC 369
- (C) (27) AIR 1927 PC 242: 9 Lah 284 (PC)
- (D) (28) AIR 1928 Cal 640: 56 Cal 512 (FB)
- (E) (52) AIR 1952 Punj 103: ILR (1951) Punj 395 (FB)
- (F) (49) 1949 Madh-B LR 8 (FB)
- (G) (51) AIR 1951 SC 253: 1951 SCR 474 (SC)
- (H) (37) AIR 1937 All 19: ILR (1937) All 191
- (I) (50) AIR 1950 Nag 177: ILR 1950 Nag 532 (FB)
- (J) (52) AIR 1952 Pat 341: 31 Pat 446 (FB)
- (K) (50) Second Appeal No. 24 of 1950 MBI (FB)
- (L) (29) AIR 1929 Mad 381: 52 Mad 361 (SB)
- (M) (1864) 10 LT 434: 10 HLC 704
- (N) (01) 28 Ind App 11: 23 All 227 (PC)
- (O) (1901) 70 LJ PC 76: 1901 AC 495
- (P) 35 CLR 69
- (Q) (1880) 49 LJ PC 82: (1880) 5 AC 371
- (R) (1905) 74 LJ PC 155: (1905) AC 601
- (S) (1862) 10 WR 324: 15 Moo PC 181
- (T) (1873) 30 LT 510: LR 5 PC 494
- (U) (1888) 57 LJ PC 104: 13 AC 780

DIXIT, J.: This is a second appeal by the defendant in a suit for the recovery of Rs. 2893-6-0 in respect of certain transaction in silver. The suit was filed by the plaintiff respondent on 3-4-1947 in the Court of Munsiff Indore. The trial Court decreed the plaintiff's claim to the extent of Rs. 1226/6/-. The District Judge of Indore held the defendant's appeal from the decision of the Munsiff as barred by time, and rejected it. Thereupon, the defendant preferred the present second appeal to this Court on 22-11-51. Under the rules of this Court in force at the time of the institution of the appeal, an appeal against a decree passed by a District Judge in the exercise of his appellate jurisdiction and arising out of a suit for money or moveable property of value exceeding Rs. 2000/- or a suit for land or other suit of value exceeding Rs. 1000/- for purposes of jurisdiction had to be heard by a Division Bench. Accordingly, this appeal was first placed before a Division Bench on 27-11-51 when it was directed to put up with the record of the case. On 24-12-1951 the Rules of this Court were altered so as to provide that an appeal from an appellate decree of a District Court in which the value of the subject-matter in appeal or of the subject-matter in appeal and any cross-objection therein under O. 41, R. 22 did not exceed Rs. 4000 could be heard and disposed of by a Judge sitting alone. When the appeal came on for hearing before a single Judge under the new Rules, an objection was taken on behalf of the appellant that the new rule was inapplicable to the hearing of the appeal and a single Judge was not competent to hear and dispose of the appeal. Kaul C. J. before whom the appeal was placed for hearing passed an order on 7-1-1952 directing that the appeal be placed before a Division Bench for the consideration of the question raised as to the jurisdiction of a single Judge to hear and dispose of the appeal. The appeal was then placed before a Division Bench consisting of my Lord the Chief Justice and Mehta J. In view of the considerable importance of the question, likely to affect a number of appeals pending in this Court, the learned Chief Justice and my brother Mehta directed on

22-4-1952 that the appeal be placed before a Full Bench.

(2) No specific question has been referred to the Full Bench for opinion. But I take it that the question for our decision is whether the new Rule 1, (II) of Chap. 1 of the Rules of Madhya Bharat High Court governs appeals arising out of cases instituted before 24-12-1951 that is, before the rule came into force.

(3) Mr. Newaskar the learned counsel appearing on behalf of the appellant maintained that a single Judge had no jurisdiction to hear this appeal. He presented before us his case in two aspects. First of all, it was said that the suit out of which the present appeal arose was filed in the trial Court in 1947 when Indore State was a separate entity; that under the Constitution of the Indore High Court a second appeal from the judgment and decree passed by a Munsiff had to be heard and disposed of by a Bench of two Judges of the Indore High Court; that the right of second appeal to the High Court and of its being heard by a Bench of two Judges was on the basis of the decision of this Court in — 'Gulab Chand v. Kudilal', AIR 1951 Madh B 1 (A) which followed — 'Colonial Sugar Refining Co. v. Irving', (1905) A C 369 (B); — 'Delhi Cloth and General Mills Co. v. Commissioner of Income Tax Delhi', AIR 1927 PC 242 (C) and — 'Sardar Ali v. Doliluddin', AIR 1928 Cal 640 (D) among others, was a vested right of the appellant which accrued to him at the time of the institution of the suit and that this right could not be taken away by a rule of the High Court; nor could the rule be so construed as to destroy this substantive right.

The second way in which the case was submitted before us was that the new rule was a clog on the appellant's right of appeal to the Supreme Court under Art. 133. It was said that if the appeal was heard under the old rule of this Court by a Division Bench, the appellant would be entitled to appeal to the Supreme Court after satisfying the requirements of Art. 133; while on the other hand if it was heard under the new rule by a single Judge, no appeal would lie to the Supreme Court because of the prohibition in Art. 133(4) of an appeal to the Supreme Court from the decree or order of a Judge sitting alone. It was contended that as on the date of the presentation of this appeal, the appellant had a right of appeal to the Supreme Court after having his appeal heard by a Division Bench at the first stage, this right could not be interfered by having the appeal heard first by a single Judge and then asking the party aggrieved by the decision of the single Judge to take the matter in appeal to a Division Bench with the leave of the Court under S. 23, Madhya Bharat High Court Act, 1949. Learned counsel for the appellant strongly relied on a judgment of the Punjab High Court in — 'Gordhan Das Baldeo Das v. G. G. in Council', AIR 1952 Punj 103 (E).

(4) Mr. Waghmare learned counsel for the respondent supports the appellant on the question of the jurisdiction of a single Judge to hear and dispose of this appeal. We have, however, had the advantage of hearing able and elaborate arguments of Mr. Chitale, Advocate-General in support of the opposite view and we are indebted to him for appearing as 'amicus curiae'. The argument of Mr. Chitale, briefly summarised, is that the appellant cannot avail himself of the Constitution and rules of the Indore High Court which have ceased to exist and of which this Court is not a successor Court; that the Madhya Bharat High Court is a new Court and appeals to this Court and the mode of their hearing is governed by its own Constitution, namely, the Madhya Bharat



High Court Act, 1949 and the rules of practice and procedure framed by this Court under S. 27 of the Act. In support of this proposition Mr. Chitale relies on a Full Bench decision of this Court in — 'Bharose Lal v. Dwarka Prasad', 1949 Madh B L R 8 (F) and on — 'State of Serai Kella v. Union of India', AIR 1951 S C 253 (G). It is further argued that under S. 27 of the High Court Act this Court has the power to make rules for the exercise of the original and appellate jurisdiction vested in it, by one or more Judges or by Division Courts and also amend them; that a rule laying down the powers of a single Judge or a Division Bench is a rule of practice and procedure as to the internal arrangement within the Court for disposal of cases and that no party has a vested right of being heard by a particular Judge or by a particular number of Judges; and that by the change in the rules the appellant's right of second appeal to the High Court under S. 23 of the High Court Act read with S. 100, Civil P. C. is not affected. Mr. Chitale cites — 'Har Prasad v. Boolchand', AIR 1937 All 19 (H); — 'Radha Kishan v. Shridhar', AIR 1950 Nag 177 (I); — 'AIR 1952 Punj 103 (E)'; and — 'AIR 1928 Cal 640 (D)' to support the contention that a party cannot claim that his case should be heard by so many Judges any more than by such and such Judges.

As to the contention of the appellant that by the change in the rule, his right of appeal to the Supreme Court is affected, the reply of Mr. Chitale is that without entering into any controversy as to whether the appellant, who had no right of appeal to the Privy Council or the Federal Court at the time of the institution of the suit, can appeal to the Supreme Court under Art. 133, and assuming for the purposes of this appeal that he can, the appeal would be under Art. 133(1)(c) at the discretion of this Court, as the amount or value of the subject-matter of the dispute in the Court of first instance and in this appeal, is less than twenty thousand rupees, that as observed in — 'AIR 1950 Nag 177 (I)' a distinction must be drawn between the appeals which satisfy the conditions of valuation prescribed in sub-cl. (a) and (b) of Art. 133(1), which are appeals as of right and an appeal under sub-cl. (c) which being at the discretion of the Court cannot be said to be a right of the litigant. Mr. Chitale has also drawn our attention to a recent Full Bench decision of Patna High Court in — 'Mahendra Raut v. Darsan Raut', AIR 1952 Pat 341 (J) in which the learned Judges while observing that the distinction made in the Nagpur case between appeals which satisfy the condition of valuation and appeals with the leave of the High Court cannot be accepted as a valid distinction, have held that a change in the rule of the Court whereby an appeal is heard by a Single Judge instead of by two Judges cannot be said to affect the right of appeal given under Art. 133 of the Constitution of India read with Ss. 109 and 110, Civil P. C.

(5) Proceeding now to consider the submissions of the learned counsel for the appellant, I do not think that the contention that on the date of the institution of the suit there accrued to the appellant a vested right of having his second appeal to the High Court heard by a Division Bench, is tenable. The contention is founded on the Constitution of the Indore High Court. It is true that in 1947 when the suit was filed, the Indore State was an independent political entity that the appellant had a right of second appeal to the Indore High Court and that S. 6 of the Constitution of the Indore High Court provided that second appeals from the decrees passed by a Munsiff shall be heard and disposed of by a Bench of two Judges

of the Indore High Court. It may also be conceded that the provision in the Constitution of Indore High Court for the hearing of a second appeal from a decision of a Munsiff by a Bench of two Judges was a statutory provision which the Indore High Court could not alter by making any rules about the practice and procedure in the High Court; and in fact the Indore High Court had under the Constitution, no power to make rules in respect of matters dealt with by Ss. 5 and 6 of the Constitution of the High Court. But from the fact that there was a statutory provision in the Constitution of the Indore High Court for the hearing of the second appeal by a Bench of two Judges, it does not follow that the hearing of an appeal by a Bench of two Judges was a vested right of the litigant. For, all that S. 6 of the Constitution of Indore High Court did was to determine the procedure to be followed in the hearing of second appeals to the High Court. This section really dealt with a matter of procedure, and as I will presently point out, that if under the rules of the Court or under a statutory provision an appeal is to be heard by a particular number of Judges, then it is not a vested right of any party. If, during the existence of the Indore High Court, its constitution had been amended so as to enable one Judge to exercise the jurisdiction of the High Court in the hearing and the disposal of a second appeal, leaving the right of appeal to the High Court intact as before, it would have been impossible, in my opinion, to contend successfully before that Court that any litigant had a right to a hearing before two Judges.

In fact, it is not the Constitution of the Indore High Court, but the Madhya Bharat High Court Act, 1949 and the Rules framed by this Court under that Act, that must be taken into consideration while considering the question of the powers and jurisdiction of this Court, and the practice and procedure of the Court. The Indore High Court having ceased to exist on the establishment of the Madhya Bharat High Court in 1948, the Constitution of the Indore High Court and the Rules of that Court cannot be said to have survived. As has been held by a Full Bench of this Court in '1949 Madh B L R 8 (F)', the Madhya Bharat High Court is not a successor Court of all the High Courts of the Covenantee States; nor has it only those powers which the defunct High Courts exercised. I observed in that case that Courts are established by the Sovereign Authority by a Statute or Letters Patent or Charter; and sometimes they also subsist by prescription on the implication that at one time there must have been a grant from the Sovereign Authority with regard to the establishment of the Court, which has now been lost. I pointed out that the power and jurisdiction of a new Court must be determined with reference to the Statute or Letters Patent alone under which it is established and that the provision in S. 35(a) of the Madhya Bharat High Court Ordinance (No. II of 1948) that all cases pending in the High Court of any of the Covenantee States, shall stand removed to the Madhya Bharat High Court, could not be read as a provision vesting the Madhya Bharat High Court with all the powers and jurisdiction of the various High Courts of the Covenantee States. This view now finds support in the decision of the Supreme Court in 'AIR 1951 SC 253 (G)'. In that case the Supreme Court has clearly laid down that when a new Court is created then its powers and jurisdiction must be determined according to its own Constitution, and not the Constitution of the old Court, the pending cases of which have been transferred to the new Court for disposal.

(6) Learned counsel for the appellant referred us to a Full Bench decision of this Court in —



'Rajkumar Mills Ltd. v. Pratapsingh and the Hukam Chand Mills Ltd.' (M B I) — Second Appeal No. 24 of 1950 (K) and said that this decision in effect holds that if a party has vis-a-vis the Indore High Court a vested right, that right would be available to the party in this Court also. In my view, the decision in the case of Rajkumar Mills (K) is not in point here. In that case, the question was whether an appeal from a decision of a Division Bench given after the incorporation of S. 25 in the High Court of Judicature Act was competent. It appears from the judgment of the Full Bench that Mr. Chitale who appeared on behalf of the appellant in that case relying on 'AIR 1951 SC 253 (G)' sought to argue that the principle of the right of appeal being a vested right applied only when an appeal lay to the same Court and that if a new Court was created and a right of appeal was for the first time granted to that Court or within the Court from a decision of a Division Bench to a Full Bench, then that principle did not apply. The learned Judges constituting the Full Bench while observing that the Supreme Court decision reported in 'AIR 1951 SC 253 (G)' had no bearing on the case before them, and that a Court exercised only the powers which it possessed, held that inasmuch as the appellant in that case had at the time of the institution of the suit no right of appeal from the decision of a Division Bench of the High Court he could not take advantage of the right of appeal subsequently conferred under S. 25 of the High Court Act. The Full Bench decision in the 'Rajkumar Mills case (K)' is not an authority for the contention that in determining the powers and jurisdiction of this Court, the Constitution of the Indore High Court or of any other High Court of a Covenanted State ought to be taken into consideration. On the other hand that decision also recognises the fact that the powers and jurisdiction of this Court must be regulated by the Madhya Bharat High Court Act, 1949. The point that was taken by the counsel for the appellant in that appeal does not arise in the present case because here the appellant's right of second appeal to the High Court is unaffected and as I have said above he cannot claim that the hearing of an appeal by a Bench of two Judges is a vested right. The question, therefore, whether the principle of the right of appeal being a vested right only applies when an appeal lies to the same Court, does not arise for consideration here.

(7) The question, which then arises, is of the power of this Court to make rules regulating its own practice and procedure. Section 27 of the High Court Act, 1949 empowers this Court by its own rules to provide

"for the exercise by a single Judge or by Divisional Benches consisting two or more of its Judges, of the original and appellate jurisdiction vested in it in such manner as may appear to it to be convenient for the due administration of justice."

It cannot be disputed that the power to make rules includes the like power to vary, rescind and amend those rules. This power of the Court to make rules and vary or amend them is preserved by Art. 225 of the Constitution of India which 'inter alia' says that the jurisdiction of any existing High Court and the respective powers of the Judges thereof in relation to the administration of justice in the Court including any power to make rules of the Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of the Constitution. It is thus within the power of this Court to provide by rules whether the

jurisdiction in appeals to it under S. 23 of the High Court Act read with Ss. 96 and 100, Civil P. C. is to be exercised by a single Judge or by a Bench of two or more Judges. Such a rule would be one not affecting the right of appeal but exclusively regulating the procedure of the hearing of the appeal. If, therefore, in 1948 it was provided by the Rules of this Court that a second appeal arising out of a suit for money exceeding Rs. 2000/- in valuation would be heard by a Division Bench and if the rule has been now altered so as to enable a single Judge to hear and dispose of such appeals, it cannot be maintained that by the change a vested right of a party is affected. For a litigant has no vested right in the procedure as such surrounding the hearing of appeals in this Court. He has under S. 23 of the High Court Act read with Ss. 96 and 100, Civil P. C. a right of appeal to the High Court and not to any particular Bench of this Court. The principle that under such circumstances a party has no vested right to have his appeal to the High Court heard by a particular number of Judges is found asserted in a number of cases. The case of — 'AIR 1937 All 19 (H)', raised very much the same point as the one under consideration here. Sulaiman C. J. and Allsop J. observed as follows:

"The question referred to this Bench is whether the appellant can claim as of right that this appeal should be heard by a Bench of two Judges of this Court. The valuation of this appeal is Rs. 1200/- and at the time when it was filed it was cognizable by two Judges under the Rules made by this Court. Recently the pecuniary jurisdiction of a Single Judge has been raised upto Rs. 2000/- and the appeal is now cognizable by a Single Judge. The learned counsel for both the parties urged before us that there was a substantive right vested in the appellant to have the appeal heard by a Bench of two Judges only and not by a Single Judge. No doubt it is well established that the right of appeal is a substantive right and any rule taking away the right of appeal cannot have a retrospective effect so as to destroy that right. But under S. 100, Civil P. C. the appellant had a right of appeal to the High Court from the decree passed in appeal by the Subordinate Judge on the grounds mentioned therein. The right was to appeal to the High Court and not to any particular Bench of this Court. Under S. 108 (1), Government of India Act, this Court has made its own rules providing for the exercise of its appellate jurisdiction by one or more Judges or by Division Court constituted of two or more Judges. This rule is exclusively for regulating the procedure in this Court as regards the Constitution of Benches. We are unable to hold that the appellant has any vested right in such a Constitution. If by an amendment of the rules the Constitution of the Benches is altered the appeal still lies to the High Court and the appellant cannot claim that the appeal must be heard by a Bench as constituted before the rule was amended."

To the same effect is the case of — 'AIR 1928 Cal 640 (D)', where a Full Bench of the Calcutta High Court stated that:

"Now, there is a certain paradox in regarding the right of appeal within the High Court from the decision of a Single Judge as a right 'vested' in the litigant at the date of the suit, since it is in no way certain that the case will ever be decided by a Single Judge. Again as the right of second appeal is the right given by S. 100, Civil P. C. to appeal "to the High Court" it does not seem unreasonable that a litigant should take the internal arrangements, of the



High Court as he finds them when he gets there."

Following these two cases Hidayatullah J. observed in — 'AIR 1950 Nag 177 (I)'

"A party cannot be heard to say that the case should be heard by so many Judges any more than by such and such Judges. No litigant has a vested right in procedure and must take the rules in force as he finds them. In other words, the rules prescribing the number of Judges is really a matter of procedure and all changes in the procedure of the Court made even during the pendency of an action must be taken to apply to that action unless such changes and alterations touch a substantive right."

A similar view has been taken in — 'In re. Vasudevasamiar', AIR 1929 Mad 381 (L); — 'AIR 1952 Punj 103 (E)' and — 'AIR 1952 Pat 341 (J)'.

(8) It is thus clear that the appellant cannot claim that he had, whether at the time of the institution of the suit or at the presentation of the present appeal to this Court, a vested right of having his appeal heard by a Division Bench. If the matter stopped there, of course, it would be obvious that an alteration in the rule of the Court about the jurisdiction of a single Judge and Division Bench to hear and dispose of appeal could be made without affecting any vested right of any party. Learned counsel for the appellant, however, points out that the matter does not rest there, but the change effected on 24-12-1951 in the rules of the Court has interfered with the appellant's right of appeal to the Supreme Court under Art. 133 of the Constitution read with Ss. 109 and 110, Civil P. C., which is a vested right; and therefore, the new rule cannot be applied to the hearing of this appeal.

(9) It cannot be gainsaid that if the appellant has a right of appeal to the Supreme Court under Art. 133 and if that right is in any way interfered with by a change in the rule of this Court about the jurisdiction of a single Judge and a Division Bench, then the rule though in form one of procedure would really be of a character affecting the substantive right of appeal. The normal presumption that a statute is not intended to interfere with vested rights must then be applied to the construction of the rule and it must be held that the new rule which is not retrospective by express words or necessary intent and which came into force on 24-12-51 has no applicability to this appeal as also to other like appeals, pending in this Court on the said date. If any authority in support of this construction of the rule were necessary, I think it is to be found in a decision of our Court in — 'AIR 1951 Madh-B 1 (A)', and in the cases relied therein. I will assume for the purposes of my judgment that the appellant who had at the date of the institution of the suit in 1947 no right of appeal to the Privy Council or the Federal Court can appeal to the Supreme Court under Art. 133, though I do not wish to be considered as expressing an opinion on the point. But the crucial question for consideration is whether he can as of right appeal to the Supreme Court. The answer, in my view, must be in the negative. As the amount of the subject-matter of the dispute in the Court of first instance was and is in this appeal less than twenty thousand rupees, it being respectively Rs. 2893-8-0 and Rs. 1226-8-0, the appeal to the Supreme Court would clearly not be under sub-cl. (a) or (b) of Cl. (1) of Art. 133. The appeal would be one under sub-cl. (c) of Cl. (1) on the certificate of this Court that the case is a fit one for appeal to the Supreme Court. Now there is a real distinction between an appeal under sub-cl. (a) or (b) of Cl. (1) of Art. 133 and

under sub-cl. (c). It will be observed that whereas under sub-cl. (a) or (b) the appeal to the Supreme Court is dependant on the establishment of the appealable amount or value and also on there being a substantial question of law where the decree to be appealed from is one of affirmance, under sub-cl. (c) the appeal is solely dependant on the discretion of the High Court. An appeal under sub-cl. (a) or (b) is one as of right, for a party becomes entitled to appeal under either of these sub-clauses 'ex facto' when certain facts and conditions are found to exist after investigation. There is no such right of appeal under sub-cl. (c). An appeal under this sub-clause is quite independent of the existence of any fact or conditions and lies only at the discretion of the High Court. It is true that in all these cases the High Court issues a certificate of appeal. But while a certificate for an appeal under sub-cl. (a) or (b) declares a determination of the existence of certain conditions on which the right of a litigant to appeal arises and on which the jurisdiction of the Supreme Court to entertain the appeal rests, a certificate for an appeal under sub-cl. (c) merely embodies the will of the High Court itself, which is sufficient to give jurisdiction to the Supreme Court to entertain the appeal, that the question involved in the case is one which by reason of its general or public importance or otherwise ought to be submitted to the Supreme Court for determination. If, therefore, an appeal under sub-cl. (c) of Art. 133 (1) depends solely on the volition and discretion of this Court, it is a misnomer to say that the appellant has a right of appeal under that sub-clause. A person cannot be said to have a right to do anything when he cannot do it except with the permission of some other person or authority.

(10) The distinction between appeals under sub-cl. (a) and (b) on one hand and appeals under sub-cl. (c) on the other has been forcefully brought out in the Full Bench decision of the Nagpur High Court in — 'AIR 1950 Nag 177 (I)'. In this case the nature of appeals under S. 109 read with S. 110, Civil P. C. was considered and it was held that while under cl. (a) and (b) of S. 109 a substantive right is involved the same cannot be said of appeals under cl. (c) of that section. Hidayatullah J., with whom Bose C. J. and Kaushalendra Rao J. agreed, after considering the effect of the cases of — '(1905) AC 369 (B)'; — 'Attorney General v. H. J. Sillam', (1864) 10 HLC 704 (M), and — 'Banarasi Prasad v. Kashi Kishen Narain', 23 All 227 (PC) (N), said that the only appeal which cannot be taken away except by the clearest piece of legislation is an appeal which vests in a party as of right; that an appeal is merely a limitation of a Court's jurisdiction to pronounce a final decision in matters litigated; that where the decision is appealable as of right the limitation is imposed 'ab extra' but if the limitation arises from the volition of the Court itself, it having the power to grant leave to appeal exercising its own discretion, then the appeal is not one as of right and it is wrong to think that a discretion conceded to a Court is a right of the litigant.

(11) Learned counsel for the appellant has placed reliance on — 'AIR 1952 Punj 103 (E)', to support the contention that the distinction made by Hidayatullah J. is not a valid distinction. The Punjab decision, no doubt, supports the appellant. In the Punjab case which is also a Full Bench case, Bhandari J. said:

"Section 109 draws no distinction whatsoever between appeals which can be preferred under any of three clauses of the said section for it provides that "an appeal shall lie" to the Supreme



Court, (a) from any decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction, (b) from any decree or final order passed by a High Court in the exercise of original civil jurisdiction; and (c) from any decree or order, when the case as hereinafter provided, is certified to be a fit one for appeal to His Majesty in Council."

"Leave to appeal to the Supreme Court can be granted either when the case fulfils the requirements of S. 110 or when it is otherwise a fit case for appeal to the Supreme Court. In either case the petitioner has to apply for a certificate either that the case fulfils the requirements of S. 110 and is, therefore, a fit case for appeal to the Supreme Court or that for other reasons it is a fit case for appeal to the Supreme Court. Ordinarily it is not difficult to satisfy the Court that the case fulfils the requirements of S. 110 as far as the value of the subject-matter is concerned. It is more difficult to satisfy the Court that the case involves the decision of a substantial question of law. It is still more difficult to satisfy the Court that even though the matter in controversy is not measurable by money the case is a fit one for appeal to the Supreme Court. But the fact that it is more difficult to obtain a certificate in one case than in another, does not, in my opinion, alter the fact that a person who procures the certificate under cl. (c) has as much to prefer an appeal to the Supreme Court as the person who procures a certificate under either of the other two clauses. The only construction that may reasonably be placed on the words "an appeal shall lie to the Supreme Court" is that a person who satisfies any one or more of the conditions specified in Ss. 109 and 110, Civil P. C., is entitled to claim that leave to appeal must be given to him as a matter of right. If for example, he satisfies the Court that his case fulfils the requirements of S. 110 or that the case is a fit one for appeal to the Supreme Court, the Court has no discretion to refuse leave to appeal and must grant it as a matter of course."

Soni J. agreed with Bhandari J. But Kapur J. who was the third member of the Full Bench expressed some doubt as to the question whether an appeal under S. 109 (c) was one as of right. The Patna High Court also in — 'AIR 1952 Pat 341 (J)', agreed on this point with the view taken by the Punjab High Court. In the Patna case Das J. has adopted the reasons given by Bhandari J. for holding that no distinction can be drawn whatsoever between appeals which can be preferred under any of the three clauses of S. 109 read with S. 110, Civil P. C. With very great respect to the learned Judges of the Punjab and Patna High Courts, I think the view taken by the Nagpur High Court is correct.

(12) As I have already said the provision that leave to an appeal to the Supreme Court has to be obtained in all appeals under Art. 133 does not indicate that there is no distinction between appeals under sub-cl. (a) and (b) and sub-cl. (c). The distinction arises not because of the comparative ease or difficulty with which the requirements of sub-cl. (a), (b) or (c) can be satisfied for obtaining the leave. It arises because whereas under sub-cl. (a) or (b) of Art. 133 (1) on proof of the existence of the prescribed monetary value and of a substantial question of law where the decree ought to be appealed from is one of affirmance, a person becomes entitled to appeal as a matter of law, the appeal under sub-cl. (c) is not dependent on the existence or non-existence of any conditions, but on the discretion of the Court.

It is true the Court has to exercise its discretion judicially. But the manner in which the discretion is to be exercised cannot convert the discretion vested in the Court into a right of a party so as to compel the Court to exercise the discretion in his favour on his showing certain conditions.

(13) Considerable stress has been laid in the Punjab decision on the words "an appeal shall lie to the Supreme Court" which occur in S. 109, Civil P. C. and it has been observed that the only construction that may reasonably be placed on these words is that a person who satisfies any one or more of the conditions specified in Ss. 109 and 110, Civil P. C. is entitled to claim that leave must be given to him as a matter of right. I must confess, I am unable to see how the words referred to above bear the construction put on them by the learned Judges of the Punjab High Court. In my opinion, the expression "an appeal shall lie to the Supreme Court" as used in S. 109, Civil P. C. or in Art. 133 of the Constitution of India means in the context of those provisions no more than this: that if a person has obtained the requisite certificate, he can go to the Supreme Court in appeal and the Supreme Court shall have jurisdiction to entertain the appeal. A distinction has to be drawn between "the power of appeal to the Supreme Court" and "the authority of the High Court to grant leave to do so". A certificate from the High Court being necessary in all cases in determining whether an appeal under sub-clause (a), (b) or (c) of Cl. (1) of Art. 133 or under any of the clauses of S. 109 read with S. 110, Civil P. C., is an appeal as of right, the point to be considered is not whether the litigant can as a matter of right go to the Supreme Court after having obtained the certificate; but it is whether he can claim that under any of those clauses leave to appeal must be given to him as a matter of right. The expression "an appeal shall lie to the Supreme Court" as used in Art. 133 or S. 109, Civil P. C., has no reference at all to the grant or refusal of leave to appeal under those provisions. I do not think that from the fact a person acquires a right of appeal to the Supreme Court after having obtained a certificate under sub-clause (c) of Cl. (1) of Art. 133, it can reasonably be inferred that he is entitled to claim that leave to appeal under this sub-clause must be given to him as a matter of right. If as I have already shown, he is not so entitled, then clearly the appeal under sub-cl. (c) of Art. 133 (1) is not an appeal as of right.

(14) A reference has also been made in — 'AIR 1952 Punj 103 (E)', to a Privy Council case reported in — 'AIR 1927 PC 242 (C)', and it has been said that in this case the Privy Council regarded the appeal provided by sub-cl. (2) of S. 66-A, Income Tax Act, 1922 from any judgment of the High Court delivered on reference made under S. 65 of the Act to it, if the High Court certifies the case to be a fit one for appeal to the Privy Council, as "a statutory right of appeal". Here again, if the distinction between "the power of an appeal to the Privy Council" & "the authority of the High Court to grant leave to do so" is borne in mind, it becomes clear that the statutory right of appeal referred to by the Privy Council is the one which the litigant acquires after having obtained the leave to appeal. The precise question which is under our consideration did not at all arise in the Privy Council case. The question that was considered by their Lordships of the Privy Council was whether the reference to the Civil P. C. in sub-s. (3) of S. 66-A, Income-tax Act was made in terms sufficiently



comprehensive to include within the class of appealable cases all that are defined in the provisions of the Code relating to appeals to the Privy Council. Their Lordships held that the words of qualification "so far as may be" in sub-s. (3) are apt to confine the statutory right of appeal to the cases described in sub-s. (2). It is thus clear that the question whether an appeal under cl. (a), (b) or (c) of S. 109 read with S. 110 of the Code is an appeal as of right or one dependent on the discretion of the High Court was not for decision before their Lordships. The Privy Council case cannot, therefore, be taken as an authority to support the proposition that a litigant is entitled to claim leave to appeal under cl. (c) of S. 109 as a matter of right and that, therefore, the appeal provided for by this sub-clause is an appeal as of right. The Privy Council case must be considered in the light of the facts of that case and it would not be correct to extract from it a proposition on a point which was not presented to their Lordships for decision. After all a case is only an authority for what it decides. See — 'Quinn v. Leatham', (1901) AC 495 (O).

(15) In this connection it may be noted that the distinction drawn by Hidayatullah J., in — 'AIR 1951 Nag 177 (I), between appeals to the Privy Council as of grace, as of right and at the discretion of the High Court is supported by a clear authority of the High Court of Australia in the — 'Commonwealth and another v. Mimerick Steamship Co. Ltd.', 35 CLR 69 (P), which recognizes the distinction. In the — 'Australian case', the question for determination was whether S. 39 (2) (a) of the Judiciary Act, 1903-1920 had the effect of excluding an appeal as of right to the Privy Council from a decision of the Supreme Court of New South Wales exercising Federal jurisdiction, and of giving to the High Court jurisdiction to entertain an appeal from such a decision. While considering this question Starke J., observed as follows:

"It is essential in the first place, to determine whether this Court can entertain the appeals made to it — whether they are competent. This question depends upon the nature of the authority and jurisdiction conferred upon the Supreme Court of New South Wales. "The king in virtue of his prerogative has", as Bentwich says (Privy Council Practice, p. 36) "authority to review the decisions of all Colonial Courts and all Courts on which British jurisdiction has been conferred, whether the proceeding be of a civil or criminal character, unless His Majesty has parted with such authority". In such cases leave to appeal is sought as an act of grace. But, in addition His Majesty has issued, "either by virtue of the royal prerogative or in pursuance of enabling statutes". Orders-in-council granting an appeal as of right in certain cases, and at discretion in other cases. And authority has been conferred upon the Supreme Court of the British possessions to give leave to appeal in accordance with the terms of the grant. Again, some of the self-governing possessions have, in virtue of other Constitutional powers granted rights of appeal to His Majesty in Council and given jurisdiction and power to their own Courts to give the necessary leave. An instance may be found in the Supreme Court Act 1915 of Victoria, S. 232; and see — 'Goldring v. La. banque d' Hochelaga', (1880) 5 AC 371 (Q); — 'E. W. Gillet and Co. v. Lumsden', (1905) AC 601 (R). The appeal in all these cases is by right of grant and the jurisdiction and power of the local Courts is limited by the grant. Even if leave to appeal has been given by the local Courts,

still that "does not make the thing right if it ought not to have been done" — 'Macfarlane v. Laclaire', (1862) 15 Moo PC 181 (S); — 'Sauvageau v. Gauthier', (1873) LR 5 PC 494 (T); — 'Allan v. Pratt', (1883) 13 AC 780 (U); — 'Goldring v. La Banque d' Hochelaga'; — 'E. W. Gillet and Co. v. Lumsden', (Q)."

To the same effect are the observations of Isaacs and Rich JJ.

(16) Before I conclude, I must consider the Full Bench decision of the Patna High Court in — 'AIR 1952 Pat 341 (J). This decision while agreeing with the view taken by the Nagpur and Punjab High Courts that a rule laying down the powers of a Single Judge is a rule of practice and procedure as to the internal arrangement within the Court for disposal of cases, does not accept the distinction made by Hidayatullah J., between appeals which fall under cls. (a) and (b) of S. 109 and appeals which come under cl. (c) of S. 109 and dissents from both the Nagpur and Punjab High Courts on the point of the effect of a change in a rule with regard to the powers of a Single Judge or Division Bench on the right of appeal to the Supreme Court. It holds that a change in such a rule whereby an appeal instead of being heard by a Division Bench is heard by a Single Judge does not at all affect the right of appeal given under Art. 133 of the Constitution of India read with Ss. 109 and 110, Civil P. C. The material observations are in para 19 of the judgment. In this para Das J. has observed:

"Unless it is predicated that a party appealing to the High Court under S. 100, Civil P. C. has a vested right to be heard by two Judges, a change in the rules relating to the powers of a Single Judge does not take away or affect the right of appeal given to the party by the Statute. The nature of the right given by the Statute has to be kept in mind. The right is to ask for a certificate that the appeal fulfils the requirements of S. 109 or S. 110, Civil P. C., but the right is only given in such cases as are heard in the High Court by two or more Judges: there is no such right in a case which is heard by a Single Judge, there being a different right of appeal with regard to Single Judge decisions under Cl. 10, Letters Patent. If it is conceded that no party has a vested right to be heard by two or more Judges in the High Court, it follows as a necessary corollary that a change of rules with regard to the powers of a single Judge does not affect the right of appeal given by the Statute. That right still remains the same as before. All that happens is that the Statutory prohibition under S. 111, Civil P. C., now cl. (3) of Art. 133 of the Constitution, comes into operation."

(17) With very great respect to the learned Judge, I do not find myself in agreement with this view. To me, it seems that when no appeal lies to the Supreme Court from the decision of one Judge of a High Court and when a litigant is entitled to claim that leave to appeal from decision of a Division Bench must be given to him as a matter of right under sub-cl. (a) or (b) of Art. 133, it is difficult to say that this right of appeal to the Supreme Court is not in any way interfered with by the change in the rule of the Court whereby an appeal is heard by a Single Judge instead of by two Judges. No doubt a person can with the leave of the High Court appeal from the decision of the single Bench to a Division Bench of the Court in Part A States under the Letters Patent of the High Court and here under S. 23, Madhya Bharat High Court Act and then he can appeal to the Supreme Court from the decision of the Division Bench. But if



his appeal could formerly be heard straightway by a Division Bench, then to tell him that under the new procedure also he has a right of taking an appeal to the Division Bench from a decision of a Single Judge and then of appealing to the Supreme Court, is clearly to clog with a condition the right of appeal to the Supreme Court which the party had before the alteration in the rule. A rule of the High Court providing for the exercise of its appellate jurisdiction by one or more Judges is certainly a rule of procedure. But from this it does not follow as a necessary corollary that a change in the rule cannot in any way affect a substantive right of a litigant. A procedure may be of such a character as to affect a substantive right by a change in it. It may then become necessary to keep the procedure intact to preserve the substantive right. In these circumstances to say that an appeal must be heard by a Division Bench as under the old rule in order to preserve a right of appeal to the Supreme Court, is not to assert first the premise that a party has a vested right to be heard by two Judges and then from the premise come to the conclusion that the right of appeal is a substantive right. It is rather the other way. The right of appeal is a substantive right quite independent of any procedure surrounding it and the real question that one has to consider is not whether in abstract the rule of a Court providing for the hearing of the appeal by one or two Judges is a rule of procedure in which no party has a vested right; it is whether a change in it affects a substantive right of appeal to the Supreme Court.

(18) On a careful consideration of the provisions of Art. 133 read with Ss. 109 and 110, Civil P. C., I am disposed to think that the appellant has no right of appeal to the Supreme Court under sub-cl. (a) or (b) of Cl. (1) of Art. 133 and that he would not be entitled to claim that leave to appeal under sub-cl. (c) must be given to him as a matter of right. That being so, the alteration in the rule of this Court about the jurisdiction of the Single Judge and the Division Bench does not affect any substantive right of the appellant to appeal to the Supreme Court. The new rule must, therefore, govern the hearing of this appeal as also of all appeals arising out of cases instituted before the rule came into force. This conclusion could not of course be applied to appeals satisfying the requirements of Art. 133 (1), (a) or (b) as regards amount or value, if the rule had been so altered as to provide for the hearing of such appeals by a single Judge instead of Division Bench. As it is such appeals are today heard, as heretofore, by a Division Bench.

(19) SHINDE C. J.: I agree.

(20) MEHTA J.: I concur and have nothing to add.

A/V.S.B.

Decided accordingly.

**A.I.R. 1953 M. B. 216 (Vol. 40, C. N. 81)**

**(GWALIOR BENCH)**

**DIXIT AND CHATURVEDI JJ.**

The State v. Narain Singh and others, Respondents.

Criminal Appeal No. 69 of 1951, D/- 27-8-52.

Penal Code (1860), S. 511 — Attempt to export without permit — Essential Supplies (Temporary Powers) Act (1946), S. 7) — (Madhya Bharat Foodgrains Export Restriction Order (Sm. 2005).)

Accused carrying cart-load of jwar and wheat without permit towards border of

State — Accused stopped by authorities on the road leading towards a border village within State, at a place two furlongs from the border — Intention to export without permit not proved — Held that no offence of attempting to export without permit was committed. (Para 2)

Anno: Penal Code, S. 511 N. 2.

Mungre, Government Advocate, for the State; Abdul Haiz, for Respondents.

**JUDGMENT:** The respondents were convicted by the First Class Magistrate of Kurwai of an offence under S. 7, Essential Supplies (Temporary Powers) Act, 1946 and sentenced to six months' rigorous imprisonment and to pay a fine of Rs. 50/- each. In appeal the learned Sessions Judge of Shajapur set aside the convictions and sentences and acquitted the accused persons. This appeal is directed against the order of acquittal passed by the Sessions Judge, Shajapur.

(2) The charge against the respondents was that on the night of 12-12-1950 at about 2 a.m. the respondents exported without a permit wheat and jwar in a cart to Central Provinces and thus contravened Notification No. 14 published in the Gazette dated 16-12-50 and issued by the Director of Food and Supplies under the Food Grains Export Restriction Order, Samvat, 2005, which is an order issued under S. 3, Essential Supplies (Temporary Powers) Act.

This appeal is devoid of any force. From the evidence of the prosecution witnesses themselves, it is clear that the cart in which the respondents were carrying wheat and jwar was stopped by the authorities at a place in the Madhya Bharat itself, and that this place which was at a distance of about two furlongs from the border of Central Provinces, was also on the way to Karnodia Basoda a village situated in the Madhya Bharat itself. It is clear from this evidence that the accused had not exported the foodgrain to Central Provinces. It cannot also be held from this evidence that the accused were attempting to export without a permit the wheat and jwar which was in their cart. From the mere fact that the place where the cart was stopped was at a distance of two furlongs from the border of Central Provinces, it cannot be concluded that the respondents were attempting to export the foodgrains to Central Provinces. As this place was situated on a road to the village Karnodia Basoda in Madhya Bharat, the possibility that the respondents were taking the wheat and jwar to this village cannot be excluded. In the absence of any evidence to show the intention of the accused to export the wheat and jwar to Central Provinces, they cannot be held guilty even of the offence of attempt to export the foodgrain without a permit. In fairness to the learned Government Advocate, it must be said that he admitted that the evidence on record was not sufficient to press on this Court that the accused should be convicted of the offence with which they were charged.

(3) In the result, this appeal is dismissed.  
C/K.S.

Appeal dismissed.



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(INDORE BENCH)

(FULL BENCH)

SHINDE C. J., DIXIT AND  
ABDUL HAKIM KHAN JJ.Gokul Das and others, Appellants v. Mohan  
Kunwar Bai and another, Respondents.

Second Appeal No. 326 of 1951, D/- 22-9-1952.

†(a) Madhya Bharat High Court Act (8 of  
1949), Ss. 25 and 25A — Jurisdiction of High  
Court to entertain appeal from judgment of  
Division Bench — (Indore High Court Act (4 of  
1948), Ss. 21(c), 23).

Section 21(c), Indore High Court Act did not give right of further appeal in the High Court from a decision of a Division Bench; on the contrary, such an appeal was expressly prohibited by S. 23 of that Act.

Even assuming that S. 21(c) did confer on the appellant such a right, it is further clear from the opening words of S. 21(c) namely "save as otherwise provided by any law for the time being in force" that if any other statute prohibits an appeal with-in the High Court from a decision of a Division Bench, then S. 21(c) would give way and the provisions of the other statute would prevail. Hence as the Madhya Bharat High Court Act, 1949 negatives the existence of any such right of appeal, the appellant cannot exercise the right said to have accrued to him under S. 21(c), Indore High Court Act.

Section 25, M. B. High Court Act, 1949, which replaced the M. B. High Court Ordinance No. 2 of 1948, no doubt, provided for appeals to a Full Bench in certain cases from decisions of a Division Bench. But on 25-1-50 by Ordinance No. 1 of 1950, a new section 25A was inserted in the Act and the new section took away the jurisdiction of that Court to hear and determine any appeal from a decision of a Division Bench given after 25-1-50.

It follows from this that whatever might have been the law prior to 25-1-50, the High Court has now no jurisdiction at all to entertain any appeal from a decision of a Division Bench given after 25-1-1950. AIR 1951 MB 149 (FB) Ref. (Para 9)

(b) Madhya Bharat High Court Act (8 of  
1949), S. 25A — 'Notwithstanding anything  
contained in S. 25' — Meaning.

The words "Notwithstanding anything contained in S. 25" which occur in S. 25(A) only override the provisions of S. 25. They do not limit the deprivation of jurisdiction only to appeals falling under S. 25. The words only mean that S. 25 shall be no impediment to the non-existence of the jurisdiction. If the intention had been to limit the taking away the jurisdiction of the High Court only to appeals under S. 25, then one would have found the qualifying words "under S. 25" after the words "any appeal" and before the word "from" in S. 25(A). But as it is S. 25(A) uses the un-

qualified words "any appeal" which mean that any appeal whether under S. 25 or under any other provisions of law. (Para 9)

(c) Madhya Bharat High Court Act (8 of  
1949), Ss. 23, 24, 6, 37 — Existing and current  
law binding on Madhya Bharat High Court.

Majority view: Madhya Bharat High Court is not a successor Court of the High Courts of the Covenantee States. It is a new Court and the powers and jurisdiction of the Court are those conferred under the Madhya Bharat High Court Ordinance No. 2 of 1948 and the Madhya Bharat High Court Act (8 of 1949), under which it has been established and is continuing.

The Indore High Court having ceased to exist, the Indore High Court Act, 1948, cannot be said to have survived. If the Indore High Court Act cannot be regarded as operative today, it follows that it is not an existing or current law which the Madhya Bharat High Court is required to apply under S. 6, Madhya Bharat High Court Act to civil, criminal and other proceedings. AIR 1953 Madh-B 209 (FB), Rel. on; Case law referred. (Para 6)

Per KHAN J.: In ascertaining the jurisdiction of the Madhya Bharat High Court, it is not only Ss. 23 and 24, Madhya Bharat High Court of Judicature Act (which define its civil and criminal and appellate jurisdiction) that are to be looked at, but all the relevant sections of the Act have also to be considered. Thus Ss. 6 and 37 of the Act cannot be left out of account. (Para 21)

The scope of the jurisdiction of the High Court is widened by Ss. 6 and 37 of the Act, in so far as these sections enjoin on the High Court to apply the laws of the covenantee States also, (including the right of appeal which may exist under some law of any of the Covenantee State) till such time as they were modified. In this view of the matter, if the Indore High Court Act of 1948 had really provided for an appeal from the decision of a Division Bench then having regard to Ss. 6 and 37, Madhya Bharat High Court of Judicature Act, such an appeal was competent. AIR 1951 SC 253, Expl. and Rel. on. (Para 22)

Bharucha, for Appellants; Rege, Samvatsar  
and Kotwal, for Respondents.

## CASES CITED:

- (A) ('51) AIR 1951 Madh-B 1: ILR (1952) Madh-B 15 (FB)
- (B) ('50) Second Appeal No. 24 of 1950 (Madh-B)
- (C) ('51) AIR 1951 SC 253: 1951 SC J 474
- (D) ('53) AIR 1953 Madh-B 209: (S. A. No. 354 of 1951) (FB)
- (E) ('51) AIR 1951 Madh-B 149: 52 Cri LJ 1467 (FB)
- (F) ('51) AIR 1951 Bom 147: 53 Bom LR 556
- (G) ('40) AIR 1940 Bom 216: ILR (1940) Bom. 426
- (H) ('48) AIR 1948 Lah 64: 49 Pun LR 230
- (I) ('49) 1949 Madh-B LR 8



(1) (52) AIR 1952 Bom 303; ILR (1952) Bom 906

(2) (50) AIR 1950 Madh-B 112; (Special Cri. Appeal No. 1 of 1949) (FB)

DIXIT J.: This is an appeal by the plaintiff from a decision of a Division Bench of this Court, whereby the decree of the Additional District Judge, Indore, was set aside and the plaintiff's claim for the specific performance of a contract for sale of a house was dismissed with costs throughout. The suit out of which this appeal arises was instituted on 2-7-1943 by the plaintiff in the Court of Additional District Judge, Indore. A decree in favour of the plaintiff was made by the trial Court on 28-2-1950. The defendant, then, filed an appeal to this Court on 29-6-1950 from the decree of the Additional District Judge Indore. The appeal was heard by a Division Bench and allowed on 12-7-1951 and the plaintiff's suit was dismissed. The present appeal is directed against the decision dated 12-7-1951 of the Division Bench and was filed on 2-11-1951.

(2) The preliminary question that arises for consideration in this appeal is as to the competence of the appeal. Prima facie under the Madhya Bharat High Court Act, 1949 (Act 8 of 1949), as amended by Ordinance No. 1 of 1950, no appeal lies from any judgment, decree, order or sentence passed or made by any Division Bench of this Court after 25-1-1950. Mr. Bharucha learned counsel for the appellant admits that the present appeal is not under the old S. 25 of the High Court Act which provided for appeals under certain conditions from decisions of any Division Bench and which was repealed on 25-1-50 by Ordinance No. 1 of 1950. He, however, claims that the appeal is under S. 21 (c), Indore High Court Act 1948 (Act 4 of 1948 of Indore State). The argument is that on the date of the institution of the suit in the Court of the Additional District Judge, the Indore High Court Act, 1948 existed; that under S. 21 of the Act an appeal lay to the Indore High Court from a decree passed by the District Judge in the exercise of his original civil jurisdiction and a further appeal lay within the High Court itself from the decision of the Court in a first appeal from decree of the District Judge, that this right of two appeals which according to the Full Bench decisions of this Court in — 'Gulab Chand v. Kudi Lal', AIR 1951 Madh-B 1 (A) and in — 'The Rajkumar Mills v. Pratap Singh and the Hukam Chand Mills Ltd.', (Indore Bench) Second Appeal No. 24 of 1950 (Madh-B) (B), is a right which vested in the appellant at the time of the filing of the suit; that this right of further appeal in the High Court has not been taken away by express provisions or necessary intendment of any piece of legislature; and that on the other hand the provision contained in Madhya Bharat High Court Ordinance, 1948 (Ordinance 2 of 1948) and Madhya Bharat High Court Act (Act 8 of 1949) by which this Court was established and then continued and the Indore High Court ceased to exist, that the High Court is to

"apply the laws and usages prevailing in any State forming part of the United State to Civil, Criminal and other proceedings in that State till such time as a duly constituted authority modifies them"

(S. 6 of Act 8 of 1949) and that all appeals, petitions for revision, etc., which lay to the High Court of any Covenanting State according to the laws in force in that State, shall lie to the High Court (See S. 37 (1) of Act 8 of 1949) distinctly show that so far as appeals to this Court, arising out of suits instituted in the quondam Indore

State are concerned, the Indore High Court Act, 1943 is still operative. On this reasoning, it is maintained that the right of the appeal within the High Court itself which the appellant had with respect to the Indore High Court, enures also in regard to this Court and that, therefore, this appeal is competent.

(3) The reply of Mr. Samvatsar, learned counsel appearing on behalf of the respondent is that the Madhya Bharat High Court being a new Court, its powers and jurisdiction must be determined with reference to Ordinance 2 of 1948 and Act 8 of 1949 constituting it and not with reference to the Indore High Court Act 1948; that under Act 8 of 1949 as amended on 25-1-50 this appeal is clearly incompetent. Mr. Samvatsar relies on the decision of the Supreme Court in — 'State of Serai Keila v. Union of India', AIR 1951 SC 253 (C), to support this proposition. It is further urged that as on the establishment of this Court, the Indore High Court ceased to exist, the Act under which High Court was established, namely the Indore High Court Act, 1948 also ceased to be operative and that Act cannot be said to be an existing law which this Court is enjoined to apply under S. 6 of the High Court Act to Civil, Criminal and other proceedings; nor can it be said to be a law at present in force in the territories of Madhya Bharat comprising of the former Indore State under which the appellant can claim to file this appeal by virtue of the provision of S. 37 (1), Madhya Bharat High Court Act. Mr. Samvatsar proceeded to point out that even under the Indore High Court Act, 1948, the appellant had no right of appeal from a decision of a Division Bench; that S. 21 (c) of the Act only provided for an appeal within the High Court from a decision of a single Judge passed in the exercise of his appellate jurisdiction; and that on the other hand S. 23 of the Act stated in express words that

"no appeal shall lie from any decree or order passed by the High Court in the exercise of its civil or criminal jurisdiction except as provided in the enactment."

(4) As Mr. Chitale had addressed us arguments on an allied question in 'Udaybhan v. Firm San-karlal', AIR 1953 Madh-B 209 (FB) (D), appearing as amicus curiae, we thought it desirable to hear him in that capacity in this case also. Mr. Chitale supported the arguments of the learned counsel for the respondent and added that even accepting as correct the proposition that as the hearing of an appeal by a Single Judge or a Division Bench of the High Court is merely a matter of procedure, the appellant would have been entitled under S. 21, Indore High Court Act to a further appeal within the Indore High Court if his appeal from the decree of the Additional District Judge had been heard by a Division Bench, the appellant cannot claim that right in relation to this Court for the reason that the opening words of S. 21, Indore High Court Act, namely "Save as otherwise provided by any law for the time being in force" clearly show that, that right would now be subject to the provisions of the Madhya Bharat High Court Act, 1949. It is contended that whatever might have been the law prior to 25-1-50 with regard to appeals from decisions of a Division Bench of this Court, on 25-1-50 this Court was deprived by Ordinance No. 1 of 1950 of any jurisdiction to hear and determine any appeal from the decisions of any Division Bench given after 25-1-50 and that as under Art. 225 of the Constitution of India the jurisdiction of this Court is the same as that vested immediately before the commencement of the Constitution and as on that date this Court



had no jurisdiction to hear and determine any appeal against the decisions of any Division Bench given after 25-1-50, it follows that this Court has no jurisdiction to entertain, hear and determine this appeal. In support of this contention Mr. Chitale has cited a Full Bench decision of this Court in — 'Baldeo Singh v. The State', AIR 1951 Madh B 149 (FB) (E) relying on — 'James Chadwick & Bros. Ltd. v. National Sewing Thread Co. Ltd.', AIR 1951 Bom 147 (F); — 'Vaman Ravji v. Nagesh Vishnu', AIR 1940 Bom 216 (G) and — 'Hanuman Chamber of Commerce Ltd., Delhi v. Jassa Ram Hira Nand', AIR 1943 Lah 64 (H). Mr. Chitale further argued that this appeal is really what is commonly described as "inter Court-Appeal" that appeals within the High Court itself are the peculiarities of the Constitution and the rules of practice and procedure of the specific High Court; and that if the Court is abolished its Constitution and rules cannot survive and therefore, even if this appeal could have been entertained by the Indore High Court under its own Constitution, if the Constitution and rules of practice and procedure of this Court do not provide for an appeal from a decision of a Division Bench, then the appeal cannot be entertained.

(5) It will be seen from the arguments summarised above that the appellant stand upon the provisions of the Indore High Court Act, 1948 and his contention is twofold: (1) that in relation to appeals arising out of suits instituted in the territories of Madhya Bharat comprising of the former Indore State, the Indore High Court Act, 1948 is still operative and that the power and jurisdiction of this Court must in the matter of these appeals be determined with respect to the Indore High Court Act; (2) and that the appellant had in any case acquired under that Act while it was in force a vested right of appeal within the High Court from a decision of a Division Bench and this right is available to him in this Court also. In my opinion, both these contentions are unsound and must be rejected.

(6) The contention that the powers and jurisdiction of this Court in respect of appeals of the type referred to above must be determined with reference to the Indore High Court Act, 1948 must be repelled for the reasons which I have already given in — 'AIR 1953 Madh B 209 (FB) (D)' which raised very much the same consideration as the present. In that case relying on the Supreme Court decision in — 'AIR 1951 SC 253 (C)' and on a Full Bench decision of this Court in — 'Bharosi Lal v. Dwarika Das', 1949 Madh B L R 8 (I), I have held that this Court is not a successor Court of the High Courts of the Covenantee States but that it is a new Court and the powers and jurisdiction of this Court are those conferred under the Madhya Bharat High Court Ordinance No. 2 of 1948 and the Madhya Bharat High Court Act (8 of 1949) under which it has been established & it is continuing. It seems to me a truism to say that the Indore High Court having ceased to exist, the Indore High Court Act, 1948 cannot be said to have survived. If the Indore High Court Act cannot be regarded operative today, it follows that it is not an existing or current law which this Court is required to apply under S. 6, Madhya Bharat High Court Act to civil, criminal and other proceedings; and which would 'proprio vigore' entitle the appellant to prefer this appeal.

Learned counsel for the appellant strongly relied on the Full Bench decision of this Court in — 'Second Appeal No. 24 of 1950 (Madh B) (B)' and also drew our attention to a decision of the Bombay High Court reported in — 'Dajisaheb v. Shankarrao Vitha'rao', AIR 1952 Bom 303 (J) and pressed on us to hold that the powers and jurisdiction of this Court in regard to appeals arising

out of suits instituted in the former Indore State must be determined with reference to the provisions of the Indore High Court Act 1948. These cases, in my view, have no application here. I have already considered the decision in — 'Second Appeal No. 24 of 1950 (Madh B) (B)', in the opinion which I have just delivered in — 'AIR 1953 Madh-B 209 (FB)(D)' & pointed out that the decision is not an authority for the contention that in determining the powers and jurisdiction of this Court, the Constitution of the Indore High Court or of any other High Court of a Covenantee State ought to be taken into consideration. The Full Bench decision did not, and of course could not, reject the proposition laid down by the Supreme Court in the case of — 'State of Serai Kella v. the Union of India', (C) that when a new Court is established, its jurisdiction and powers are those as defined by the statute constituting it. In the 'case of Raj Kumar Mills (B)' also this principle was recognised and the learned Judges constituting the Full Bench examined the provisions of the Madhya Bharat High Court Act, 1949 and then came to the conclusion that there was nothing in S. 25, Madhya Bharat High Court Act or any other provision of that Act to show that the right of appeal conferred by S. 25 was available to a party who did not possess such a right at the time of the institution of the suit. Now, it must be remembered that it is one thing to say that in the matter of appeals the power and jurisdiction of this Court are regulated by the Indore High Court Act 1948 and that as under that Act a party had no right of appeal, he cannot claim the right in this Court; but it is quite different to say that under the powers and jurisdiction of this Court as defined in the Madhya Bharat High Court of Judicature Act, 1949, a right of appeal, which had not vested in a party at the time of the suit, was not available to him in this Court or that a right which had so vested in him has been preserved or taken away. It is essential to bear in mind the ratio decidendi of the Supreme Court decision in the case of 'the State of Serai Kella (C)'. The 'ratio decidendi' is, that the Supreme Court being a new Court established under the Constitution of India, its power and jurisdiction are those as defined in the Constitution itself and that if the Constitution expressly bars the jurisdiction of the Supreme Court with regard to any matter, then notwithstanding the fact that the Federal Court had jurisdiction to entertain the matter or that it was pending before the Federal Court at the time of the establishment of the Supreme Court and was removed to the Supreme Court for disposal, the Supreme Court would not have jurisdiction to entertain the matter.

(7) The learned Judges of the Bombay High Court in — 'AIR 1952 Bom 303 (J)' simply applied to the case before them the principle laid down by the Supreme Court in the case of 'the State of Serai Kella (C)'. The decision in — 'AIR 1952 Bom 303 (J)' is of no assistance to the appellant.

In 'the Bombay case (J)' the question under consideration was whether in respect of appeal to the Supreme Court arising out of suits filed prior to the coming into force of the Constitution, the limitation as to value or amount prescribed in Art. 133 of the Constitution of India applied. Their Lordships held that although under sub-cl. (a) and (b) of Art. 133 no appeal lay to the Supreme Court where the subject-matter in dispute was less than Rs. 20,000, the Supreme Court has been given under Art. 135 the same jurisdiction and powers with respect to any matter to which the provisions of Art. 133 or 134 did not apply, if the Federal Court had jurisdiction to entertain the matter. They also held that S. 27 of the Adaptation of Laws Order, 1950 expressly preserves the right



already accrued to a party to appeal to the Supreme Court in cases where the amount or value of the subject matter in dispute was Rs. 10000 or more. The Bombay case was decided on the basis that the Constitution itself gives to the Supreme Court the jurisdiction to deal with appeals where the amount or value of the subject matter in dispute is less than Rs. 20000, - if the appeal is one arising out of a suit filed before the coming into force of the Constitution. As the learned Judges of the Bombay High Court pointed out whereas in the case of the State of Serai Kella (C) the question was of absence of jurisdiction under the Constitution in the Supreme Court, in the case before them there was no such absence of jurisdiction. The Bombay case, therefore, does not support the contention of the appellant, which in my opinion, is untenable.

(8) The contention that the appellant had acquired, under the Indore High Court Act, a vested right of appeal within the High Court from a decision of a Division Bench is not supported by the wording of Ss. 21(c) and 23, Indore High Court Act. Section 21(c) is as follows:

"Save as otherwise provided by any law for the time being in force, an appeal shall lie to the High Court from (c) a decree or an order appealable under the Indore Code of Civil Procedure or any other law for the time being in force, passed either by a Judge of the High Court or a District Judge in the exercise of his appellate jurisdiction."

Section 23 says:

"No appeal shall lie from any decree or order passed by the High Court in the exercise of its Civil or Criminal jurisdiction except as provided in this enactment."

(9) It is clear from these provisions that the appellant had under the Indore High Court Act no right of further appeal in the High Court from a decision of a Division Bench, on the contrary such an appeal was expressly prohibited by S. 23 of that Act. Assuming for the sake of argument that S. 21(c) did confer on the appellant such a right, it is further clear from the opening words of S. 21(c) namely, "save as otherwise provided by any law for the time being in force" that if any other statute prohibits an appeal within the High Court from a decision of a Division Bench, then S. 21(c) would give way and the provisions of the other statute would prevail. If, therefore, the Madhya Bharat High Court Act, 1949 negatives the existence of any such right of appeal, the appellant cannot clearly exercise the right said to have accrued to him under S. 21(c), Indore High Court Act. That this Court has under the Madhya Bharat High Court Act, 1949, as it stands today no jurisdiction to hear and determine any appeal from a decision of a Division Bench, is clear enough. The Madhya Bharat High Court Ordinance No. 2 of 1948 did not confer on this Court any such jurisdiction. Section 25 of the High Court Act, 1949 which replaced the Ordinance, no doubt, provided for appeals to a Full Bench in certain cases from decisions of a Division Bench. But on 25-1-50 by Ordinance No. 1 of 1950, a new section, namely S. 25(A) was inserted in the Act and this new section took away the jurisdiction of this Court to hear and determine any appeal from a decision of a Division Bench given after 25-1-50. Section 25(A) was in these terms:

"Notwithstanding anything contained in S. 25, the High Court shall have no jurisdiction to hear and determine any appeal from any judgment, decree, order, and sentence passed or made after the promulgation of this Ordinance by any Divisional Court of the High Court on its original or appellate side."

It must be noted that the words "Notwithstanding anything contained in S. 25" which occur in S. 25(A) only override the provisions of S. 25. They do not limit the deprivation of jurisdiction only to appeals falling under S. 25. The words only mean that S. 25 shall be no impediment to the non-existence of the jurisdiction. If the intention had been to limit the taking away the jurisdiction of this Court only to appeals under S. 25, then one would have found the qualifying words "under S. 25" after the words "any appeal" and before the word "from" in S. 25(A). But as it is S. 25(A) uses the unqualified words "any appeal" which in my opinion, mean that any appeal whether under S. 25 or under any other provisions of law. The word "any" is a word which as used in S. 25(A) excludes limitation or qualification. It follows from this that whatever might have been the law prior to 25-1-50, this Court has now no jurisdiction at all to entertain any appeal from a decision of a Division Bench given after 25-1-1950. The effect of S. 25A of the High Court Act and Ordinance No. 1 of 1950 has already been considered by a Full Bench of this Court in — 'AIR 1951 Madh B 149 (E)' and it has been held in that case that as at the commencement of the Constitution of India, this Court had no jurisdiction to hear and determine any appeal against the decisions of any Division Bench given after 25-1-50, the inference follows from Art. 225 of the Constitution of India that it has none today. For these reasons the contention of the appellant that he had at the institution of the suit a vested right of appeal within the High Court or that if he had such a right he is entitled to exercise it in this Court also must be rejected.

(10) In this view of the matter, it is not necessary to consider the further argument of Mr. Chitale about the nature of appeals within the High Court itself i.e. of "inter-Court" appeals. Such appeals are, in my view, no doubt, something quite special being peculiar to the Constitution, and the rules of practice and the procedure of the particular Court. It, however, appears to me that the real question raised by this argument is whether the principle of the right of appeal being a vested right applies to appeals within the High Court, and that so far as this question is concerned, it is for the present, concluded by the Full Bench decision of this Court in — 'Second Appeal No. 24 of 1950 (Madh B) (B)'. As I have held that this Court has no jurisdiction at all to entertain any appeal from a decision of a Division Bench, the question whether the appellant can take advantage of an inter-Court appeal, when at the time of the institution of the suit, there was no such appeal provided, does not arise. It would not, therefore, be proper to examine the correctness of the decision in — 'Second Appeal No. 24 of 1950 (Madh B) (B)' in this case, where the point covered by that decision does not arise.

(11) In the result, I have come to the conclusion that this appeal is incompetent and must be dismissed directing the appellant to pay to the respondent half his costs here.

(12) SHINDE C. J.: I agree and have nothing to add.

(13) A. H. KHAN J.: This appeal arises out of suit No. 53 of 1948 for specific performance, which was instituted on 2-7-1948 and in which a decree was passed in favour of the plaintiff by the Additional District Judge of Indore on 28-2-1950. The defendant filed an appeal No. 19 of 1950 before the Madhya Bharat High Court, which was allowed by a Division Bench of this Court on 12-7-1951, and the plaintiff was non-suited. Aggrieved by the decision of the Division Bench, the plaintiff has filed this second appeal.



(14) A preliminary objection has been raised that the appeal is incompetent. It is said that the High Court of Judicature Act, Madhya Bharat (Act No. 8/1949) as it stands today does not provide for an appeal from the decree of a Division Bench to a larger Bench of this Court. No doubt that under S. 25, High Court of Judicature Act, such an appeal was possible, but first by Ordinance 1 of 1950, and later on by Act 3 of 1952, S. 25 was done away with. In the circumstances, it is contended that the plaintiff is not entitled to prefer this appeal.

(15) The learned counsel for the appellant, Mr. Bharucha contends that this appeal is not brought under the repealed S. 25, High Court of Judicature Act, but that it is preferred in accordance with S. 21 (C), Indore High Court Act (4 of 1948). It is contended that the Indore High Court Act provided for two appeals in the High Court, and, by virtue of S. 6 read with S. 37, Madhya Bharat High Court of Judicature Act (8 of 1949), this High Court has to apply the law that prevailed in the High Court of the former Holkar State, and, as such this appeal is competent. It is further argued that the right of appeal is a vested right & according to the well established principle of law as affirmed in the decision of this High Court 'Daulat Singh v. State', AIR 1950 Madh B 112 (FB) (K) this right inheres in a party at the commencement of the proceedings, and, because at the time of filing the suit, the Indore High Court Act was in force, which provided for two appeals in the High Court, this appeal is competent.

(16) Learned and lengthy arguments have been addressed to us by the counsel of both the parties and we had also the benefit of hearing Mr. Chitale, the learned Advocate General, who has appeared as amicus curiae.

(17) I would uphold the preliminary objection and dismiss the appeal on the short ground that as contended by the learned counsel of the appellant, no appeal is provided against the decision of a Division Bench in the Indore High Court Act, 1948 (Act 4 of 1948). All that S. 21(C), Indore High Court Act intends to provide is that in the event of an appeal being heard by a Judge of the High Court (Single Bench), an appeal would lie to the High Court. In other words it provides that on a case being decided by a single Bench another appeal before a larger Bench could be filed. But the Act nowhere says that if an appeal was initially heard by a Division Bench, the aggrieved party had a further right of appeal to a larger Bench. In the course of the arguments, I asked Mr. Bharucha whether he could cite any authority or for the matter of that refer to the practice of the Indore High Court, to substantiate the point that under Indore High Court Act, it was possible to appeal against the decree of a Division Bench. His reply was not satisfactory. I am, however, quite clear in my mind that it was not possible and the reasons are two: First, there is no provision express or implied in the Indore High Court Act for such an appeal, secondly, the Indore High Court consisted of a Chief Justice and two puisne Judges vide S. 2(1), Indore High Court Act (Act 4 of 1948). Now if an appeal was initially heard by a Division Bench it was not physically possible for the High Court to constitute a larger Bench to hear an appeal from it. Furthermore, S. 23, Indore High Court Act says:

"No appeal shall lie from any decree or order passed by the High Court in the exercise of its Civil or Criminal jurisdiction except as provided in this enactment....."

(18) There being no provision for an appeal from the decision of a Division Bench in the Act, a second appeal was barred by S. 23 of the Act itself.

(19) For the reasons stated above, I have no hesitation in holding that under the Indore High Court Act, no appeal could be heard by a larger Bench against the decision of a Division Bench, and, as such this appeal is not competent. In the view I take of the preliminary objection, regarding the competence of this appeal, it is, in fact, unnecessary to examine and discuss any further arguments, but en passant, one or two arguments advanced with great vehemence may be noticed.

(20) Mr. Chitale, the learned Advocate General, has specially referred to the decision of the Supreme Court in the case of — 'AIR 1951 S C 253 (C)' to establish the proposition that when a new Court is established, its jurisdiction and powers are those as defined by the Statute constituting it, and that in considering the competence of this appeal, the Indore High Court Act of 1948 should be brushed aside altogether, and, that we should determine the question only by reference to the Madhya Bharat High Court Act (Act 8 of 1949) under which this Court is constituted. But what if the Madhya Bharat High Court Act itself enjoins on us to take the Indore High Court Act into consideration? I refer to Ss. 6 and 37, Madhya Bharat High Court Act, the material portions of which run as follows:

"Section 6: The High Court shall apply the laws and the usages prevailing in any State forming part of the United State to Civil, Criminal and other proceedings in that State till such time as a duly constituted authority modifies them. Section 37.....and all cases pending before the said High Court, Tribunal or Authority, shall be transferred to the High Court of the United State for disposal, and all appeals, petitions for revision etc., which lay or lie to the said High Court, Tribunal or Authority, according to the laws in force in that State, shall lie to the High Court of the United State."

On reading the 'State of Seraikella case (C)', I find that what their Lordships of the Supreme Court have observed, is thus:

"that the Supreme Court was a new Court established by the Constitution of India and the jurisdiction of the Court has, therefore, to be ascertained 'by considering all the relevant articles of the Constitution'. It is in that light, the provisions of Art. 363 have to be read and interpreted."

(21) I would like to point out that their Lordships have laid particular emphasis on the fact that 'all the relevant Articles have to be considered in ascertaining the jurisdiction' of the Court, and this being so, in ascertaining the jurisdiction of the Madhya Bharat High Court, it is not only Ss. 23 and 24, Madhya Bharat High Court of Judicature Act (which define its civil and criminal and appellate jurisdiction that are to be looked at, but all the relevant sections of the Act have also to be considered). Thus Ss. 6 and 37 of the Act cannot be left out of account.

(22) It was also held in 'the State of Seraikella case (C)' that Art. 363 controlled Art. 374(2) of the Constitution in determining the question of jurisdiction. In other words Art. 363 put an embargo on the operation of Art. 374(2) of the Constitution. But in our case the jurisdiction to hear appeals, as contained in Ss. 23 and 24, Madhya Bharat High Court of Judicature Act, suffers from no such restraint as is placed on Art. 374 by Art. 363 of the Constitution. On the contrary, the scope of our jurisdiction is widened by Ss. 6 and 37 of the Act, in so far as these sections enjoin on this High Court to apply the laws of the Covenanting States also (including the right of appeal which may exist under some law of any of the covenanting State) till such time as they were modified.



Thus on analysing the Supreme Court case, I find that it does not exclude the consideration of the Indore High Court Act of 1948; on the contrary it directs us to consider all the provisions of the Statute which created the Madhya Bharat High Court. In this view of the matter if the Indore High Court Act of 1948 had really provided for an appeal from the decision of a Division Bench (and I have held above that it did not so provide), then having regard to Ss. 6 and 37, Madhya Bharat High Court of Judicature Act, this appeal was competent.

(23) It has been contended that in the abolition of the Indore High Court, the Indore High Court Act came to an end. This statement is only partially true. In so far as the Indore High Court Act created the Indore High Court and contained provisions of an administrative and procedural nature, it must be held to be inoperative, but so much of the Indore High Court Act which relates to the right of appeal in the Indore High Court, must be deemed to have survived because the right of appeal is a vested right and it inheres in a party at the commencement of proceedings. And S. 6 read with S. 37 referred to above, is responsible for keeping that right alive.

(24) It has been argued that the opening words of S. 21, Indore High Court Act, "save as otherwise provided by any law for the time being in force" imply that if any other law bars the jurisdiction of the Indore High Court to hear an appeal from the decision of a Division Bench, then that law would supersede the direction contained in S. 21(C). Now it is contended that Madhya Bharat High Court of Judicature Act as it stands today, negatives the existence of any such right and therefore, it must prevail over the Indore High Court Act of 1948. But this argument ignores the existence of Ss. 6 and 37, Madhya Bharat High Court of Judicature Act, whereby the laws of the Covenanting States are made applicable in cases that lay or may lie till such laws are modified. However queer the position may appear to be, yet it is a fact that on one hand the Madhya Bharat High Court of Judicature Act (Act 3 of 1949) lays down its own constitution for the hearing of appeals filed before it in Ss. 23 and 24 of the Act, and on the other it enjoins on us that the laws of the Covenanting States shall be applied as well. At the first blush, it may appear to be somewhat non-plusing and even incongruous, but when one considers the circumstances and conditions under which the State of Madhya Bharat came into being one can well appreciate the nature of such a Statute. Although the High Court of Madhya Bharat is a new Court and it cannot be regarded as a successor Court of the various High Courts (small and big) that existed in the covenanting States, yet the proposition cannot be gainsaid that in many respects the M. B. High Court was intended to take the place of the covenanting High Courts that were abolished as a consequence of the merger and the emergence of the United State of Gwalior, Indore and Malwa (Madhya Bharat). The Legislature had not a clean slate to write upon and a good deal was already there. It is in this context that the Madhya Bharat High Court of Judicature Act should be construed and interpreted.

(25) In result I agree with the conclusion of my learned brother Dixit J., that the appeal is not competent & that it should be dismissed with half the costs.

(26) BY THE COURT: The decision of the Full Bench being ready, it is pronounced by me today. The appeal stands dismissed as the same is not competent. The appellant shall pay half of

the costs of the respondent in this Court and bear his own.

A/D.R.R.

Appeal dismissed.

A.I.R. 1953 M. B. 222 (Vol. 40, C. N. 83)

(GWALIOR BENCH)

DIXIT AND CHATURVEDI JJ.

Chhatar Singh, Applicant v. State of Madhya Bharat and another.

Civil Misc. Case No. 25 of 1952, D/- 21-1-1953.

Constitution of India, Arts. 226, 228 — Another remedy open — (Madhya Bharat Police Act (76 of S. 2007), S. 12).

Where the petitioner applying under Art. 226 for quashing the District Magistrate's order posting additional police in the village at the cost of the petitioner and other residents, has already paid his share of the cost, the right which he can claim to enforce under Art. 226 is not a right to restrain the opponents from recovering from him any portion of the cost, but it is the right to the refund of the amount already realised from him on the ground that it was an illegal exaction. The challenge to the order and the proclamation is plainly incidental to the establishment of the applicant's right to the refund of the money paid by him and if he thinks that the amount paid by him was illegally recovered from him, he has the remedy of a suit for the refund of the amount already paid by him. This remedy is equally effective, beneficial and convenient. A suit for such a remedy lies in the Civil Court and the fact that in the suit the validity of S. 12, Police Act would be questioned and the question would be referred in the High Court under Art. 228 cannot be regarded as a valid ground for short-circuiting the proper remedy of a suit and holding that the remedy of suit is not as effective, beneficial and convenient as the one this Court can give under Art. 226 of the Constitution.

(Para 4)

Anno: Civil P. C., Appendix III, Constitution of India, Art. 226 N. 8; Art. 228 N. 1.

Patankar, for Applicant; K. A. Chitale, Advocate-General and Mungre and Shiv Dayal, Govt. Advocate, for the State.

## CASES CITED:

- (A) ('51) AIR 1951 Rajas 150(2): 1952-21 ITR 33
- (B) ('51) AIR 1951 SC 41: ILR (1951) Hyd 461
- (C) ('51) AIR 1951 Nag 58: 52 Cri LJ 1140 (FB)

ORDER: The petitioner moves this Court under Art. 226 of the Constitution of India for an order or a writ quashing an order dated 11-7-52 passed



by the District Magistrate of Morena by which additional police was posted in certain villages of Morena District and cost of the additional police was levied on the residents of those villages, and for an order prohibiting the opponents from enforcing the said order and realising the cost of the additional police from the petitioner and other residents of those villages.

(2) The petitioner states that he is a Gujar Thakur by caste and a resident of the village Ghuraiya Basaia in Pargana Jaura of District Morena; that on 10-7-52 the Government issued a proclamation under S. 12(1), Madhya Bharat Police Act Samvat 2007 declaring 5 villages including Ghuraiya Basai of Dist. Morena as a disturbed & dangerous area; and authorised under sub-s. (2) of S. 12 the Commissioner Northern Division to employ adequate police force in addition to the ordinary fixed complement in the above villages, that on 11-7-52, the District Magistrate of Morena purporting to act under S. 12 of the Police Act and under the proclamation issued by the Government on the previous day, quartered additional police in the villages and imposed on the residents of those villages the cost of the police, exempting Harijans, Vaishya, Brahmins and other minor communities such as barbers, washermen, gadariyas etc., from liability to bear any portion of the cost of the police. The petitioner further states that he and other residents of the five villages had applied to the District Magistrate of Morena to withdraw the order dated 11-7-52; but that the District Magistrate did not cancel the order. The validity of the proclamation and the order of the District Magistrate is challenged mainly on the grounds:

- "1. The proclamation was not issued in conformity with S. 12(1) of the Police Act.
2. That under the proclamation the Government did not authorise the District Magistrate to quarter additional police.
3. That the order of the District Magistrate by which he exempted certain castes from liability to bear the costs of additional police being repugnant to Arts. 14 and 15 of the Constitution, was bad;
4. and that S. 12 of the Police Act which permits exemption of any person or class or section of inhabitants from liability to bear any portion of cost of additional police is itself void in view of Arts. 14 and 15 of the Constitution."

On these allegations after stating that he had no other speedy, effective and other adequate remedy, the petitioner prays that the order dated 11-7-52 of the District Magistrate be quashed and a writ in the nature of mandamus or appropriate order be issued either restraining the opponents from realising the cost of the additional police from him and other residents of the village or enjoining them to exempt the applicant and other residents from liability to bear the cost of additional police. On behalf of the opponents a return has been filed opposing the application.

(3) This petition was filed on 23-8-52. It was admitted by us on 27-8-52 and after the issue of the notice to the opponents, it was put up before us for hearing on 6-1-1953. In the meantime the petitioner from whom on the date of the filing of this petition, no demand had been made to pay any portion of the cost of additional police, paid the amount of his share & the proclamation issued by the Government as well as the order of the District Magistrate which were to be operative for a period of two months from the date of their making, ceased to be in force. In these

circumstances the learned Advocate General took the preliminary objection that the reliefs prayed for by the applicants could be of no avail to the applicant and that the petition should, therefore, be thrown out as infructuous.

(4) Having heard the learned counsel for the petitioner and the learned Advocate-General on the preliminary point, I am disposed to uphold the objection of the learned Advocate General. The petitioner has prayed the relief that the order of the District Magistrate be quashed and the opponents be prohibited from realising from him and other residents any cost in respect of the additional police. It is not disputed by the learned counsel for the applicant that the order passed by the District Magistrate and the proclamation issued by the Government are not now operative. The question, therefore, of the issue of any order by this Court to quash the order of the District Magistrate or the proclamation of the Government does not arise. It is true that the liability to pay the cost of additional police quartered under the proclamation of the Government and order of the District Magistrate subsists even after the expiry of the proclamation and the District Magistrate's order, and if a demand is being made from the petitioner to pay any portion of such cost, the applicant can still complain that the proclamation and the order of the District Magistrate being both illegal, the demand is wholly without jurisdiction. But in the present case the petitioner has already paid his share of the cost of additional police. That being so, the right which he can now claim to enforce is not a right to restrain the opponents from recovering from him any portion of the cost, but it is the right to the refund of the amount already realised from him on the ground that it was an illegal exaction. The applicant has not averred in this petition that he has already paid his share of the cost and claimed the relief of the refund of that amount. The reliefs of the nature asked for by the applicants have now become inappropriate and when on the petition as it is framed there remains now no right of the applicant to be enforced, the applicant is clearly not entitled to a mere declaration that the proclamation and the order of the District Magistrate were illegal. The challenge to the order and the proclamation is now plainly incidental to the establishment of the applicant's right to the refund of the money paid by him and if he thinks that the amount paid by him was illegally recovered from him, he has the remedy of a suit for the refund of the amount already paid by him. This remedy is equally effective, beneficial and convenient. Mr. Patankar learned counsel for the petitioner had to concede that the remedy of a suit for the refund of the cost was equally effective, beneficial and convenient remedy. He, however, felt some doubt as to whether such a suit could at all be entertained by a Civil Court. I myself have no such doubt. If the petitioner's complaint is that the proclamation and District Magistrate's order were illegal and ultra vires and the amount realised from him was beyond the competence of the District Magistrate and was, therefore, an illegal exaction, then a suit claiming refund of the amount would lie in the Civil Court. I realise that if in the suit the question that S. 12 of the Police Act is void in view of certain provisions of the Constitution is raised, that question would have to be referred in this Court for its opinion under Art. 228 of the Constitution of India. But his consideration can hardly be regarded as a valid ground for short-circuiting the proper remedy of a suit and holding that the remedy of suit is



not as effective, beneficial and convenient as the one this Court can give under Art. 226 of the Constitution.

(5) A further point was made by the learned Advocate General that as on the date of the petition, no demand had been made on the petitioner to pay his share of the cost of the police and as no action had been taken under the order of the District Magistrate to his detriment, the petitioner had no such interest as to be competent to maintain the application under Art. 226 of the Constitution of India for an order restraining the opponents from imposing on all the residents of the five villages the cost of the additional police. To this contention the reply of Mr. Patankar learned counsel for the respondents was that although on the date of the application, the petitioner was not called upon to pay any cost of the police, he and other residents of the five villages were persons who in the immediate future were to be affected by the order of the District Magistrate and that therefore, the petitioner had a cause of action consisting in the threatened infringement of his right to property. The objection raised by the learned Advocate General is no doubt supported by a decision of the Rajasthan High Court in — '*Pratap Mal v. Commissioner, Income-tax*', AIR 1951 Rajas 150 (2) (A) in which following the observation of the Supreme Court in the case of — '*Chiranjit Lal v. Union of India*', AIR 1951 SC 41 (B) that only those persons whose interests are directly affected by a statute can apply for redress under Art. 226, it was held that an interim injunction under Art. 226 restraining the Income-tax Officer from assessing income-tax on all the residents of the locality could not be granted, where no action had been taken against the applicant & the applicant wanted the injunction to be issued not only in his favour but also in favour of all residents of locality, who had not come to the Court. It also finds some support in the observations of Hidayatullah J., in — '*Sheo Sankar v. State of Madhya Pradesh*', AIR 1951 Nag 58 (FB) (C). At this time it must be said that the contention of the learned counsel for the applicant that on the date of the application the petitioner had a cause of action in the threatened infringement of his right cannot be rejected summarily as devoid of any substance. As this application fails on the ground that it has become infructuous, it is not necessary to decide the objection whether in the circumstances existing on the date of the petition, the petitioner was competent to maintain this application, the point might be profitably considered on a more appropriate occasion, when it arises in some other case.

(6) In the result I would dismiss this petition leaving the parties to bear their own costs.

A/H.G.P.

Petition dismissed.

A.I.R. 1953 M. B. 224 (Vol. 40, C. N. 84)

(INDORE BENCH)

CHATURVEDI J.

Setanbai, Appellant v. State.

Criminal Appeal No. 119 of 1951, D/- 19-1-52.

Penal Code (1860), S. 318 — Evidence and proof — Criminal P. C. (1898), S. 367.

The same evidence which has not been believed for an offence of murder should

not be believed for an offence under S. 318 when there is no eye witness who can depose that the accused herself came to the Charwada and secretly buried the body of the child there. The fact that she absconded soon after the incident is not sufficient to base a conviction under S. 318 thereon. Even grave suspicion against an accused cannot be taken to be substitute for proof.

(Para 2)

Anno: Penal Code, S. 318 N. 1; Cr. P. C., S. 367 N. 6.

Upadhyay, for Appellant; Govt. Advocate, for the State.

JUDGMENT: The appellant Setanbai was challaned and committed to Sessions for offences under Ss. 302 and 318, Penal Code. She is a young Hindu widow and according to the prosecution she was pregnant and delivered a child who was found dead and buried in a Charwada, in village Laxamkhedi, on 12-3-1950. The Sessions Judge, Ujjain acquitted her of the charge under S. 302, Penal Code but convicted her under S. 318 and sentenced her to rigorous imprisonment for one year. She has now preferred this appeal against the judgment of the learned Sessions Judge.

(2) The learned Sessions Judge has commented very severely on the latches and lapses of the Police in this case and has rightly acquitted the appellant of the charge of murder but I feel that the same evidence which has not been believed for an offence of murder should not have been believed for an offence under Section 318, Penal Code, as there is no eye witness who can depose that Setanbai herself came to the Charwada and secretly buried the body of the child there. No witness is forthcoming even to depose that Setanbai was seen near the Charwada. The fact that she absconded soon after the incident is not sufficient to base a conviction under S. 318 thereon. The learned Sessions Judge has relied upon circumstantial evidence in the case but that is not incompatible with the innocence of the appellant. It is just possible that Setanbai's father Hindusingh or a servant or some other friend of her might have taken the child & buried it in one corner of the Charwada of the village. I am sure that a conviction under S. 318, Penal Code cannot be based in this case on the mere circumstantial evidence referred to in the judgment of the learned Sessions Judge. I have gone through the statements of Bheru P.W. 9 & Lalu P.W. 10, relied upon by the learned Government Advocate in his arguments but there is nothing in those statements which may incline me to take a view that Setanbai was seen inside the Charwada secretly leaving or disposing of the dead body of the child. In my opinion there is surmise and conjecture against Setanbai but even grave suspicion against an accused cannot be taken to be substitute for proof. In this view of the matter I would allow the appeal, set aside the conviction and sentence and order that she be acquitted. She is already on bail and she need not surrender to her bail bonds which are hereby cancelled.

C/D.H.

Appeal allowed.



A. I. R. 1953 MB 225 (Vol. 40, C. N. 85)  
(INDORE BENCH)

SHINDE, C. J. AND  
NEVASKAR, J.

Firm Lunaji Narayan and another, Appellants  
v. Purshottam Charan & another, Respondents.

Second Appeal No. 291 of 1951 and Civil Misc.  
Appeal No. 33 of 1950, D/- 10-2-1953.

(a) Civil P. C., (1908), S. 13 — Judgment  
against foreigner.

The judgments pronounced by foreign  
Courts against non-residents foreigners are  
not absolute nullities in the sense that  
they are void from their inception. They  
are valid and binding in the country of the  
forum which passed them and are execut-  
able there until they are satisfied or become  
barred by the operation of statute of limi-  
tation or otherwise become inoperative:  
AIR 1951 Bom 125 (FB) Foll. (Para 32)  
Anno: C. P. C., S. 13, N. 9.

(b) Constitution of India, Art. 261(3) — Exe-  
cution of decree passed by court in Part A State  
by court in Part B State.

Article 261(3) cannot be availed of for the  
purpose of pressing an application of exe-  
cution in the territory now forming part of  
Part B State where the final judgment of  
which the execution is sought was given  
by a Court in the territory now forming  
part of Part A State prior to 26-1-1950. AIR  
1951 SC 124, foll. (Para 44)

Even apart from the provisions of Art.  
261 (3) such decrees have not become exe-  
cutable in courts in Part B States by rea-  
son of change in the status of the judgment-  
debtor from that of a foreigner to that of  
national of India, AIR 1951 Bom 190, foll.  
(Para 56)

(c) Civil P. C. (Amendment) Act (1951), S.  
20 — Execution of decree passed by court in  
Part A State by Court in Part B State. AIR  
1952 Mys 69 Dissented from.

Executability of a binding judgment with-  
in a certain territory is a matter not affect-  
ing vested right of a judgment-debtor. It  
is therefore competent for the decree-holder  
who obtained an ex parte decree against  
a resident of a Part B State from a court  
in a Part A State before the promulgation  
of the Constitution to execute the same  
through a court in Part B State: AIR 1951  
Bom 125 (FB), foll. AIR 1952 Mys. 69,  
Dissented from. (Paras 65 and 73)

M. B. Rege (in No. 291 of 1951) and K. A.  
Chitale (in No. 33 of 1950), for Appellants; S.  
M. Samvatsar (in No. 291 of 1951), for Res-  
pondents.

#### CASES CITED:

- (A) ('51) AIR 1951 Bom 125: 53 Bom LR 398  
(FB)
- (B) ('51) AIR 1951 Bom 190: ILR (1950) Bom  
640
- (C) ('51) AIR 1951 SC 124: 52 Cri LJ 391 (SC)
- (D) ('52) AIR 1952 Mys. 69: ILR (1952) Mys  
201
- (E) ('94) 22 Cal 222: 21 Ind App 171 (PC)
- (F) ('50) AIR 1950 Cal 12: 53 Cal WN 817

NEVASKAR J.: This judgment will dispose of  
two appeals viz., Civil Second Appeal No. 291 of  
1951 and the other (what is styled as) Civil Mis-  
cellaneous Appeal No. 33 of 1950 as in both the  
aforesaid cases the same question of law is in-  
volved viz., whether it is competent for the Courts  
in Madhya Bharat to execute decrees passed ex

parte by Courts outside Madhya Bharat but with-  
in the territories of India.

(2) On 30-11-1949, a decree was obtained by the  
respondent Purshottam Saran, resident of Mura-  
dabad in U. P., against the appellants who is a  
Firm owned by Mishrimal and his son Sohanlal of  
Ratlam (Madhya Bharat) in the Court of Munsiff  
Muradabad for Rs. 2400/-. This was obtained ex  
parte.

(3) On 18-12-1950 decree-holder applied for exe-  
cution praying for transfer of decree for execu-  
tion to the Civil Court of Ratlam. Thereupon, an  
order for transfer of decree for execution was pass-  
ed and a transfer certificate dated 22-12-1950 was  
issued by Muradabad Court under O. 21, R. 6, Civil  
P. C.

(4) On the basis of this transfer certificate, the  
decree-holder applied for execution on 8-2-1951 in  
the Court of Civil Judge Ratlam in Execution Case  
No. 20 of 1951 and prayed for attachment and sale  
of the properties of the judgment-debtors.

(5) A notice thereupon was served on the judg-  
ment-debtor under O. 21, R. 22, Civil P. C. The  
judgment-debtors thereupon on 24-3-1951 submitted  
various objections to the execution of the decree  
principal among them were as follows:

I. Muradabad Court was a foreign Court when  
the decree was passed. This Court had no  
jurisdiction to pass the decree as the judg-  
ment-debtors never submitted to its jurisdic-  
tion. The decree thus passed ex parte against  
a non-resident foreigner was nullity.

II. The decree was not given on merits and was  
fraudulently obtained.

(6) The Court of the Civil Judge, Ratlam, over-  
ruled these objections holding that the decree is  
executable and ordered the amount in execution  
to be deposited within a fortnight. Failing to make  
the deposit, it was further ordered that process  
for attachment be issued.

(7) Judgment-debtor thereupon preferred an ap-  
peal to the District Judge Ratlam who relying upon  
a Full Bench decision of the Bombay High Court  
reported in — 'Bhagwan Shankar v. Rajaram', AIR  
1951 Bom 125 (A) dismissed the appeal.

(8) The judgment-debtors have now preferred  
this second appeal.

(9) In Civil Miscellaneous Appeal No. 33 of 1951  
the facts are as follows: Kunwar Adityaveer-  
sinh obtained a decree in Civil Suit No. 569 of 1949  
on 30-11-1949 in the Court of Munsiff Bijnaur  
(U. P.) for Rs. 4509/- against Choudhari Shivdan-  
sinh ex parte.

(10) On 9-9-1949 the decree-holder obtained an  
order for the transfer of decree to the District  
Judge, Mandsaur on an application for execution.  
A transfer certificate under O. 21, R. 6, Civil P. C.  
was issued by the Court which passed the decree.  
On 29-4-1950, the decree-holder submitted the  
transfer certificate and other papers connected  
with it to the District Judge at Mandsaur and  
applied for appropriate order to be passed after  
hearing. No regular application for execution was  
submitted. The District Judge after hearing the  
parties passed an order on 2-5-1950 holding that  
"there is a serious doubt if the decree could be  
executed in a case like this by reason of the  
provisions of the Indian Constitution as contend-  
ed on behalf of the decree-holder"  
and he therefore refused to execute the decree.

(11) The decree-holder thereupon has preferred  
this appeal.

(12) In both these appeals, therefore, one by the  
judgment-debtor and the other by the decree-  
holders the question is whether it is competent for  
the decree-holder, who obtained an ex parte de-  
cree against a resident of Madhya Bharat from a  
Court situated in a State outside Madhya Bharat



before the promulgation of the Constitution of India, to execute the same through Courts in Madhya Bharat (i.e. Part B State) on the basis of transfer certificate issued by the former Court under O. 21, R. 6, Civil P. C.

(13) On behalf of the decree-holder, it is contended that whatever may be the position prior to 26-1-1950 after the Constitution came into force on this date the judgment-debtors ceased to be foreigners; and the Courts in the States (former British Indian Provinces, States or now Part A States) ceased to be foreign Courts and the judgments passed by the Courts in those States ceased to be foreign judgments.

(14) At any rate, it is contended, that when on 1-4-1951 Indian Civil Procedure Code, 1908 was made applicable to Part B States and the definition of foreign Court and foreign judgment was altered such judgments have become enforceable in what are now Part B States.

(15) The status of the judgment-debtor altered from that of being a foreigner to that of a national of 'India' (which includes Part A, B and C States by the act of State).

(16) This alteration of status brought with it as a necessary result that the protective shell afforded by the existence of two different States or political entities was removed and the enforceability now merely rested on the question whether the judgment pronounced was by a Court competent to do so under the domestic law of the State in which the Court passing such judgment was situate.

(17) The judgment pronounced by a Court in a foreign country against a non-resident foreigner, it is contended, is not an absolute nullity in the sense that it is nowhere good. It is good as regards the country of the forum in which it is pronounced and if by accidents of political changes its territorial limits got extended it cannot have a different effect as regards its executability or enforceability in different parts of the same country.

(18) Secondly it is contended that Art. 261(3), of the Constitution, provides:

"Final judgments or orders delivered or passed by Civil Courts in any part of the territory of India shall be capable of execution anywhere within that territory according to law."

(19) This gives constitutional sanction to the execution of decrees of any Court within the territorial limits of India (i.e., Part A, B and C States) anywhere in India. The words 'Civil Courts in any part of the territory of India' should be taken to mean Civil Courts within the geographical limits of what is now 'India', whether existing before or after the Constitution came into force. The words 'according to law' are intended to give effect to the legal provisions in some of the States which till the Indian Civil Procedure Code was applied to them continued to have a separate Code of Civil Procedure with a distinct definition of 'foreign Court' and 'foreign judgment'.

(20) Reliance is placed on behalf of the decree-holders, for some of the aforesaid contentions mainly on cases reported in — 'Chunnihal Kasturchand v. Dundappa Damappa', AIR 1951 Bom 190 (B) and 'AIR 1951 Bom 125 (FB) (A)'.  
(21) On behalf of the judgment-debtors, it is contended that Art. 261(3) of the Constitution cannot be availed of for enforcement of decree passed before the commencement of the Constitution of India. The Courts then functioning will not be the Courts within the territory of India as defined in the Constitution. Before 26-1-1950 there was no territory of India in existence as defined in the Constitution, and therefore final judgments passed by such Civil Courts were not by Civil Courts within the territory of India and

therefore not executable under this provision. Reliance for this view is placed on — 'Janardhan Reddy v. The State', AIR 1951 S C 124 (C). It was also urged that execution cannot be levied in Madhya Bharat regarding decree of Muradabad or Bijnaur (U. P.) because the decrees when passed were nullities by international law and this characteristic continued to attach to them when the question of execution arose. The appropriate time to consider the validity of the decree is the time when the decree was passed and not when the execution is sought to be levied and order therein is passed.

(22) On behalf of the judgment-debtors reliance is placed upon the cases reported in — 'Subbaraya Setty & Sons v. Palani Chetty & Sons', AIR 1952 My 69 (D). The Mysore case dissents from the view expressed in 'AIR 1951 Bom 190 (B)' and 'AIR 1951 Bom 125 (FB) (A)' and takes the view favouring the judgment-debtor that the decree passed by Courts situate in the territory which now forms part of Part A State is not executable in Courts situated in what is now Part B State when an ex parte decree was passed before the Constitution and there was no submission to the jurisdiction.

(23) Before I proceed to consider these two opposing views I shall briefly state changes in the Civil Procedure Code at different stages both in Madhya Bharat and that part of territory of India which was formerly British India or 'the States' and which now form Part A States. I am omitting from consideration the changes in Civil Procedure Code in other Part B and Part C States as the same is not relevant for the purpose under consideration.

(24) In territories which now form Part A States, the Civil Procedure Code of 1908 was in force before. According to this Code, by S. 2(5) 'Foreign Court' was defined thus:

'Section 2 (5):—

"Foreign Court means Court situated outside British India etc. (leaving out portion not material for the present purpose)."

(25) Foreign judgment was defined as judgment of a foreign Court.

(26) Later on, the words 'British India' were changed to Provinces of India and subsequently to 'States' and by the Adaptation of Laws Order, 1950 for the word 'States' the words Part A and Part C States were substituted.

(27) Thus it will be clear that even when India became politically one by the passing of the Constitution, for the purpose of Civil Procedure Code, Part B States' Courts continued to be foreign Courts by reason of statutory provision contained in Civil P. C.

(28) It is only when the present amendment came into force on 1-4-1951 that S. 20 of the Amending Act provides as follows:

"If, immediately before the date on which the said Code comes into force in any Part B State, there is in force in that State any law corresponding to the said Code that law in that State shall stand repealed.

Provided that the repeal shall not affect:

- the previous operation of any law so repealed or anything duly done or suffered thereunder or
- any 'right', 'privilege', obligation or liability 'acquired', accrued or incurred under any law so repealed or
- any investigation, 'legal proceeding or remedy' in respect of any such right, privilege, obligation, liability or penalty, forfeiture, or punishment as aforesaid and 'any such' investigation, 'legal proceeding' or 'remedy' may be instituted, continued or enforced and any



such penalty, forfeiture or punishment may be imposed 'as if this Act had not been passed'."

Before this Amending Act was brought into force, there was in Madhya Bharat what is known as Madhya Bharat Indian Civil P. C., Angikaran Vidhan. This came into force from 22-1-1950. This provided that Indian Civil P. C. as it existed on the date when this Vidhan came into force is adopted with necessary changes 'Mutatis Mutandis' and with all the amendments as are indicated in Sch. 'A' attached to this Act. It also provided that any subsequent amendment in Indian Civil P. C. will be deemed to be engrafted 'Mutatis Mutandis' in this Code. Before this there were different Civil Procedure Codes for different States which constituted Madhya Bharat, confined to the territories of the corresponding States and more or less akin to the Indian Civil Procedure Code.

(29) The material question which will arise for consideration while considering the executability of the decrees passed by Courts of territories which now form part of Part A States in the territory of Madhya Bharat through Madhya Bharat Courts is which Civil Procedure Code will be applicable to these proceedings in execution. Whether the new Civil Procedure Code which came into force on 1-4-1951 by the Amending Act No. II of 1951 to the Indian Civil Procedure Code of 1908 or the Indian Civil Procedure Code, Angikaran Vidhan which came into force on 22-1-1950.

(30) Civil Procedure Code deals with vested rights as well as rights which are of purely procedural character. Section 20 of amending Act provides that in so far as the vested rights are concerned they will not be affected by the repeal and the Courts have to regard as if the new Act has not been passed and therefore as if the old Act has not been repealed but continued to have its force. But as regards rights which are purely procedural in character the new law will apply, as law relating to procedure is generally interpreted to have retrospective operation, and the question which we will have ultimately to consider is whether facts involved in the cases under consideration affect vested rights of the judgment-debtors. If not, the new Civil Procedure Code will apply and the decrees will be executable. However if vested rights are likely to be affected by reason of the change in the Civil Procedure Code then we will have to assume as if the new Act had not been passed and the decrees will remain un-executable.

(31) Analysing these respective contentions of the two sides and legislative changes in the Civil Procedure Code which has a bearing on the subject of enforcement of final judgments the following points arise for consideration:

Firstly — Are the decrees when passed being foreign decrees against non-resident foreigners absolute nullities?

Secondly — Whether Art. 261 (3) of the Constitution affords constitutional sanction to the execution of decrees of any Court within the territorial limits of India anywhere in India even if the judgments had been pronounced prior to the coming into force of the Constitution of India.

Thirdly — Whether apart from the provisions of Article 261 (3) have the decrees in Courts situate in what are now Part 'A' States become executable in Courts in Part 'B' States by reason of change in the status of the judgment-debtor from that of foreigner to that of national of India.

Fourthly — Assuming that the decrees will not become executable merely by reason of the coming into force of the Constitution and

change in the status of the judgment-debtor by reason of the Legislative hindrance due to the existence of two different Civil Procedure Codes the two States, one in which the decree was passed (which has now become Part 'A' State) and one in which the decree is sought to be executed (which has now become Part 'B' State) will these decrees become executable by reason of the passing of the Amending Act No. II of 1951 on 1-4-1951.

Will this Act have retrospective operation in the sense that this Act will apply to the execution applications in respect of decrees passed prior to the coming into force of the Constitution?

(32) As regards the first question it is clear from the discussion of the question in — 'AIR 1951 Bom 125 (FB) (A)', with which I respectfully agree, that the judgments pronounced by foreign Courts against non-residents foreigners are not absolute nullities in the sense that they are void from their inception. They are valid and binding in the country of the forum which passed them and are executable there until they are satisfied or become barred by the operation of statute of limitation or otherwise become inoperative. In this Full Bench case his Lordship Chagla C. J. has explained the phrase 'absolute nullity' used by their Lordships of the Privy Council in — 'Gurdial Singh v. Raja of Faridkot', 21 Ind App 171 (PC) (E), thus:

"Therefore the decree is not an absolute nullity. Something which is an absolute nullity can never be enforced in any part of the world under any circumstances. But the Privy Council itself contemplates that such a decree can be enforced in the forum by which it was passed provided special local legislation authorises that forum, and therefore in one sense the decree is a nullity in a limited sense. The other way of putting the same idea is that the decree is a valid decree, but it is not enforceable in Courts other than Courts where it was passed by reason of private international law. Therefore, once the position is made clear that the decree is not an absolute nullity, but merely there is an impediment in the way of its being executed, then no difficulty arises in coming to the conclusion to which, again with respect very rightly, Rajadhyaksha J. and Shah J. came."

(33) I will now consider the second of the aforesaid questions. Article 261 of the Constitution of India lays down:

"261 (1) Full faith and credit shall be given throughout the 'territory of India' to public acts, records and judicial proceedings of the 'Union' and by every 'State'.

(2) The manner in which and conditions under which the acts, records and proceedings referred to in Clause (1) shall be proved and effect thereof determined shall be as provided by law made by Parliament.

(3) Final judgments or orders delivered or passed by Civil Courts in any part of the 'territory of India' shall be capable of execution anywhere within that territory according to law."

(34) Now the word 'Union' in this is meant Union of State (India) of Bharat and the word 'State' means Part A, Part B or Part C State.

(35) Before the Constitution of India came into force there was no such thing as 'Union' or Part A, B and C States. Therefore, when under Art. 261 (1) 'Full faith and credit' clause is introduced it has necessary reference to the period subsequent to the introduction of the Constitution and not to the earlier one.



(36) You cannot conceive of public acts, records and judicial proceedings of the Union unless the union itself came into existence and so is the case of a 'State'.

(37) Clause (3) again provides for execution of final judgments or orders of Civil Courts in any part of the territory of India and lays down that these will be capable of execution anywhere within the territory of India.

(38) Now territory of India is defined thus:

"Article 1 (3)

The territory of India shall comprise

(a) the territories of the States

(b) territories specified in Part D of First Schedule

(c) Such other territories as may be acquired."

(39) The term 'States' is defined as the States specified in Part A, B and C in the First Schedule.

(40) Now Courts in any part of the territory of India will be Courts in existence after the coming into force of the Constitution. The Courts existing and functioning prior to that would be Courts of different political entities such as Madhya Bharat or Holkar State, Gwalior State, Bombay State or Province etc. They would be Courts of respective territories of those States within those territories but by no means within the territories of India because India as understood in this Clause was not in existence.

(41) This view is fully supported by the decision of the Supreme Court reported in — 'AIR 1951 SC 124 (C)'. Question there was regarding the entertainability of application for special leave to appeal to Supreme Court against a decision given by Hyderabad High Court on 12th, 13th and 14th December 1949.

(42) Before this, on 23-11-1949 Nizam of Hyderabad issued a 'firman' whereby he declared that the proposed Constitution of India was suitable for the Government of Hyderabad as one of the Part B States.

(43) The Constitution of India became therefore applicable to Hyderabad on 26-1-1950 and it became one of the Part B States under the Constitution of India. The question before the Supreme Court was whether the judgment passed by Hyderabad High Court on 12th, 13th and 14th December 1949 was the judgment of a Court within the territory of India and it was held in the negative. The reason given was that the territory of Government of H. E. H. the Nizam was never the territory of India till 26-1-1950 and therefore the judgment passed by the Hyderabad High Court on 12th, 13th and 14th December 1949 cannot be considered as judgment of Court within the territory of India and on that ground special leave to appeal was refused as Art. 136(1) of the Constitution of India was held inapplicable.

(44) From this it is clear that Art. 261 (3) cannot be availed of for the purpose of pressing an application of execution in the territory now forming part of Part B States where the final judgments of which the execution is sought was given by a Court in the territory now forming part of Part A States prior to 26-1-1950.

(45) This view has been taken in — 'AIR 1952 Mys 69 (D)'.

(46) Taking the third question for consideration we now consider whether, by reason of change in the status of the judgment-debtor from that of a foreigner to that of a national of India, the decree against him became executable. This question will depend upon whether there are more than one obstacles in the matter of execution. When an ex parte decree is pronounced by a foreign Court competent to do so according to the domestic law of the country of the Court

pronouncing it against a non-resident foreigner it is nullity by private international law and such a foreign judgment cannot be enforced even by a suit based on it although it is good in the country of the Court which passed it. When the two countries cease to be foreign there is no basis for applying private international law and the decrees would be executable if there is no legislative hindrance according to the laws in force. Some times this second obstacle exists as in the present cases.

(47) In spite of the fact that after 26-1-1950 judgment-debtor ceased to be a foreigner in the international sense he continued to be a foreigner for the applicability of private international law by reason of definition of foreign Court and foreign judgment under the Civil Procedure Code applicable in the territory where the decree is sought to be executed. The Civil Procedure Code is accepted as good law, until changed, by the Constitution under Art. 372 of the Constitution. The result is that as long as the two Civil Procedure Codes applicable in the two territories i.e. Part A and B States were different the ex parte decree of one could not be executed against the resident of another who had not submitted to the jurisdiction of the Court pronouncing it. This result follows not because we apply private international law because of the status of the judgment-debtor as a foreigner but by reason of legislative fiction by which he is reckoned to be so.

(48) From what has been discussed above, it is clear that when this political merger of two countries took place at least one of the bars existing in execution of the decrees is removed, one existing by reason of the countries being different. But as long as the Civil Procedure Codes which cover the subject of execution of decrees continued to be different there remained an internal bar by the existence of a valid legislation binding upon all and the decrees could not be executed.

(49) This aspect is accepted even in the earlier Bombay case reported in — 'AIR 1951 Bom 190 (B)', wherein Shah J. in Para. 30 says as follows: "Now, it is true that prior to 28-7-1948 the Civil Procedure Code as passed by the Jamkhandi State was applicable to the State territory. That Civil Procedure Code was in terms the same as the Civil Procedure Code, Act V (5) of 1908, of British India as amended till 1914, with this alteration that the expression 'British India' whenever it occurred in the latter Code was substituted by the expression 'Jamkhandi State'. However for all practical purposes there were two separate Codes of Civil Procedure of two different States."

(50) In order to fully appreciate points underlying the present question it will be useful to deal with the aforesaid Bombay case in somewhat detail.

(51) The facts of this case were that an ex parte decree was passed by Belgaum Court which was in the Province of Bombay forming part of British India against a person who was the subject of Jamakhindi State. When the decree was initially sought to be executed in 1940 it was a foreign Court and execution was sought on the strength of reciprocity arrangement (Section 44, Civil P. C.) between Government of Bombay and Jamakhindi State. This execution petition was dismissed by District Judge, Jamakhindi on 10-3-1948 on the ground that this was an ex parte decree against a non-resident foreigner who had not submitted to the jurisdiction of the Court which passed the decree viz., Belgaum Court and therefore a nullity by international law.

(52) This case was then taken in appeal to the High Court of Bombay. There it was heard by



a Division Bench consisting of Rajadhyaksha and Shah JJ. both of whom decided upon its executability by the Jamakhindi Court.

(53) The line of reasoning adopted by both the learned Judges was that:

1. The decree passed by Belgaum Court on 11-3-1938 was good and operative within the limits of British India as Belgaum Court by the Municipal laws of British India of which Belgaum formed part was authorised under S. 20 of Indian Civil Procedure Code 1908 to pass a judgment against a non-resident foreigner.

2. It was invalid and unexecutable or 'absolute nullity' by private international law for the purpose of any place beyond British India and therefore so far as the territory of Jamakhindi State was concerned upto a certain date i.e., till the two States were separate, it was invalid.

3. When Jamakhindi State acceded to India and Raja Sahib of Jamakhindi executed an agreement some time prior to 25-2-1948 transferring his sovereignty in favour of Central Government, Jamakhindi ceased to be a foreign territory and Court in Jamakhindi ceased to be a foreign Court. Therefore when on 10-3-1948 the Court of Jamakhindi passed order refusing execution it was not a foreign Court but a Court constituted or continued by the Government of India. Both the Belgaum Court and Jamakhindi Court were Courts of the same State (vide Shah J. page 202, Para. 30); consequently Jamakhindi Court was bound to execute it.

4. Even assuming that before the application of Indian Civil Procedure Code to Jamakhindi territory on 28-7-48 by the Indian States Application of Laws Order 1948 for the first time, Jamakhindi Court was a foreign Court qua Belgaum Court till that date and so on 10-3-1948 the Court can take into account subsequent events and grant relief accordingly if it is expedient to do so in the interest of justice and to shorten litigation.

(54) It was conceded in this case that if fresh execution were levied the decree would be executable.

(55) It appears from the judgment of both the learned Judges that they were not unwilling to hold:

"1. Till 28-7-1948 i.e., till the Indian States (Application of Laws) Order came into force Jamakhindi Court was a foreign Court vis-a-vis Belgaum Court.

2. The decree of Belgaum Court therefore could not be executed in Jamakhindi territory till that date and the order passed by the lower Court on 10-3-1948 might be said to be correct."

But they held that on 28-7-1948 the Jamakhindi C. P. C. was repealed and Indian C. P. C. was applied. Clause (6) of the Order saved the jurisdiction of local Courts for the purpose of proceedings then pending before the Courts.

(56) Now till 1-4-1951, Civil Procedure Code applicable to Madhya Bharat defined in S. 2 (5) foreign Court as a Court situate beyond the territory of Madhya Bharat and foreign judgment meant a judgment of a foreign Court thus defined. Therefore till that date the decrees of Bijnaur or Muradabad Courts were unexecutable in Madhya Bharat.

(57) This sort of allocation of jurisdiction creating exclusiveness under the same sovereign, in the sense in which it is understood, where territories are different can be seen as in the case of British India, England and other countries under British Crown.

(58) In — '21 Ind App 171 (PC) (E)', it is said at page 185:

"As between different provinces under one sovereignty (e.g. under the Roman Empire) the legislation of the sovereign may distribute and regulate jurisdiction; but no territorial legislation can give jurisdiction which any foreign Court ought to recognise against foreigners who owe no allegiance or obedience to the Power which so legislates."

(59) This brings us to the fourth question. What is the effect of passing of Act No. 2 of 1951 by which Indian Civil Procedure Code, 1908 was extended to Part B States and the definitions of foreign Court and foreign judgment were modified?

(60) Will the decrees now be executable by applying this newly applied Civil Procedure Code? This will depend upon the question whether this is likely to affect vested rights. In case it does, new Civil P. C. cannot be applied but if no vested rights are affected by the repeal of Indian Civil Procedure Code, Angikaran Vidhan (Madhya Bharat) and applying the new Act then the new law will apply.

(61) According to Mysore case reported in—'AIR 1952 Mys 69 (D)', vested rights are affected by the repeal. This matter is very briefly touched in the Mysore case by stating that the Amending Act No. 2 of 1951 cannot have retrospective operation. It seems there to have been assumed that the question as regards execution of duly obtained decree in a territory within which it was not executable before the Amending Act would necessarily affect vested rights.

(62) In Bombay cases emphasis is laid on the fact that it is not by reason of the repeal of any law that the decrees became executable but by reason of change in the status. But the judgment clearly indicates that if the execution is held permissible that does not affect vested rights.

(63) It was urged by Mr. Rege for the judgment-debtor in Civil Second Appeal No. 291 of 1951 before us that a man has a vested right that a decree passed by a Court of another country shall not affect him until he goes there and that beyond those territorial limits he has got an immunity. It is difficult to agree with this. It is difficult to conceive of a vested right that a concluded and binding judgment will only be enforceable within certain geographical limits not capable of extension by any political events. In fact the existence of territorial limitations in the enforcement is attributable to the inability of the sovereign to enforce them beyond those limits and do not touch the rights of parties.

(64) A converse case is reported in — 'Dominion of India v. Hiralal', AIR 1950 Cal 12 (F), where a decree of what was before the division of India and Pakistan a decree of a domestic Court now situated in Pakistan was after the division sought to be executed in India. It was held that the decree cannot be executed straightway.

(65) Executability of a binding judgment within a certain territory is a matter not affecting vested right of a judgment-debtor because he cannot be said to have acquired a vested right not to have the decree executed beyond certain territorial limits. This is a matter that affects procedure in enforcement. For this reason, it is the Act No. 2 of 1951 that should be made applicable and not the Madhya Bharat Act which it repeals.

(66-67) The Mysore case dissents from the Bombay view because as the learned Judge Vasudevamurthy J. puts it:

"The Bombay cases do not in my opinion recognise the cardinal principle by which ex parte decrees were not being allowed to be executed by the Courts of another."



At another place, the same learned Judge says:

"With great respect to learned Judges who decided the two Bombay cases I think the way in which this question has to be approached is to see whether such decrees, 'which when passed were according to international law nullities' in the foreign State where they were to be enforced, have by reason of any subsequent change in the status either of the native State or of its former subject becomes executable."

The other learned Judge Venkataramayya J. observes in Para. 19 of the judgment as follows when dealing with the aforesaid Bombay cases:

"This limitation with respect to execution 'is considered' to have been removed and decrees freed from being foreign 'by the Constitution' so as to render them executable as that of a Court in the 'territory of India'."

In Para. 20 the same Judge observes:

"There is no reference in the decisions relied upon to Article 261 of the Constitution of India which expressly provides for execution of decrees passed in Courts within the Union."

(68) I think with great respect to the Judges of Mysore High Court the view thus expressed by them regarding the Bombay decisions is difficult to appreciate.

(69) On reading the Bombay decisions, it becomes clear that they do not fail

"to recognise the cardinal principle by which such foreign ex parte decrees were not being allowed to be executed by Court of another."

(70) Nor can the approach to question of execution under the circumstances of Bombay cases be considered erroneous.

(71) The Bombay cases make no reference to Constitution nor do they assume that it is by reason of the Constitution of India that the decrees become executable. They nowhere hold that the phrase 'the territory of India' has to be construed to have retrospective operation. As the facts in those cases stood, it was unnecessary to make a reference to the Constitution or Art. 261 (3). The Bombay decisions do not take their stand on Art. 261 (3) of the Constitution.

(72) On the whole therefore I generally agree with the line of reasoning adopted in Bombay cases; principle of which can now be extended to the present cases.

(73) The decrees in these cases are not absolute nullities. They are good. They were not executable in Madhya Bharat till 1-4-1951 but after this they became executable as no vested right is likely to be affected and although when the order was passed it may be good no useful purpose will be served by holding that the decrees are now executable without affording relief on the changed circumstances. As the substantial points arising in these cases are covered by the Bombay and Mysore decisions referred to above it is unnecessary to refer to other cases which follow the one or the other of these lines of reasoning.

(74) One more point deserves some reference and that is in case such executions are permitted it will lead to obvious prejudice. When a foreign Court is dealing with a cause a party who is non-resident foreigner is entitled to take no notice if he is sure that he has no earthly reason to go within the territorial limits of the country of that forum and if he does so and a judgment is passed 'in absentum' why should he not be afforded a chance to meet the case which he had no reason to meet before? This may be a good reason for the Legislature to make a positive law to relieve likely hardship if any and not for Courts to consider it.

(75) The result is that Civil Second Appeal No. 291 of 1951 is dismissed with costs and the execution application is ordered to proceed.

(76) Civil Miscellaneous Appeal No. 33 of 1951 is allowed with costs and the order of the lower Court dismissing the execution application is set aside and the execution is allowed to continue.

(77) SHINDE C. J.: I am in entire agreement. A/V.R.B. Order accordingly.

**AIR 1953 M. B. 230 (Vol. 40, C. N. 86)  
(INDORE BENCH)**

NEVASKAR J.

N. K. Chitnis, Applicant v. State through Factory Inspector, Indore, Opponent.

Criminal Revn. Nos. 53 to 57 of 1952, D/-7-4-1953.

(a) Criminal P. C. (1898), S. 439 — Conviction proceeding on plea of guilty — No question of legality or extent of sentence involved — Revision will not be entertained.

(Para 9)

Anno: Cr. P. C., S. 439 N. 9.

(b) Factories Act (1948), Ss. 51, 52 and 92 — Prosecution in respect of each worker.

By reading Ss. 51, 52 and 92 together, a contravention in respect of each worker in a factory and not in respect of a factory considered as a unit has been made punishable under S. 92.

(Para 14)

D. G. Bhalerao, for Applicant; N. H. Dravid and P. R. Sharma, Govt. Advocate, for the State.

CASE CITED:

(A) ('21) AIR 1921 Bom 322(1): 21 Cri LJ 728

ORDER: These are five revision petitions in five different cases arising out of convictions of Mr. N. K. Chitnis, Engineer and Manager, Hukumchand Mills Ltd., Indore for offences under Ss. 51 and 52 of Indian Factories Act No. LXIII of 1948 as applied to Madhya Bharat. He was sentenced to pay a fine of Rs. 150/- in respect of each of the offences aforesaid in each case.

(2) Appeals preferred against this decision of Additional City Magistrate, Indore, who was the trying Magistrate, were dismissed by the Sessions Judge, Indore.

(3) The accused has preferred these five different revision petitions to this Court and they are all being heard and disposed of together by a single judgment as the question involved in all of them is the same.

(4) The facts which gave rise to the present prosecutions are undisputed. They are that on 15th of May 1951, Factory Inspector inspected the said Mills and he found that the said Mill continued to work for over an unbroken period of 10 days i.e. from 27th April 1951 to 8th May 1951 in its five departments of warping, winding, sizing, folding and dyeing and the workers therein were required to work contrary to the provisions of Ss. 51 and 52(1)(a) of the Indian Factories Act, 1948 as applied to Madhya Bharat by being made to work for more than 48 hours a week and for being made to work for over an unbroken period of 10 days.

(5) He therefore submitted five different complaints one in respect of each of the de-



partments, wherein the transgression took place, in respect of workers working therein, against the petitioner Mr. N. K. Chitnis the Manager of the said Mills among others.

(6) The accused submitted a written statement. He was asked whether he pleaded guilty in each case whereupon he admitted the guilt and acting on his plea of guilty the accused was convicted in each of the cases and was sentenced to pay a fine of Rs. 150/- in respect of each of the two charges in each case.

(7) The accused preferred an appeal and ordinarily no appeal would have lain against the conviction except as to the extent or legality of the sentence. The appeals however were entertained and dismissed by the Sessions Judge after repelling the contention raised on behalf of the accused that conviction could only be had in one case in respect of the entire factory (Mills) considered as a unit and not in respect of each of the departments of the said factory.

(8) The accused has preferred these revision petitions against his conviction in all the five cases and it is prayed that the conviction should only be confined to one case and in the rest of the cases the accused be acquitted.

(9) If no offence is legally made out on the prosecution case taken at its highest then perhaps revision petitions can be entertained but where such is not the case it is difficult to entertain petition for revision where conviction proceeds on a plea of guilty and no question of legality or extent of sentences is involved.

(10) The point urged by Mr. Bhalerao for the petitioner is that having regard to the wording of S. 92 on which the conviction is based the contravention which is made penal is in respect of the factory treated as a single unit and this Section cannot be used distributively in respect of the cases of individual workers or cases of different departments. In this connection, he brought to my notice provision of S. 4 of the Act which authorises the State Government to direct by an order in writing that different departments or branches of a specified factory shall be treated as separate factory or for all or any of the purposes of the Act and as in this case no such thing is done different departments of the factory cannot be treated as a separate factory and the Manager of the Factory i.e. the Mill cannot be held guilty separately for each of the departments of the Mills. He further brought to my notice the provisions in the earlier Act where the penal provision is differently worded and it is laid down that the transgression of the provisions of the Act in respect of the individual workers was penal.

(11) On giving careful thought to the contentions raised by the learned counsel I am inclined to hold that having regard to the provisions of Ss. 51 and 52 read with S. 92 of the Indian Factories Act there is hardly any material departure in the earlier provisions and those in the present Act pertaining to the point involved in these cases.

(12) Section 51 lays down:

that no adult worker shall be required to work in a factory for more than forty-eight hours in a week.

(13) Section 52(1)(a) lays down:

that no adult worker shall be required to work in a factory on the first day (Sunday) of the week unless he has or will have a

holiday for a whole day on one of the three days immediately before or after the said day.

(14) Section 92 lays down (omitting portion not material for the present purpose):

If in, or in respect of any factory there is any contravention of any of the provisions of the Act the Manager of the factory shall be guilty of an offence and punishable with imprisonment for the term which may extend to three months or with fine which may extend to five hundred rupees or with both.

Thus by reading these three Sections together a contravention in respect of each worker in a factory has been made punishable under S. 92 and the use of the words "in respect of the factory" cannot have the effect of confining it to the cases not of individuals but of factory considered as a unit.

(15) In this case, no doubt the complaints, fortunately for the Mills, are confined to individual department and one prosecution for all the workers in that department. But cases can be conceived where a prosecution can be made in respect of each individual worker to whatever department he belongs.

(16) The case reported in — 'Vrijvallubdas Jaikisondas v. Emperor', AIR 1921 Bom. 322 (1) (A), indicates possibility of such a thing and if that case is correctly decided, as I feel it is, then there cannot be any doubt that convictions in these cases cannot be challenged as unsustainable.

(17) Moreover the convictions proceed upon the plea of guilty and since no question regarding the sustainability of conviction is involved revision petitions will be incompetent.

(18) They are therefore dismissed.

A/V.R.B.

Petitions dismissed.

A. I. R. 1953 M.B. 231 (Vol. 40, C. N. 87)  
(GWALIOR BENCH)

CHATURVEDI AND NEVASKAR, JJ.

Jiyajirao Cotton Mills Ltd., Applicant v. The Chairman Industrial Court, Madhya Bharat, and another, Opponents.

Civil Misc. Case No. 605 of 1951, D/- 24-3-1953.

(a) **Bombay Industrial Relations Act, (11 of 1947), (as adapted in M. B. State), S. 73A — S. 73A is not discriminatory within scope of Constitution of India, Art. 14.**

Section 73A, Bombay Industrial Relations Act, 1947 (as adapted in Madhya Bharat State) does not amount to discrimination in the eye of the law and is, therefore, not within the inhibition of the equal protection clause contained in Art. 14 of the Constitution. (Paras 14, 16)

(b) **Bombay Industrial Relations Act, (11 of 1947), Ss. 87 and 88 — Industrial Court is not Court of law.**

Per Chaturvedi, J.: The Industrial Court, though called a Court, is not a Court of law but is only an arbitral tribunal; and 'arbitration' is a term which, taken by itself, connotes a process for the settlement of disputes by submitting them to the decision of an arbitrator or to the decision of



arbitrators selected by the parties or accepted by them. The Industrial Court can in no way be restricted to legal points but it has to settle disputes on equitable considerations. 11 Com-W.L.R. 1; 11 Com-W.L.R. 311, Ref. (Paras 19, 21)

(c) **Bombay Industrial Relations Act, (11 of 1947), S. 73-A — Nature of right conferred by S. 73A.**

Per Chaturvedi, J.: The right conferred on a representative union to make a reference to Industrial Court of a pending industrial dispute is not a substantive right. In fact, it is in the nature of a liability imposed on the union. Even if it be considered to be a right then it appears to be a mere right of procedure with regard to moving the arbitral tribunal. And, it is too well known that questions of procedure do not enter into or form the basis of fundamental right. (1877) 169 U. S. 557, Rel. on. (Para 22)

G. P. Patankar, for Applicant; K. A. Chitale, Advocate General, for Opponent No. 1.

#### CASES CITED:

- (A) ('51) AIR 1951 SC 41: ILR (1951) Hyd 461 (SC)
- (B) ('52) AIR 1952 SC 235: ILR (1952) Bom 995 (SC)
- (C) ('53) AIR 1953 SC 10: 1953 Cri LJ 180 (SC)
- (D) (1909) 54 Law Ed. 536: 216 US 400
- (E) ('53) AIR 1953 SC 91: 1953 SCR 404 (SC)
- (F) 11 Com-WLR 1
- (G) 11 Com-WLR 311
- (H) 40 Sc LR 265
- (I) (1877) 42 Law Ed 853: 169 US 557

NEVASKAR J.: This is a petition under Art. 226 of the Constitution by the petitioner Jiyajirao Cotton Mills Ltd., Birla Nagar, Gwalior for the issue of a writ of prohibition & also one of certiorari or for any other suitable direction. The writ of prohibition is prayed for in order to prevent the Industrial Court of Madhya Bharat from proceeding with the reference made to it under S. 73A, Bombay Industrial Relations Act as applied to Madhya Bharat. The writ of certiorari is prayed for in order to secure the quashing of proceedings before that Court.

(2) The facts which gave rise to the present petition are that: A notice of change as contemplated under S. 42(2), Industrial Relations Act in force in this State and under R. 52 of the Rules thereunder, was given by the President Mazdoor Congress Gwalior to the Management of the petitioner Mill. This was dated 23-12-1950. This notice of change was based on the allegation that the clerical employees of the Mill were not granted bonus equal to 3 months basic salary as was granted to the other employees of the Mill.

After this notice of change was served upon the management the matter was referred for conciliation. It is alleged that while the proceedings before the Conciliator were still pending the President of the aforesaid Union of workers, which is a registered Union as contemplated under the Act applied for referring the matter to the Industrial Court under S. 73A of the aforesaid Act.

The Industrial Court entertained the reference and issued notice dated 16-2-1951 to the petitioner as required under the Act.

The petitioner appeared before the Industrial Court and contended that S. 73A under which the reference was purported to be made was ultra vires of Art. 14 of the Constitution. The reference was, therefore, bad in Law and inoperative

and that that Court had no jurisdiction to proceed with such a reference.

The Industrial Court by its order dated 30-3-1951 overruled the objection on the ground that the 'Court was not a Civil Court and was therefore unable to pronounce on the constitutional question raised before it.'

It is after this that the petitioner has moved this Court.

(3) None of the parties submitted any returns. The only question which was raised before this Court was whether the provisions of S. 73(A), Bombay Industrial Relations (Adaptation) Act Madhya Bharat No. 31 Samvat 2006 is contrary to Art. 14 of the Constitution and is, therefore, void.

(4) It was contended by Mr. Patankar for the petitioner that the impugned provision of the Act is clearly contrary to Art. 14 of the Constitution as it places two persons or bodies belonging to the same category in different positions for, whereas if there is an industrial dispute it is open for a Registered Union which has in its rules a rule not to sanction a strike unless all methods of settlement were exhausted as provided in the Act & a majority of members vote by ballot in favour of such a strike, can make a reference so as to compel the employer to submit to an Arbitration by the Industrial Court. No such corresponding right is conferred upon the employer to enable it to make a reference upon the existence of the Industrial dispute & he has to rest content and face the ordeal until the Government chooses to make such a reference. This makes an invidious distinction between the employer and the employees who have formed themselves into a Registered Union of employees although having regard to the object of the Industrial Relations Act there is no reasonable basis for classification between them.

(5) Although both the employer and the Registered Union of employees, the counsel contended, belong to the same category for the purposes of the Act yet the employers are singled out for a discriminatory and hostile legislation. The counsel then cited three Supreme Court cases — 'Charanjit Lal v. Union of India', A. I. R. 1951 SC 41 (A); — 'Lachmandas Kewalram v. State of Bombay', AIR 1952 SC 235 (B) and — 'The State of Punjab v. Ajaib Singh', AIR 1953 SC 10 (C). On the basis of these authorities the counsel sought to deduce the following propositions: Firstly — Classification sought to be made in a legislative provision must be based on intelligible differentia which distinguish persons included within the group from those left out of the group. Secondly — The classification must bear a reasonable and just relation to the object sought to be achieved by the legislation.

(6) The object of the Act, urged the counsel, is to secure industrial peace and thereby to step up production for the good of the country and having regard to this object there is no reasonable basis for making a distinction between the employer and the employees and both are entitled to parity of treatment under the Act. This not being done this provision of the Act, viz. S. 73A is contrary to Art. 14 of the Constitution and is void.

(7) On the other hand the Advocate General, Madhya Bharat who appeared before us and represented the State contended that the classification made between the employer and the employees of a Registered Union has in its Constitution a rule not to resort to strike until all avenues of conciliation are exhausted and a majority of them decide by ballot to do so cannot be said to be arbitrary or unreasonable. The learned Advocate



General traced the history regarding this branch of legislation and analysed various provisions of the Act to indicate general scope and object of this Act and from this he tried to indicate that the classification though apparently indicating inequality of treatment cannot be said to be arbitrary or unreasonable.

(8) Now it cannot be denied that the principle of collective bargaining has come to stay in the present stage of social development. In the process of collective bargaining the employees can within certain limits, resort to strikes thus paralysing the industries. The industries or the employer in order to counteract the force of a strike which may bring losses to the employer may themselves form into union of industries and act in a composite unit or may resort to victimization or may resort to lock-outs. The forces of evil may spring up creating condition of unrest, breach of peace both industrial and general.

In the present stage of the country's economy the evils resulting from strikes or lock-outs as weapons resorted to for trial of strength or for coercing the other party to give in may be very great and may give a considerable set-back to material progress of the country.

(9) In order to lessen the evil effect of this conflict which is inherent in the process of collective bargaining if it is allowed to operate unbridled the legislature has made various laws one of which is the Industrial Relations Act.

One of the objects of the Act is to secure Industrial peace and thereby step up production. Now this can be achieved by stimulating, amongst the employees the formation of Registered Unions, which will resort to strike only as a last resort after all possible avenues of conciliation and arbitration have failed. As long as it is possible both the industries and the employees must try to meet each other half way by avoiding unreasonable attitude and when maximum approach has been secured the remaining differences can then be ironed out either by conciliation or ultimately by arbitration.

Arbitration, by mutual agreement of reference, is provided. What is objected to is arbitration at the desire of one of the parties.

These are all matters of legislative sagacity with which the Courts of law are not expected to deal. Suffice to find that reasons for classification are conceivable which may bear reasonable and just relation to the object sought to be achieved by the provision.

(10) The experience must have shown that in the absence of some such provision tendency amongst the employees to resort to strike for enforcing their demands against the employer and the attitude of the employer not to bend down would continue unabated and unless this zeal for strike is channelled out by a healthier, more peaceful and rational method of settlement the evil could not be remedied. It is conceivable that the legislature must have seen that the employers have got whip-hand in many ways and the present provisions in their case of inducing the authorities to make a reference if the need arises, might be thought adequate, the urgency in their case being obviously less.

(11) There is no doubt that this provision which enables a Registered Union of employees of particular description as indicated above will have the salutary effect of stimulating formation of such Unions and of inducing them to have in their Constitution a rule not to resort to strikes except under the conditions laid down in the Act. This will tend to make them rational and peaceful in their demands.

(12) This may be one of the objects sought to be achieved. Many others can legitimately be conceived. Can it then be said that this classification is arbitrary or unreasonable or that it bears no reasonable and just relation to the object sought to be achieved by the Act?

(13) In the case of — 'AIR 1951 S. C. 41 at p. (58) (A)', Mukherjea J. said:

"The legislature undoubtedly has a wide field of choice in determining and classifying the subject of its law, and if the law deals alike with all of a certain class, it is normally not obnoxious to the charge of denial of equal protection; but the classification should never be arbitrary. It must always rest upon some real and substantial distinction bearing a reasonable and just relation to the things in respect to which the classification is made; and classification made without any substantial basis should be regarded as invalid. (See — 'Southern Railway Co. v. Green', (1909) 216 U. S. 400 at p. 412 (D)).

In a recent case — 'Ammeerunnissa Begum v. Mahboob Begum', AIR 1953 S. C. 91 at p. 94 (E) the same learned Judge has laid down:

"The nature and scope of the guarantee that is implied in the equal protection clause of the Constitution have been explained and discussed in more than one decision of this Court and do not require repetition. It is well settled that a Legislature which has to deal with diverse problems arising out of an infinite variety of human relation must, of necessity, have the power of making special laws to attain particular objects; and for that purpose it must have large powers of selection or classification of persons and things upon which such laws are to operate. Mere differentiation of inequality of treatment does not 'per se' amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary that it does not rest on any rational basis having regard to the object which the Legislature has in view".

Thus no challenge can be based merely on the inequality of treatment.

(14) There is no doubt that the Legislature has made classification and therein included all the Registered Unions which have a rule of the sort indicated above in its Constitution and has conferred upon them this specific right.

In the group thus classified no inequality has been brought about and the law acts equally to all within the group. Nor can it be said that the employers who were left out of this group from reaping advantage of S. 73A have been so left out without any rhyme or reason.

As I have said above the employers may have a whip-hand in many ways but even beside it it is conceivable that even inducing the Union of employers to form into Registered Unions of the sort contemplated in S. 73A may in itself be sufficient basis for the classification though other reasons may possibly exist.

(15) On the whole I am inclined to hold that S. 73A, Industrial Relations Act cannot be said to run counter to Article 14 of the Constitution. It is somewhat significant that this provision viz, Section 73A has been on the statute book in the State of Bombay for over three years after the Constitution of India came into being and yet the counsel for the petitioner has not been able to bring to our notice any case from the High Court of that State where this provision was successfully challenged on the grounds urged by him.



As no other basis of challenge is put forth there is no force left in this petition. It is dismissed with costs to the Government. The counsel's fee be taxed at Rs. 100/-.

(16) CHATURVEDI J.: I agree with my learned brother Nevaskar J. that S. 73A, Bombay Industrial Relations Act, 1947 (as adapted in Madhya Bharat State) cannot amount to discrimination in the eye of the law and is, therefore, not within the inhibition of the equal protection clause of the Constitution. The aforesaid S. 73A (without the proviso which is not material here) runs as follows:

"Notwithstanding anything contained in this Act, a registered union which is a representative of employees and the rules of which provide for the matter specified in cl. (vi) of sub-s. (1) of S. 23, may at any time refer any industrial dispute for arbitration to the Industrial Court".

Section 23 deals with "approved unions" and cl. (vi) of sub-s. (1) lays down that no strike shall be sanctioned or resorted to by the said union unless all methods provided by or under this Act for the settlement of an industrial dispute have been exhausted and the majority of its members vote by ballot in favour of such strike.

(17) Section 73A is a later addition in the Act, as it was inserted by S. 13 of the Bombay Act 43 of 1948. Mr. Patankar, learned counsel for the petitioner, urges that inasmuch as a registered union has been empowered to refer any industrial dispute for arbitration to the Industrial Court and the employers have not been so empowered to refer such a dispute to the Industrial Court, there is inequality of treatment. The argument would have been cogent if there had been only two ordinary private litigants and if one of them had been given a legal right to approach a Court of law for the decision of the dispute and the other had been denied that right. I shall hereafter attempt to show that such is not the position. The argument of the learned counsel, it appears, overlooks the very object of the enactment which is the preservation or restoration of industrial peace. The Act has been entitled "the Bombay Industrial Relations Act" and is intended to regulate the entire relations of the employers and the employees and its aim is not confined simply to determine differences between an employer and his employees. The arbitration of the Industrial Court was made compulsory in the interest of the whole general population to avert disastrous industrial disorganisation. From the standpoint of the Act, the immediate combatants are not necessarily the chief objects of regards. Though a strike, for example, entails severe loss to the employers and the employees while it lasts, it is the non-combatants, the rest of the community, who after all suffer most. Except to protect the general public dependent upon the peaceful and orderly continuance of industries there could have been no legal or moral warrant for state control of any industrial-quarrel. The employees and the employers both had formidable weapons e. g. the strike and lock-out, in their hands, for carrying out their economic warfare; but it was realised that the settlement of industrial disputes in some more humane and reasonable way than by strike or lock-out, with the disturbance of industrial conditions, the bitterness, the cruel consequences to the weak and helpless, the dislocation of trade, the monetary loss to the community, which those crude methods involved was more a matter of national than of private concern.

The machinery of the Bombay Industrial Relations Act is therefore directed to arresting the

disease before the unrest and commotion have taken the usual deplorable form of a strike or a lock-out, with all the attendant miseries. The prevention and settlement of industrial warfare is the end marked out for attainment, and, conciliation and arbitration are the designed means to that end. Conciliation first, and if that fails, arbitration must be attempted before the weapons of strike and lock-out are taken in hand. If the voluntary settlement first attempted proves impossible, the Act enjoins upon a tribunal to proceed to the compulsory settlement. The provisions embodied in Sections 72 and 73, Bombay Industrial Relations Act enable the State Government to refer an industrial dispute at any time to compulsory arbitration irrespective of the consent of the parties. Under S. 72 the Government can refer any industrial dispute to the arbitration of a Labour Court or the Industrial Court; but under S. 73 the Government can refer an industrial dispute to the arbitration only of the Industrial Court if it is satisfied that, by reason of the continuance of the dispute, a serious outbreak of disorder or a breach of the public peace is likely to occur, or serious or prolonged hardship to a large section of the community is likely to be caused; or the industry concerned is not likely to be seriously affected or the dispute is not likely to be settled by other means, or, when it is necessary in the public interest to do so. It will be seen that these are wide powers vested in the Government, on behalf of the non-combatants, and in the interest of industrial peace, to arrest the disease by referring an industrial dispute to the arbitration of the Industrial Court. If the employers foresee any trouble, (about any strike or disorder) they can approach the State Government and move it for taking action under this section. Though the powers of the Government are wide enough in this respect still it may happen sometime that Government may not get the requisite information before a strike is declared by a registered union.

In order to provide for this contingency, and, as a measure of precaution only, in 1948, by virtue of S. 73A, a registered union was also enabled to refer any industrial dispute for arbitration to the Industrial Court. The section confers no privilege on the union but further curtails its right to declare a strike. It is to my mind a liability imposed upon a registered union. Lock-outs may not have been considered so bad or so frequent as strikes by unions and so before declaring lock-outs the employers are not required to refer an industrial dispute to the arbitration of the Industrial Court. If lock-outs had been more frequent a similar provision would have been inserted in the Act for preventing employers declaring lock-out before exhausting every other method of settling a dispute. But as it is, the right of the employers to lock-out their employees in order to compel them to accept certain harsh conditions remains, to a certain extent, uncurtailed. There is nothing to prevent the legislature to undertake this legislation in future as soon as lock-outs become frequent and cause anxiety. The inequality, if it can be so called, in the treatment, cannot be said to be palpably unreasonable and arbitrary but bears a reasonable and just relation to the facts as they exist. The varying needs of the employers and the employees required separate treatment and the discrimination is founded on an intelligible differential which has a rational relation to the object of preservation or restoration of industrial peace sought to be achieved by the Industrial Relations Act.

(18) We have, however, arrived at this decision on the basis of the arguments addressed to us.



But I feel, I should make it clear that Mr. Patankar's arguments involved certain misconception about two important points.

(19) Firstly, he assumed that the Industrial Court is a Court of Law. It is important to bear in mind that though it is called a Court it is not a Court of law but is only an arbitral tribunal; and 'arbitration' is a term which, taken by itself, connotes a process for the settlement of dispute by submitting them to the decision of an arbitrator or to the decision of arbitrators selected by the parties or accepted by them. Both the parties surrender their rights to reach a Court of law and desire that the arbitrator or arbitrators should make an agreement for them by which they mutually consent beforehand to be bound. The range, then, of the authority of the arbitrator, if the submission is wide enough, is co-extensive with the powers of the parties to settle their disputes without him. Whatever they can lawfully agree to, he may lawfully award. And it is also important to note that there is no substantial difference between a voluntary arbitration and a compulsory arbitration. I am fortified in this view by certain observations of their Lordships of the High Court of Australia in —*The King v. The Commonwealth Court of Conciliation and Arbitration and the President thereof & The Boot Trade Employee's Federation Ex Parte Whybrow & Co.*, 11 Com-W LR 1 (F), and in —*the Australian Boot Trade Employee's Federation v. Whybrow and Co.*, 11 Com-W LR 311 (G). Though the powers and the functions of the Commonwealth Court of Conciliation and Arbitration differ considerably from our Industrial Court and there is also no unanimity of opinion on the points pressed in the cases adverted to above, still I have derived considerable help from the general observations of certain learned Judges on the nature of proceedings in an arbitral tribunal.

(20) 'Arbitration' is defined by Lord Trayner in —*McMillen & Son Ltd. v. Rowan and Co.*, 40 Sc. L. R. 265 at p. 267 (H), in the following words: "An agreement to submit to arbitration simply means that the parties have agreed to have their differences determined otherwise than by a Court of law, but does not even suggest whether the Court they have chosen for themselves shall consist of one member or many or how many members."

The essence of the matter, then, is that the differences are to be decided otherwise than by a Court of law.

(21) The term 'arbitration' then, has expanded in meaning during the last century so as to include methods and principles of adjudication, differing in many respects from those connoted by the term as known to the Common Law. It is abundantly clear that, in many enactments, it has been used in Great Britain and other countries of the Commonwealth of Nations during the last hundred years by arbitral tribunals, resort to which was compulsory, and in the constitution of which the disputants had no choice. The numerous enactments in force, while maintaining the method of arbitration, have made partial and successive inroads into the principle of voluntariness and they are decisive of the position that the term 'arbitration' does not connote a possible choice of arbitrators. In the face of these enactments, it is impossible to maintain that arbitration ceases to be arbitration unless it retains its voluntary character. And when we have regard to the use of this word in connection with the settlement of industrial dispute, it becomes still plainer that there is well recognised

use of the word as describing permanent public arbitral tribunals for settlement of industrial disputes, constituted not by choice of the parties, but by public authority. Even when the tribunal has been appointed by law instead of the parties, and even if the submission has been compulsory instead of voluntary, it is significant to note that the Industrial Court under the provisions of the Bombay Industrial Relations Act is a tribunal which is bound to settle trade disputes by way of arbitration and by no other method. It follows that it can in no way be restricted to legal points but it has to settle disputes on equitable considerations; and according to S. 63 the proceedings in arbitration under Chap. II of the Act are to be in accordance with the provisions of the Arbitration Act 1940, in so far as they are applicable. It will thus be manifest that the very basis of Mr. Patankar's arguments that the Industrial Court is a Court of law is not sound.

(22) Then, secondly, Mr. Patankar thought that the right conferred on a representative union to make a reference to Industrial Court of a pending industrial dispute is a substantive right. This too does not appear to be sound. I have already taken the view that it is in the nature of a liability imposed on the union. Even if it be considered to be a right then it appears to be a mere right of procedure with regard to moving the arbitral tribunal, and, it is too well known that questions of procedure do not enter into or form the basis of fundamental right. All that is essential is that in a recognised way, inquiry shall be made into the dispute, &, that the employer or employees will be heard about the way in which the dispute is to be settled. As the tribunal is bound to settle dispute by way of arbitration the essential rights of the employers are already safeguarded. As observed in —*A. Backus, Jr. and Jone v. Fort Street Union Depot Co.*, (1877) 169 U. S. 557: 42 Law Ed 853 at p. 859 Col. 2 (I) there is no vested right in a mode of procedure. Each succeeding legislature may establish a different one, provided only that in each is preserved the essential elements of protection. In this American case the respondents had alleged that they were entitled to a trial by jury of inquiry; but had been forced to trial by a common law jury presided over and controlled by a circuit judge. The Supreme Court of Michigan State had upheld this procedure and had changed its previous decision. It was held by the Supreme Court of U. S. A. that it was a question about a matter of procedure and therefore the adjudication of the Supreme Court of a State could not be set aside as an unjust discrimination or a denial of the equal protection of the laws merely because it had changed its previous decision. The question whether a legislature could prescribe a different mode of procedure than that which had been existing was considered and Brewer J. who delivered the judgment of the Supreme Court of U. S. A., observed as follows:

"An Act of the legislature which in terms gave to one individual certain rights and denied to another similarly situated the same rights might be challenged on the ground of unjust discrimination and a denial of the equal protection of the laws. But that does not prevent a legislature, which has established a certain rule of procedure and continued it in force for years, from subsequently repealing the Act and establishing an entirely different mode of procedure. In other words, there is no absolute right vested in the individual as against the power of the legislature to change modes of procedure."



If an existing mode of procedure in a Court of law can be altered by the legislature, it has also the power to alter the mode of procedure in an arbitral tribunal, and, I am clear in my mind that this alteration cannot be challenged on the ground of denial of the equal protection of the laws.

(23) Considering the question from every point of view, I am of opinion that the petition must fail and therefore I agree with the order proposed by my learned brother.

A/V.S.B.

Petition dismissed.

A. I. R. 1953 M. B. 236 (Vol. 40, C. N. 88)

(GWALIOR BENCH)

SHINDE C. J. AND DIXIT J.

Mahendra Bahadur Singh, Applicant v. State of Madhya Bharat and another; Opponents.

Civil Misc. Case No. 1 of 1953, D/- 9-4-1953.

(a) **Arms Act (1878), S. 2 — Commencement in Part B States — (Part B States (Laws) Act (3 of 1951), S. 3) — (General Clauses Act (1897), S. 5).**

Arms Act came into force in the State of Madhya Bharat on 1-4-1951.

Section 3 of Act 3 of 1951 amends the Acts and Ordinances specified in the Schedule to that Act as they existed at the time of the enactment of Act 3 of 1951 & if, therefore, at that time any of the Acts or Ordinances mentioned in the Schedule (Arms Act (1878), being one of them) having already come into force was in an active and not in a dormant state, then the extension of such an Act or Ordinance to a new territory or area would necessarily imply that the Act or Ordinance has been brought into force in the area or territory to which it has been extended.

The Arms Act which had already become effective at the time of the amendment in its extant clause by S. 3 of Act 3 of 1951, is effective also in the Part B States to which it has now been extended by the amendment, from 1-4-1951. No fresh notification under S. 2, Arms Act was necessary. (Paras 5, 6)

Anno: Gen. Clauses Act, S. 5, N. 1.

(b) **Arms Act (1878), Ss. 14, 16 — Sections are not unconstitutional and void on ground that they infringe fundamental rights — (Constitution of India, Arts. 19(1)(b), (f), 19 (5) and 31).**

The restriction put on the right of assembly by Art. 19(1), (b) does not import in Art. 19(1), (f) an unrestricted fundamental right to acquire, hold and dispose of arms. The right to hold, acquire, dispose of property is not absolute. It is subject to the limitations specified in Art. 19(5) and to the provisions contained in Art. 31. (Para 8)

Reasonable restriction on the exercise of the right to acquire, hold or dispose of property can be imposed either in the interests of the general public or for the protection of the interests of any Scheduled Tribe; secondly a person may be deprived of his property by authority of law; and thirdly the State may acquire any property or take possession of it for public purposes on payment of compensation. (Para 8)

The question whether the restrictions imposed are reasonable or unreasonable has to be decided in the context of, social, economic and political conditions in which they are imposed. (Para 8)

The restrictions imposed by law, the substantive as well as the procedural provisions of law should be examined and the question whether the provisions of the Act provide reasonable safeguard against the abuse of the power given to the executive authority to administer the law is not relevant for the true interpretation of the law. AIR 1950 S. C. 211, AIR 1951 S. C. 118, Relied on. (Para 8)

The restrictions imposed on the possession and disposal of arms by Ss. 14 and 16, Arms Act are reasonable restrictions necessary to the preservation of peace and prevention of danger to life, and property and permissible under cl. 5 of Art. 19 of the Constitution. Consequently, it cannot be held that these two sections in so far as they prohibit the possession of arms except under license, require a person to deposit the arms already in his possession, if his possession thereof becomes unlawful, and restrict the sale of arms to persons whose possession of the same would be unlawful, constitute an infringement of Art. 19(1), (f) of the Constitution and are, therefore, void. (Para 9)

Article 31 of the Constitution which is operative only when a person is deprived of his property or when his property has been acquired or taken possession of for a public purpose has no applicability here. The Article that is relevant here is Art. 19(1), (f) which applies in cases where property has not been taken away under Art. 31. The argument that as under certain conditions such as those stated in Ss. 24 and 26, Arms Act the arms in possession of a person can be confiscated without compensation or detained, they are repugnant to Art. 31 overlooks the fact that Art. 31 (1) implies that a person may be deprived of his property by authority of law & that in the exercise of police powers a person may be deprived of his property for the prevention of danger to life or property even without compensation. (Para 10)

Ss. 14 and 16, Arms Act are not therefore void on ground of repugnancy with Art. 31. (Para 10)

Anno: Arms Act. S. 14, N. 1.

(c) **Arms Act (1878), S. 14 — Is not void of as delegated legislation — (Constitution of India, Art. 245).**

Delegation of the character which S. 14 involves cannot on any view be held to be invalid. The Legislature has laid down in S. 14 itself the principle that no person shall possess fire arms except under a license. Such matters as the authority competent to issue licenses, the form in which they should be issued and the terms and conditions on which they should be granted are all matters of detail. Section 17, Arms Act does no more than enable the Government to make rules to carry out the principle embodied in S. 14. This delegation of power to administrative bodies is permissible. AIR 1951 S. C. 332, Relied on. (Para 11)



(d) Constitution of India, Art. 226 — Point not taken in petition but based on statement in return cannot be allowed.

In regard to applications for prerogative writs, the settled practice of English and American Courts is that no ground shall be relied upon or relief sought at the hearing of the motion except the grounds and relief set out in the application and a writ would be refused where the case tendered by the petition is radically different from that set up upon argument. The practice being one which only carries out the object with which a copy of the application for the issue of a writ is served on the opponent and he is called upon to show cause in respect of the grounds stated in the application, must be adopted as regards applications under Art. 226 also. The applicant cannot be permitted to argue and raise objection on the basis of an incidental statement in the return. (Para 12)

Anand Bihari Misra; for Applicant; K. A. Chitale; Advocate-General, for the State.

#### CASES CITED:

- (A) ('50) AIR 1950 SC 211: 52 Cri LJ 550 (SC)
- (B) ('51) AIR 1951 SC 118: ILR (1951) Hyd 221
- (C) ('51) AIR 1951 SC 332: 1951 SCR 747 (SC)

DIXIT J.: This is an application under Art. 226 of the Constitution of India for the issue of a suitable writ or a direction to the State of Madhya Bharat to forbear from acting in any manner by virtue of or under the Indian Arms Act, 1878 and for an order to the District Magistrate restraining him from enforcing a notice, directing the petitioner to deposit certain arms in his possession with the officer in charge of the police station in Laxmi Ganj Lashkar.

(2) The petitioner stated that he is in possession of two guns, two rifles and two revolvers; that he is the owner of these arms, which were duly registered under the Gwalior State Arms and Ammunition Control Order; that in anticipation of the extension of the Indian Arms Act to this State by the Part B States (Laws Act) 1951 (Act 3 of 1951) which came into force on 1-4-1951, the Madhya Bharat Government issued a notification in the Gazette dated 25-3-1951 directing persons in possession of fire arms to apply for licenses in accordance with the Indian Arms Act; that accordingly he applied to the District Magistrate for a license in respect of the six fire arms in his possession, that on 4-10-1951 the District Magistrate gave a notice to the petitioner directing him to deposit the fire arms within a week at the nearest police station. The petitioner further states that, thereupon, he made a representation to the District Magistrate and in reply the District Magistrate assured him that he would be granted the necessary licenses. The petitioner's grievance is that the District Magistrate instead of issuing the licenses again gave him a notice on 23-12-1952 to surrender all the arms in his possession at the nearest police station. The petitioner challenges this action of the District Magistrate and the validity of the Indian Arms Act 1878 on several grounds. The main grounds are that the Indian Arms Act, 1878 though extended to this State has not yet been brought into force and that the Arms Act being repugnant to Arts. 19 (1) (f) and Art. 31 of the Constitution of India is void. He prays that an order be issued to the State and the District Magistrate of Gird restraining them from giving effect to the Act and to the notice calling upon him to surrender the arms in his possession.

(3) The non-applicants oppose the petition. In the return filed on behalf of them it is said that the Indian Arms Act, 1878 came into force in this State on 1-4-1951 under a notification issued by the Central Government under S. 1 (2), Part B States (Laws) Act, bringing the latter Act and the several Acts and Ordinances mentioned in the schedule to it into force with effect from 1-4-1951. It is admitted that in anticipation of the coming into force of the Indian Arms Act 1878 the Government of Madhya Bharat published 'a directive' to the citizens of Madhya Bharat to apply for licenses as required by that Act; that in response to this notice the petitioner did apply for a license in respect of the six fire arms in his possession. It is further stated that the petitioner being in possession of revolvers of prohibited bore was asked to explain how he came to possess those revolvers, as under Rr. 7 and 31, Indian Arms Rules 1951 no license in respect of revolvers of prohibited bore could be granted unless it was lawfully procured or purchased; that the petitioner did not give any satisfactory explanation of his possession of the revolvers; that as the power of granting or refusing a license in respect of revolvers and pistols is vested under R. 31 (1), (aa) in the Chief Secretary or any officer authorised by him, the District Magistrate subsequently reported to the Home Secretary that the petitioner could not explain satisfactorily his possession of the revolvers and was suspected of smuggling arms and ammunition, and that, therefore, no license should be granted to him in respect of the revolvers; that the Home Secretary having been authorised by the Chief Secretary to deal and dispose of matters concerning the administration of the Indian Arms Act, 1878 considered the report submitted by the District Magistrate and came to the conclusion that no license should be granted to the petitioner and that he should be called upon to deposit all the fire arms in his possession at the nearest police station. The District Magistrate, therefore, in compliance with the orders of the Home Secretary issued a notice dated 23-12-1952 to the applicant calling upon him to deposit the fire arms in the Laxmi Ganj Police Station, Lashkar.

The opponents deny that the Indian Arms Act, 1878 in any way interferes with the fundamental rights of the petitioner or that it is confiscatory in nature. In the return it is further stated that the order dated 23-12-1952 directing the petitioner to deposit his arms at the nearest police station is purely an executive order passed by the appropriate authority in its discretion and as such is not open to challenge under Art. 226 of the Constitution.

(4) In the petition, the applicant has taken several grounds. But at the hearing of the petition Mr. Anand Bihari Misra learned counsel for the applicant confined his arguments to two points only, namely, that the Indian Arms Act 1878 has not yet come into force in the Madhya Bharat and that Ss. 14, 16, Arms Act under which he is being required to obtain a license and deposit the fire arms at the nearest police station being repugnant to Arts. 19 (1), (f) and 31 of the Constitution are void and inoperative.

(5) On the first question, the contention of the learned counsel for the petitioner is that the Part B States (Laws) Act 3 of 1951 which came into force on 1-4-1951 no doubt extended the Indian Arms Act 1878 to Part B States; but by the mere coming into force on 1-4-1951 of the Act 3 of 1951 the Indian Arms Act did not come into force on that date in this State. It is argued that the Arms Act contains a special commencement section, namely, S. 2 which provides that the Act shall come into force on such day as the Central



Government by a notification in the Official Gazette appoints. But nothing appears to have been done so far under this provision and that, therefore, the Arms Act cannot be said to be in force in Madhya Bharat. I do not accept this submission. I think the learned Advocate-General is right when in reply he says that S. 3 of Act 3 of 1951 amends the Acts and Ordinances specified in the schedule to that Act as they existed at the time of the enactment of Act 3 of 1951 and that if, therefore, at that time any of the Acts or Ordinances mentioned in the Schedule having already come into force was in an active and not in a dormant state, then the extension of such an Act or Ordinance to a new territory or area would necessarily imply that the Act or Ordinance has been brought into force in the area or territory to which it has been extended. The Arms Act when it was enacted in 1878 extended to British India. Section 2 of the Act provided that it shall come into force on such day as the Government by a notification in the Gazette appoints in that behalf. A notification bringing the Act into force was issued on 1-10-1878. Subsequently the Act was extended to other areas by various Acts and Regulations, and on the date of the passing of the Part B States (Laws) Act, 1951 it extended to the whole of India except Part B States and was effective in that territory. Now, S. 3 Part B States (Laws) Act 1951 is as follows:

"The Acts and Ordinances specified in the Schedule shall be amended in the manner and to the extent therein specified, and the territorial extent of each of the said Acts and Ordinances, shall, as from the appointed day... be as stated in the extant clause thereof as so amended."

(6) The Indian Arms Act, 1878 is one of the Acts specified in the Schedule and has been so amended as to include in its territorial extent Part B States. It must be noted that S. 3 besides amending in certain respects the Acts and Ordinances specified in the Schedule also amends the extant clause of each of those Acts and Ordinances so as to extend them to Part B States. It does not re-enact the provisions of the Acts and Ordinances mentioned in the Schedule with the modification that they shall extend to Part B States. The question, therefore, of bringing into force any 're-enactment' by the issue of a notification such as the one contemplated by S. 2, Arms Act does not arise.

What we have to consider is whether the law amended by S. 3 of Act 3 of 1951 was an effective or inactive law at the time of the amendment. If the law was effective when its territorial extent was amended then the result of the amendment would be to make the Act actually effective in the territory to which it has been extended. If on the other hand the law was inactive at the material time then an amendment of its territorial extent would mean a change in the area in which the law would be effective when it is put in force. This follows from the fact that in relation to laws the term 'amendment' means a change in some of the provisions of law as they are at the time of the amendment. Amendment is of an existing law and not of a law as it was in the past or as it would be in the future. It will thus be seen that the Arms Act which had already become effective at the time of the amendment in its extant clause by S. 3 of Act 3 of 1951, is effective also in the Part B States to which it has now been extended by the amendment.

The learned Advocate-General relied on S. 6, Part B States (Laws) Act 1951 as supporting this conclusion "in a negative manner". He argued that as S. 6 of Act 3 of 1951 repeals from 1-4-1951 any law in force in any Part B State correspond-

ing to any of the Acts or Ordinances attended to that State and as an intention to create a vacuum cannot be attributed to the Legislature, it must be taken that the extended law came into force in the State also from 1-4-1951.

I do not think that S. 6 is of much assistance in deciding the point before us. For, the question whether under S. 6 any corresponding law in force in Part B State is or is not repealed itself depends on the question whether the material provisions of the extended Act have become operative in the Part B State concerned, and this question in its turn depends on the terms of the extended Act and S. 3, Part B States (Laws) Act 1951. For example, if as in the case of the Bar Councils Act, 1926 or the Legal Practitioners Act, 1879 with the extension of the Act to Part B States, only some sections come into force leaving the substantial provisions of the Act to be brought into force by a subsequent notification, then it cannot be said that with the mere extension of such an Act by S. 3 of Act 3 of 1951, the corresponding law in any Part B State would stand repealed under S. 6. However, no such provision is to be found in the Indian Arms Act, 1878.

Section 2 of the Act is concerned with the issue of a notification bringing the provisions of the Act into force for the first time after its enactment. The object of postponing the effectiveness of the Act until the issue of a notification under S. 2 was obviously to give to the public sufficient notice of the enactment of the law. Sections 1 and 2 of the Act do not say that S. 1 alone shall extend to the whole of India and the rest of the Act shall come into force in any territory to which the Act applies on such date as the Government may by a notification appoint. It is noteworthy that the Parliament in enacting S. 1 (2), Part B States (Laws) Act, 1951 which empowers the Government to appoint a suitable date by a notification in the Gazette for the commencement of the Act, took notice of the fact that it would be a hardship to the general public if the first intimation of the President's assent to the Part B States (Laws) Act, 1951 was also to be the date of the coming into force in Part B State of the Acts and Ordinances specified in the Schedule. It cannot, therefore, be maintained that the issue of a notification bringing the Arms Act into force in Part B States was necessary also on the ground of giving to the public sufficient notice of the Act. It must also be stated that although the Arms Act after its enactment in 1878 was extended between the years 1878 to 1951 to various territories by several laws and regulations and brought into force in those territories without a notification under S. 2, there does not appear to be any case in which an objection similar to the one raised here was taken and decided by any High Court. Learned counsel for the applicant was unable to draw our attention to any such decided case, I am, therefore, disposed to reject the contention of the learned counsel for the applicant that the Arms Act has not come into force to this State as no notification under S. 2 of the Act has been issued.

(7) The next contention of the learned counsel for the petitioner is that Ss. 14 and 16 of the Act abridge the petitioner's fundamental right under Art. 19 (1) (f) of the Constitution to acquire, hold and dispose of arms and are, therefore, void. Section 14 prohibits possession inter alia of fire arms except under a license and in the manner and to the extent permitted thereby. Section 16 (1) provides that any person possessing arms, ammunition or military stores shall deposit them with the officer in charge of the nearest police station or with the license dealer, if his possession thereof becomes unlawful for any of the reasons stated in that section. The person so depositing the



arms is under S. 16 (2) entitled to receive them back if his possession again becomes lawful or to dispose, or authorise the disposal of the arms by sale or otherwise to any person whose possession of the same would be lawful and to receive the proceeds of any such sale. Sections 16 (4) and 17 empower the Government to make rules to determine the officers by whom, the conditions, fees, subject to which any license shall be granted and the condition subject to which arms, ammunition etc. may be deposited with a license dealer and the period after the expiry of which things deposited under S. 16 (1) shall be forfeited to Government, if they are not returned or disposed of within that period. In exercise of these powers the Government has framed complete and exhaustive rules laying down the purposes for which licenses to possess arms may be granted, prescribing the authority by whom the licenses may be granted or renewed, and the manner in which any person wishing to obtain a license should apply. It seems to me unnecessary to summarise here all these rules. For our purposes it is sufficient to state that under the rules no license for the possession of revolvers, pistols, muskets and rifles of certain prohibited bore is granted unless the authority granting the license is satisfied that it has been lawfully procured by the person applying for a license. The authority empowered to grant or renew a license may in his discretion refuse to grant or renew a license (R. 41). An appeal is also provided by R. 41 from an order refusing to grant or renew a license.

(8) The argument of Mr. Anand Bihari Misra learned counsel for the applicant is that Art. 19 (1), (f) confers on the petitioner the fundamental right to acquire, hold and dispose of property which includes arms; that the only restriction put by the Constitution on the possession of arms, is that under Art. 19 (1), (b) the assembly of citizens with arms is prohibited; that, therefore, the Constitution gives to the petitioner a fundamental right to possess arms for purposes other than that of assembly; and that inasmuch as Ss. 14 and 16, Arms Act and the rules framed under the Act interfere with the rights of a citizen to possess, hold and dispose of arms and also in some cases totally prohibit a person from possessing arms and deprive him of the arms in his possession without any compensation, they are repugnant to Art. 19(1), (f) and Art. 31 and are, therefore, unconstitutional.

In my opinion the contention is without any substance. A right to acquire, hold and dispose of arms is no doubt a right to property. But I am unable to see how the restriction put on the right of assembly by Art. 19 (1), (b) imports in Art. 19 (1), (f) an unrestricted fundamental right to acquire, hold and dispose of arms. The right to hold, acquire, dispose of property is not absolute. It is subject to the limitations specified in Art. 19 (5) and to the provisions contained in Art. 31. It is obvious from an examination of the provisions of Art. 19 (1), (f) read with cl. 5 of the Article, and Art. 31 firstly that reasonable restriction on the exercise of the right to acquire, hold or dispose of property can be imposed either in the interests of the general public or for the protection of the interests of any Scheduled Tribe; secondly a person may be deprived of his property by authority of law; and thirdly that the State may acquire any property or take possession of it for public purposes on payment of compensation.

When, therefore, it is urged that Ss. 14 and 16, Arms Act and the rules framed thereunder interfere with the petitioner's right to property, what we have to see is whether the restrictions imposed by the impugned provisions on the right to possess

arms are reasonable, and in the interests of general public, there being no question of the protection of any Scheduled tribe here. Now, it is plain that the question whether the restrictions imposed are reasonable or unreasonable has to be decided in the context of, social, economic and political conditions in which they are imposed. Again as pointed out by the Supreme Court in the case of — '*Dr. Khare v. State of Delhi*', AIR 1950 SC 211 (A) in deciding on the reasonableness or otherwise of the restrictions imposed by law, the substantive as well as the procedural provisions of law should be examined and the question whether the provisions of the Act provide reasonable safeguard against the abuse of the power given to the executive authority to administer the law is not relevant for the true interpretation of the law. In — '*Chintamanrao v. State of Madhya Pradesh*', AIR 1951 SC 118 (B) it was observed as follows:

"The phrase 'reasonable restriction' connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word 'reasonable' implies intelligent care and deliberation, that is the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Art. 19 (1), (g) and the social control permitted by Cl. (6) of Art. 19, it must be held to be wanting in that quality."

(9) This reasoning applied equally to Art. 19 (1), (f) and Art. 19 (5). Judged by these tests I do not think that the restrictions put by Ss. 14 and 16, which I have already summarised above, on the possession and disposal of arms can be stated to be unreasonable in relation to the present-day economic, political and social conditions. That a person should not possess arms except under a license; that he should not be allowed to sell them to persons whose possession of the arms would be unlawful; that a license in respect of dangerous arms of prohibited bore should not be granted unless it is shown that they are lawfully procured; that the authority empowered to grant a license or renew it should have the power to refuse it to persons whose possession of arms would be quite incompatible with the maintenance of peace, good order requires no expatiation whatsoever. The restrictions imposed on the possession and disposal of arms by Ss. 14 and 16 are reasonable restrictions necessary to the preservation of peace and prevention of danger to life and property and permissible under cl. 5 of Art. 19 of the Constitution. Consequently, it cannot be held that these two sections in so far as they prohibit the possession of arms except under license, require a person to deposit the arms already in his possession, if his possession thereof becomes unlawful, and restrict the sale of arms to persons whose possession of the same would be unlawful constitute an infringement of Art. 19 (1), (f) of the Constitution and are, therefore, void.

(10) The contention that these provisions of Arms Act offend Art. 31 is equally untenable. Here, the petitioner has not been deprived of the arms in his possession. He has been merely asked to deposit them at the nearest police station. If he obtains a license in respect of them, the arms would be returned to him. Otherwise he would be entitled to receive the proceeds of the sale of the arms to a person whose possession of the same would be lawful. That being so, Art. 31 of the Constitution which is operative only when a person is deprived of his property or when his pro-



erty has been acquired or taken possession of for a public purpose has no applicability here. The Article that is relevant here is Art. 19(1), (f) which applies in cases where property has not been taken away under Art. 31. Article 31 is of no help in judging the validity of the provisions such as those impugned here, which do not deprive any person of his property or acquire or take possession of his property but simply lay down the conditions under which a person is entitled to hold and dispose of the property. The argument that as under certain conditions such as those stated in Ss. 24 and 26, Arms Act the arms in possession of a person can be confiscated without compensation or detained and, therefore, they are repugnant to Art. 31 overlooks the fact that Art. 31(1) implies that a person may be deprived of his property by authority of law and that in the exercise of police powers a person may be deprived of his property for the prevention of danger to life or property even without compensation. I am, therefore, unable to accept the contention that Ss. 14 and 16, Arms Act being repugnant to Art. 31 are void.

(11) Learned counsel for the petitioner also took the objection that S. 14 was ultra vires the Legislature which passed the Act as by simply providing that no person shall have in his possession any fire arms, ammunition etc. except under a license and in the manner and to the extent permitted thereby and by empowering the Government to frame rules to determine the officer by whom, the form in which, and the terms and conditions subject to which a license may be granted, the Legislature virtually abdicated its legislative power in favour of the executive. I do not see how the question of delegated legislation arises in this case. The Supreme Court considered the question as to how far 'delegated legislation' is permissible. 'In re Art. 143, Constitution of India and Delhi Laws Act 1912 Etc.', AIR 1951 S C 332 (C), and a reference to its final conclusion will show that delegation of the character which S. 14 involves cannot on any view be held to be invalid. The Legislature has laid down in S. 14 itself the principle that no person shall possess fire arms except under a license. Such matters as the authority competent to issue licenses, the form in which they should be issued and the terms and conditions on which they should be granted are all matters of detail. Section 17, Arms Act does no more than enable the Government to make rules to carry out the principle embodied in S. 14. This delegation of power to administrative bodies is permissible.

(12) Learned counsel for the petitioner also sought to argue that under S. 14 read with S. 17, Arms Act he was entitled as of right to obtain a license; that a Government was not empowered to frame a rule giving the authority empowered to grant a license, a discretion to refuse the license; that under the Indian Arms Rules 1951 the authority empowered to grant a license for the possession of D.B.B.L. Guns and S.B.B.L. Guns is the District Magistrate, and Chief Secretary is empowered to grant licenses for revolvers and pistols; and that, therefore, the order dated 11-11-1952 of the Home Secretary rejecting the petitioner's application for license was one without jurisdiction and invalid. On these grounds it was urged that a direction be issued to the Chief Secretary and the District Magistrate to grant to the petitioner the necessary licenses for the arms in his possession.

I agree with the learned Advocate-General that the applicant cannot be allowed to raise this objection which has not been taken in the peti-

tion but which is founded on the statement in return, namely,

"that the Home Secretary Mr. Bamroo after a perusal of the whole record and taking into consideration the opinion of the District Magistrate, by order dated 11-11-1952 refused the application for license of the petitioner and ordered that the applicant should be called upon to deposit all fire arms."

In his application the petitioner has only stated the facts and grounds for the enforcement of a right to possess arms without any license and to have the notice given to him for the deposit of the arms cancelled. The rule nisi was issued to the opponents to show cause in respect of the grounds and relief stated in the petition; and the opponents have filed their answers to these grounds and not to the grounds which the petitioner is now putting forward. The petition is not for quashing the determination of any authority refusing a license to the applicant and the non-applicants have not been called upon to show cause why a license should not be granted to the applicant. In regard to applications for prerogative writs, the settled practice of English and American Courts is that no ground shall be relied upon or relief sought at the hearing of the motion except the grounds and relief set out in the application and a writ would be refused where the case tendered by the petition is radically different from that set up upon argument. The practice being one which only carries out the object with which a copy of the application for the issue of a writ is served on the opponent and he is called upon to show cause in respect of the grounds stated in the application, must be adopted as regards applications under Art. 226 also. In my view, the applicant cannot be permitted to argue on the basis of an incidental statement in the return that the Home Secretary has passed an order rejecting his application for license, that the order is illegal and that he is entitled to the grant of a license as of right. If he thinks there has been a determination refusing a license to him and it is illegal, and that a license must be granted to him, the applicant is at liberty to take appropriate proceedings for quashing the determination and for enforcing his alleged right to obtain a license.

In so far as the notice given to the applicant by the District Magistrate is concerned, it is merely one by way of reminder to the applicant that as after the coming into force of the Arms Act his possession of arms without a license has become unlawful, he must under S. 16 deposit the arms with the officer in charge of the nearest police station. Even without a notice from the District Magistrate the applicant is under an obligation to deposit the arms under S. 16 if his possession thereof under the Arms Act is unlawful. The notice, therefore, cannot be objected to on the ground that it violates the provisions of S. 16 or on the ground that the District Magistrate as the Chief Administrative and executive authority of the District was not competent to draw the attention of the applicant to these provisions.

(13) For the above reasons, I am of the opinion that this application must be dismissed with costs, fixing the counsel's fee at Rs. 75/-.

(14) SHINDE C. J.: I agree.

A/R.G.D.

Application dismissed.



**A. I. R. 1953 M. B. 241 (Vol. 40, C. N. 89)**  
(INDORE BENCH)

NEVASKAR J.

Ramlal Hazarimal, Applicant v. Hiralal Ramlal and another, Opponents.

Criminal Ref. No. 86 of 1952, D/- 31-3-1953.

**(a) Criminal P. C., (1898), Ss. 516 A, 517 and 523 — Property seized by Police — Jurisdiction of Magistrate to pass orders in respect thereof.**

After property is seized by the Police orders for its final disposal can only be passed by the Court and the Police are expected to hold the property subject to the orders of the Magistrate. Therefore if the property is with the Police the Magistrate alone has got jurisdiction to pass orders.

(Para 4)

Anno: Cr. P. C., S. 516A, N. 1; S. 517, N. 1; S. 523, N. 1.

**(b) Criminal P. C., (1898), Ss. 523 and 561A — Power to re-call property wrongfully disposed of.**

Where the property seized by the Police is not produced before the Magistrate and is wrongfully handed over by them to the complainant, the Magistrate and the High Court in exercise of its inherent powers have power to re-call the property, to require the police to produce the property for final disposal by the Magistrate under S. 523 and to give effect to this order.

(Para 6)

Anno: Cr. P. C., S. 523, N. 6; S. 561A, N. 4.

W. Y. Pande, for Applicant; P. R. Sharma, Govt. Advocate, for the State; Rameshwarji Bhatta, for Municipality Sitamau.

**CASE CITED:**

(A) ('38) AIR 1938 Cal 17: 39 Cri LJ 245

**ORDER:** Accused Hiralal Ramlal was prosecuted before the Sub-Divisional Magistrate, Sitamau for a charge under S. 409, Penal Code and was acquitted on 25-9-50. During the Police investigation the petitioner who is the father of the accused Hiralal had handed over a sum of Rs. 701-2-9 to the Police Officer in charge of the investigation on 5-12-1948. This sum, it appears, immediately after the receipt of the same from the petitioner Ramlal was handed over by the Police to the Municipality Sitamau in which the accused was serving and in respect of which the offence is alleged to have been committed without any specific order of the Court to that effect. On reference to the Panchanama Ex. P/3 with regard to the seizure of this sum it appears that this sum was seized or attached by the Police during the course of investigation.

In various columns in the forms printed for the purpose of use of Sitamau Police it was mentioned that this sum of Rs. 701-2-9 was being seized in connection with the criminal breach of trust in respect of the funds of the Municipal Committee by Sub-Inspector Suryamal from the custody of the petitioner Ramlal. After the accused was acquitted the petitioner submitted an application to the Sub-Divisional Magistrate Sitamau for the refund of this sum seized from his custody by the Police. The application purported to be made under S. 517, Criminal P. C. This application was rejected by the Magistrate on the ground that the sum was not produced before the Court during the inquiry or trial and therefore he had no jurisdiction to pass any order in respect of the same. The petitioner there-

upon submitted an application for revision to the Sessions Judge Mandsaur who has made this reference.

(2) The grounds set forth by the learned Judge for setting aside the order of the learned Magistrate are that under S. 523, Criminal P. C., the Magistrate had jurisdiction to pass order in respect of the property seized by the Police though not produced before it. Reliance for this purpose is taken on the decision reported in — 'Mahomed Yusuf v. Krishna Mohan', AIR 1938 Cal 17 (A).

(3) Before me counsel both for the petitioner as well as for the Municipality appeared. Mr. Pande who appeared for the petitioner suggested that the order for directing the delivery of the property from the Municipality to the petitioner could be passed under S. 523, Cr. P. C., by the joint operation of powers under S. 523 and the inherent powers of the Court. While it was contended by the counsel for the Municipality that no order can be passed under S. 523, Cr. P. C., as the only order contemplated under S. 523 is one in respect of the property that is seized by the Police and is in their custody. If the Police rightfully or wrongfully part with the possession of that property in favour of some person the remedy in that case is by having recourse to the Civil Court for the enforcement of the right of the claimant and not by an application made under S. 523 or 517, Criminal P. C. No authority has been brought to my notice which covers the case of the description that is before me and therefore I will have to consider the matter on the principles indicated in the various sections of the Criminal Procedure Code in respect of such properties which are seized by the Police.

(4) There are two kinds of properties that are dealt with under the Criminal Procedure Code. Firstly those that are seized by the Police and produced before the Court during the inquiry or trial and those which are seized by the Police and not produced during the inquiry or trial. The Police are empowered to seize the properties during the course of investigation as will appear from S. 165, Cr. P. Code, and also on reference to S. 523, Cr. P. Code. A duty is cast upon the Police to prepare a list of such property and to report the fact of the seizure to a Magistrate. If the property is produced before the Court the Court is empowered to pass orders in respect of it under S. 517, Cr. P. Code, for its disposal after the conclusion of the inquiry or trial.

During the course of inquiry or trial the Court before whom the property is produced is empowered to pass such orders as it thinks fit for the proper custody of such property pending the inquiry or trial under S. 516A Criminal P. C. Thus it will appear that Ss. 516A and 517 deal with the power of the Court with regard to the custody of the property during the inquiry or trial and for its disposal by delivery or otherwise after the conclusion of the trial. But if the property is not produced before the Court but remains with the Police then under S. 523, Cr. P. Code the power is given to the Court to make such order as it thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof or, if such person cannot be ascertained, respecting the custody or production of such property.



A procedure is indicated in sub-cl. (2) of S. 523, Cr. P. Code for the delivery of the same where the person entitled is known, after ascertaining the claimant before passing final orders thereon. In the latter case an inquiry is contemplated. On consideration of all these provisions it is plain that after property is seized by the Police orders for its final disposal can only be passed by the Court and the Police are expected to hold the property subject to the orders of the Magistrate. Therefore if the property is with the Police the Magistrate alone has got jurisdiction to pass orders. But the difficulty in this case arises on account of the wrongful action by the Police in handing over the sum directly to the Municipality and the question is whether in view of this fact it is competent for a Magistrate to re-call the property from the person to whom it has been wrongfully handed over and to pass orders in respect of the same.

There is no provision in the Criminal Procedure Code directly bearing on the point, and the only question is whether recourse could be had to the inherent powers of Criminal Court to remedy wrongs committed during the course of proceedings before it. Such an inherent power is conceivable with reference to subordinate Criminal Courts and the High Court. Section 561-A, Criminal P. C., specifically declares that such a power exists in the High Court to give effect to any order under that Code or to prevent abuse of process of any Court or otherwise to secure ends of justice.

(5) In this case justice of the petitioner's case is quite clear. The Police seize the property in the course of investigation. This was, therefore, liable to be disposed of by the Magistrate under S. 523, Cr. P. C. The Police unauthorisedly handed over the property to the Municipality. The fact of the delivery to it by the Police is admitted by the counsel for the Municipality appearing before me. The person to whom this sum of Rs. 701-2-9 is made over is nobody else than the real complainant. He was given a hearing before this Court to justify the action of the Police. All that he could urge is that the petitioner be asked to file a Civil Suit against the Municipality. Accused is acquitted in this case. Since the property which is the subject matter of this petition was cash unidentifiable in its nature it could not be urged that an offence with respect to it was committed.

(6) Under the circumstances both the Magistrate below as well as High Court in exercise of its inherent powers have power to re-call the amount wrongly handed over by the Police to the Municipality. They have further power to require the Police to produce the property seized by it for final disposal by the Magistrate under S. 523. They have also powers to give effect to this order. To drive the petitioner to a costly and troublesome civil action would be sheer injustice and abuse of the process of Court.

(7) The result is that the reference is accepted, order of the lower Court is set aside and it is ordered that the subject matter of this petition viz. Rs. 701-2-9/- seized by the Police and made over to Sitamau Municipality shall be recalled.

(8) The Police may also be directed to produce that property for final disposal under S. 523, Cr. P. C. After the property is secur-

ed by either of these methods the same be made over to the petitioner.

A/V.R.B.

Reference accepted.

**A. I. R. 1953 M. B. 242 (Vol. 40, C. N. 90)  
(INDORE BENCH)**

**ABDUL HAKIM KHAN J.**

Dewilal Kukaji Sutar, Applicant v. Ramotar Dwarkaprasad, Opponent.

Small Cause Revn. No. 123 of 1950, D/- 25-9-1952.

**Provincial Small Cause Courts Act (1887), S. 25 — Interference on question of fact — (Civil P. C. (1908), Ss. 115, 100-101).**

Small Cause suit for arrears of rent brought by heir to property of J — Judge holding that plaintiff was not heir of J — Question whether plaintiff was heir of J or not held was question of fact — Finding of Judge not being perverse or obviously wrong High Court held could not interfere on revision side. AIR 1944 Mad 181 and AIR 1925 All 172, Ref. (Para 3)

Anno: Provin. Sm. Cause Courts Act, S. 25 N. 11; Civil P. C., S. 115 N. 29; Ss. 100-101 N. 28, 52, 53.

Mrs. Gandhe, for Applicant; Balwantsingh, for Opponent.

**CASES CITED :**

(A) ('44) AIR 1944 Mad 181: 45 Cri LJ 464

(B) ('25) AIR 1925 All 172: 22 All LJ 1035

**ORDER :** This revision arises out of a Small Cause suit No. 39 of 1950 which was dismissed by Small Cause Judge, Ujjain, on 26-9-1950. One Dewlal brought the suit against Ramotar for arrears of rent amounting to Rs. 357/- plus interest on it. The suit was brought as an heir to the property of Jaganath who had given the house on rent to Ramotar. Defendant admitted the Tenancy of Jaganath, but pleaded that the plaintiff was not the heir of Jaganath and that in consideration of the rent he had been supplying  $\frac{1}{2}$  seer of milk daily to Surajbai, the widow of Jaganath. The Small Cause Judge, Ujjain held that plaintiff was not the heir of Jaganath, and, that Surajbai is the real successor of Jaganath. Aggrieved by this the plaintiff has filed this revision.

(2) In — 'Duraishwami Nadar v. Sivanupandia Nadar', AIR 1944 Mad 181 (A) it has been held that under S. 25, Provincial Small Cause Courts Act (the section under which this revision has been filed) the High Court cannot constitute itself a court of appeal. In — 'Bengal N. W. Ry. v. Manorath Bhagat', AIR 1925 All 172 (B) it has been held that unless there was no evidence before the Judge to support the finding or unless the finding was impossible or perverse one, it is unfair to interfere on the revision side.

(3) What I have to decide in this case is whether the plaintiff is the heir of Jaganath or not? This is a question of fact and finding (of?) the Court below not being perverse or obviously wrong, I see no interference by way of revision.

(4) Revision rejected with costs.

C/H.G.P.

Revision rejected.



A. I. R. 1953 M. B. 243 (Vol. 40, C. N. 91)  
(GWALIOR BENCH)

DIXIT, J.

Kanhaiya Lal, Applicant v. The State.

Criminal Revn. No. 3 of 1952, D/- 22-7-1952.

Madhya Bharat Essential Supplies (Temporary Powers) Act, (S. 2006), S. 11 — "Report in writing of the facts in constituting such offence" — (Criminal P. C., (1898), S. 537).

The sine qua non is a report in substantial compliance with requirements of S. 11. Absence of objection goes to the root of the case and can be taken at any stage of the case. It cannot clearly be cured under S. 537, Criminal P. C., which applies to mere errors of procedure and not to substantive errors of law affecting the jurisdiction of the Court to take cognizance of an offence. Case Law Rel. on. (Paras 5, 6, 8)

Anno: Cr. P. C., S. 537, N. 6, 10.

Patankar, for applicant; Mungre, Govt. Advocate, for the State.

#### CASES CITED:

- (A) ('44) AIR 1944 Bom 139: 45 Cri LJ 691
- (B) ('44) AIR 1944 Bom 247: 46 Cri LJ 354
- (C) ('46) AIR 1946 All 416: 47 Cri LJ 876
- (D) ('49) 1949 GWL 66
- (E) ('49) AIR 1949 Oudh 66: 50 Cri LJ 469

ORDER: The applicant Kanhaiya Lal is being prosecuted in the Court of the Sub-Divisional Magistrate Susner for having contravened the provisions of the Madhya Bharat Cotton Textile Control Order of 1948 by selling on 13-1-51, 1½ yard cloth to one Nanda in excess of the control price. Soon after the charge was framed, the applicant objected to his trial for the offence on the ground that the police charge sheet on the basis of which the Magistrate took cognizance of the offence is not a report by a public servant and is, therefore, not in compliance with S. 11, Essential Civil Supplies Act, 1946 under which Act the Cotton Textile Control Order was made. The objection was rejected by the trial Magistrate. The applicant then preferred a revision petition to the Sessions Judge of Shajapur raising the additional contention that the report did not contain the facts constituting the offence alleged against him and was, therefore, not in substantial compliance with the requirements of S. 11, Essential Supplies Act. The learned Sessions Judge rejected the revision petition. The petitioner has now come up in revision to this Court.

(2) Mr. Patankar, the learned Counsel appearing on behalf of the petitioner, did not dispute before me the fact that the Sub-Inspector who filed before the Magistrate the Charge-sheet against the applicant is a public servant and the charge-sheet against the accused is a report by a public servant as required by S. 11, Essential Supplies Act. The only point pressed before me on behalf of the applicant is that there was no jurisdiction in the Magistrate to try the petitioner because the charge-sheet filed by the Sub-Inspector did not contain a report of the facts constituting the offence, but only mentioned the bare fact that the applicant had sold in "black market" 1½ yards of cloth to Nanda and had thus committed an offence under S. 8, Madhya Bharat Essential Supplies (Temporary Powers) Act of Samvat 2006. It was argued that this charge-sheet was not in compliance with S. 11 and the Magistrate could not take cognizance of the offence on this report. In support of this contention, learned counsel cited before me — 'Jayantilal

Jagjivan v. Emperor', AIR 1944 Bom 139 (A) and — Purushottam Devji v. Emperor', AIR 1944 Bom 247 (B); — 'N. G. Chatterji v. Emperor', AIR 1946 All 416 (C); 1949 Gwl. 66 (D).

(3) On behalf of the State, Mr. Mungre contended that the accused raised no objection before the Magistrate as to the charge-sheet being defective on account of the omission therein of the facts constituting offence with which the applicant was charged; that this point was raised in the Sessions Court for the first time; and that therefore, the applicant cannot be allowed to question the validity of the charge-sheet in this Court. It was further submitted that S. 11, Essential Supplies Act was directory only, and that an omission to satisfy its provisions could not affect the jurisdiction of the Court. The learned Government Advocate sought to distinguish the cases relied on by the learned counsel for the petitioner by saying that they related to R. 130 (1), Defence of India Rules which spoke of a report of the facts constituting a contravention of the Defence of India Rules and not of a report of the facts constituting an offence, as S. 11, Essential Supplies Act does. It was said that there is a difference between a "report of the facts constituting an offence" and a "report of the facts constituting a contravention of Rules" such as the Defence of India Rules. It was further maintained that the charge-sheet against the applicant contains a statement of facts constituting the offence alleged against the applicant.

(4) In my opinion, the contention of the learned counsel for the applicant is well-founded. Section 11, Essential Supplies Act is as follows:

"No Court shall take cognizance of any offence punishable under this Act except on a report in writing of the facts constituting such offence made by a person who is a public servant as defined in S. 21 of the Indian Penal Code."

(5) It is obvious that a Magistrate cannot take cognizance of any offence under the Act if there is before him a report which does not contain the facts constituting the offence alleged or if the report whether complete or incomplete in the facts, is by a person who is not a public servant. The object of this section is to protect persons from being needlessly harassed by rash, baseless or vexatious prosecutions at the instance of private individuals. For taking cognizance of any offence punishable under the Act, the 'sine qua non' is a report in substantial compliance with the requirements of S. 11 of the Act. It would be observed that S. 11 of the Act uses the expression a "report in writing of the facts constituting such offence" and not the expression a "report of such offence". The report must state facts which constitute the offence. This is a requisite of fundamental importance. Mere assertion that an offence under certain section has been committed is only a report of the offence and cannot be regarded as compliance with the letter or spirit of S. 11 of the Act. In the present case on 13-1-51 one Hazarat Shah sent a slip to the Sub-Inspector Police stating merely "Maine kapadeka blek pakada hai Aap fouran aye." On the basis of this slip, the police took up the investigation and then on 16-2-51 presented a charge-sheet against the applicant. In col. 7 of the charge-sheet, it was stated:

"Is abhiyogaka sankashipta wiwarana yah hai ki Hajarat Shah putra Chhotekhan wilayati niwasi Zedawadne tehriri report kee ki muljim Kanhaiyalal putra Hiralal Mahajan niwasi Nalkhedase sawa gaj kapda lathha blek marketse Nanda putra Mera chamar niwasi Namukhediko becha tha. Mukaddama kayam hokar anusandhan kiya gaya."



Anusandhanki pragatise abhiyukta Kanhaiyalalke wiruddha aparadha dhara 4 Awashyak Padartha Ashaya Widnan Samvat 2006 sabit hai.

Atayewa Kanhailal abhiyukta Swikrut aropa paura number 6:51 dwara prastut hai."

(6) In other columns, the names of the accused and witnesses are given. It will be seen that this charge-sheet does not give the facts constituting the offence alleged to have been committed by the applicant. The first part of the statement of facts contained in col. 7 only refers to the report made by Hazarat Shah to the Sub-Inspector that Kanhaiya Lal had sold 1½ yards of cloth in 'black market' to Nanda. The other portion of the statement only says that after investigation the offence against the accused was found established. The concrete facts which constituted the alleged offence have not been mentioned anywhere in the charge-sheet. The assertion that the applicant sold a piece of cloth in 'black market' to Nanda and the police found the offence established after investigation gives no idea, whatsoever, of the specific acts done by the accused and as to the manner in which they constitute the offence. If the facts constituting the offence are not before the Magistrate, then he is clearly not in a position to apply his mind to the suspected commission of the offence and to take the decision whether he should take judicial notice of the offence. In my opinion, the charge-sheet presented against the applicant does not at all fulfil the requirements of S. 11, Essential Supplies Act and on this charge-sheet, the Magistrate had no power to take cognizance of the offence. The whole of the proceedings are, therefore, without jurisdiction and must be regarded as invalid.

(7) This view is supported by the authorities cited before me by the learned counsel for the applicant. In 'AIR 1944 Bom 247 (B)', the question was whether a charge-sheet by the police against the accused person was in compliance with the provisions of R. 130, Defence of India Rules which provided that

"no Court shall take cognizance of any alleged contravention of these Rules except on a report in writing of the facts constituting such contravention made by a public servant."

In that case, cognizance had been taken upon submission of a charge-sheet in which it was stated that the accused persons were being prosecuted for exporting Toor. The charge-sheet did not contain the facts constituting the contravention. Nor did it mention that the offence committed was of the contravention of the Bombay Retail Trade and Licensing Order. The Bombay High Court held that the charge-sheet did not comply with the provisions of R. 130, Defence of India Rules inasmuch as it did not contain the facts constituting such contravention, & therefore, the Court could not properly take cognizance of the offence charged.

To the same effect are the decisions reported in 'AIR 1944 Bom 139 (A)'; 'AIR 1946 All 416 (C)' and — 'Rachpal Singh v. Rex', AIR 1949 Oudh 66 (E). These decisions stress the point that the jurisdiction of a Court taking cognizance of an offence of contravention of the Defence of India Rules depends upon a report made by a public officer in which the facts constituting such contravention are stated. These decisions, no doubt, dealt with the question of a report in accordance with Rule 130 of the Defence of India Rules. But the principle laid down in these cases is applicable with equal force while considering the question of a report in accordance with S. 11, Essential Sup-

plies Act. I do not think that the distinction drawn by the learned Government Advocate between the language of R. 130, Defence of India Rules and that of S. 11, Essential Supplies Act, is a valid one. If the contravention of rule is an offence, then, there is clearly no difference in the meaning of the expression "a report of the facts constituting an offence" and the expression "a report of the facts constituting a contravention of the rule."

(8) The other objection of the learned Government Advocate may be disposed of by saying that the objection raised by the applicant touches the jurisdiction of the Court. It is one which goes to the root of the case and can be taken at any stage of the case. It is one which if upheld vitiates the entire proceedings. That being so, it cannot clearly be cured under S. 537, Criminal P. C. which applies to more errors of procedure and not to substantive errors of law affecting the jurisdiction of the Court to take cognizance of an offence.

(9) For the above reasons, this petition is accepted and the proceedings held by the Magistrate are quashed.

C/D.H.

Revision allowed.

#### A. I. R. 1953 M. B. 244 (Vol. 40, C. N. 92) (GWALIOR BENCH)

DIXIT AND CHATURVEDI JJ.

State v. Gangaram and another, Respondents.  
Criminal Appeal No. 97 of 1951, D/- 14-11-52.

(a) Essential Supplies (Temporary Powers) Act (1946), S. 7 — Proof — (Evidence Act (1872), S. 78).

Sale of cloth above maximum controlled price — Notification of Textile Commissioner issued under Madhya Bharat Textile Control Order fixing maximum price of cloth in question not produced and proved — Accused cannot be convicted under S. 7 — Cri. Appeal No. 37 of 1951 (MB), AIR 1953 Madh B 30 and AIR 1953 Madh B 84, Ref. (Para 3)

(b) Essential Supplies (Temporary Powers) Act (1946), S. 7 — Vicarious liability.

Sale of cloth above controlled price by munim in shop — Owner absent from shop — Owner of shop cannot be held vicariously liable for act of his servant. (Para 3)

Mungre, Govt. Advocate, for the State; Patankar and Anand, for Respondents.

#### CASES CITED:

- (A) ('51) Cri. Appeal No. 37 of 1951 (Madh B)
- (B) ('53) AIR 1953 Madh B 30: 1953 Cri LJ 240: (Cri. A. No. 47 of 1951)
- (C) ('53) AIR 1953 Madh B 84: 1953 Cri LJ 605: (Cri. Revn. No. 1 of 1952)

JUDGMENT: This is an appeal by the State from the decision of the City Magistrate Lashkar acquitting the respondents of a charge under S. 7 (1), Essential Supplies (Temporary Powers) Act 1946.

(2) The charge against the respondent was that on 20-3-51 they sold to one Mohan Lal some cloth in excess of the control price and thus contravened the provisions of the Madhya Bharat Cotton Control Order, 1948, issued under the Essential Supplies (Temporary Powers) Act, 1946.



(3) At the hearing of this appeal, the learned Government Advocate rightly and frankly conceded that in view of the decisions of this Court in — 'The State v. Bachchu Lal', Cri. Appeal No. 37 of 1951 (A); in — 'State v. Brijlal Dhodi', AIR 1953 Madh B 30 (B) and in — 'Panna Lal v. The State', AIR 1953 Madh B 84 (C) he is unable to support the appeal as the notification of the Textile Commissioner issued under the Madhya Bharat Textile Control Order fixing the maximum price of cloth alleged to have been sold was not produced and proved and further that inasmuch at the time of the alleged sale Ganga Ram Saboo was not present at the shop, he could not be held to be vicariously liable for the act of his Munim Kishan Lal.

(4) The appeal is, therefore, dismissed.  
C/K.S. Appeal dismissed.

**A. I. R. 1953 M. B. 245 (Vol. 40, C. N. 93)**  
**(GWALIOR BENCH)**  
**FULL BENCH**

SHINDE C. J., DIXIT AND CHATURVEDI JJ.  
Malojirao Shitole, Petitioner v. C. G. Matkar, and another, Opponents.

Civil Misc. Appln. No. 5 of 1953, D/- 19-3-53.

(a) **Constitution of India, Art. 215 — Exercise of jurisdiction — (Contempt of Courts Act (1926), S. 1).**

The jurisdiction in respect of contempt proceedings should be exercised only when the case is clear and beyond reasonable doubt. The petitioner is not entitled to invoke this special jurisdiction for a decision on the important and complicated collateral question as to when a certain notification became operative: Case law discussed. (Paras 4, 5)

Anno: C. C. Act, S. 1 N. 2.

(b) **General Clauses Act (1897), S. 5 (3) — Applicability to notifications.**

Section 5 (3) only applies to the construction of Acts and Regulations and is not made applicable to any notification that may be issued under an Act. (Para 4)

(c) **Civil P. C. (1908), O. 39, R. 1; O. 41, R. 5 — Effect of application and notice to opposite party.**

The presentation of an application for stay or for a temporary injunction and the giving of the notice of the same to the opposite party itself does not operate as a stay order or a temporary injunction till the hearing of the application. (Para 6)

Anno: C.P.C., O. 39, R. 1 N. 2; O. 41 R. 5 N. 2.

(d) **Constitution of India, Art. 215 — Contempt, what constitutes — (Contempt of Courts Act (1926), S. 1).**

In the absence of any interim prohibitory order from the court, or of an undertaking by a party, it is not contempt for the party to do any act resulting in some proceedings pending before the court being rendered infructuous. A party should not anticipate order of the court even in his legitimate actions: 1941 Rang LR 747, Rel. on. (Para 6)

Anno: C. C. Act, S. 1 N. 3.

(e) **Constitution of India, Art. 215 — Considerations of propriety — (Contempt of Courts Act (1926), S. 1).**

On considerations of propriety, the jurisdiction of the High Court to commit for contempt cannot be exercised. (Para 6)

Anno: C. C. Act, S. 1 N. 3.

(f) **Constitution of India, Art. 215 — Contempt of Court, what constitutes — (Contempt of Courts Act (1926), S. 1).**

High Court dismissing application for prohibitory order against Government on ground of want of jurisdiction — Government issuing required notification pending such application — Issue of notification held caused no real prejudice to applicant — No substantial interference with due course of justice — Theoretical consideration of High Court taking different view was not sufficient to constitute notification contempt of Court. AIR 1931 Cal 257, Rel. on. (Para 6)

Anno: C. C. Act, S. 1 N. 3.

P. R. Das, Advocate, Supreme Court, for Petitioner.

#### CASES CITED:

- (A) (1808) 15 Ves Jun 248: 33 ER 748
- (B) (1895) 64 LJQB 694: (1895) 2 QB 264
- (C) (1870) 39 LJ Ex 189: 18 WR 982
- (D) (1895) 54 LJ Ch 720: 29 Ch D 204
- (E) (1895) 64 LJQB 200: 1895-1 QB 378
- (F) ('41) 1941 Rang LR 747
- (G) ('31) AIR 1931 Cal 257: 58 Cal 884: 32 Cri LJ 675

DIXIT J.: By this application, the petitioner prays for the issue of a rule against the non-applicants for having committed contempt of this Court by issuing a notification No. 66 dated 4-12-1952, published in the Extra-ordinary Gazette of 4-12-1952 appointing 4-12-1952 as the date of resumption of all Jagir lands in the State of Madhya Bharat under S. 3 (1) of the Madhya Bharat Abolition of Jagirs Act, 1951 and directing that "on and from the above date of resumption" all Jagir lands mentioned in the schedule annexed to the notification shall stand resumed to the State.

(2) The background of this application, briefly stated is that sometime in December 1951 the petitioner and other persons filed applications under Art. 226 of the Constitution of India challenging the validity of the Madhya Bharat Abolition of Jagirs Act (Act No. 28 of 1951). On the admission of those applications, this Court issued an order on 7-12-1951 restraining the State from giving effect to or acting in any manner by virtue of or under the Act, till the disposal of those petitions. The petitions were decided on 4-12-1952. It was held by this Court that the Act with the exception of certain provisions of Sch. 1 of the Act was valid. The petitioner was also granted leave to appeal to the Supreme Court. The order of this Court disposing of the applications under Art. 226 was pronounced at about 11.30 a.m. on 4-12-1952. Immediately afterwards an application was presented to this Court on behalf of the petitioner praying that the status quo be maintained and the State be prohibited from issuing any notification under S. 3 (1) of the Act till the disposal of the appeal which the petitioner proposed to file in the Supreme Court or at least till such time within which the petitioner could obtain an order of injunction from the Supreme Court.

The Advocate-General who was present in the Court at the time of the presentation of the said application, took notice of it. In order to enable the learned Advocate-General to reply to the appli-



cation, we directed that the petition would be heard later in the day at 2.30 p.m. During the interval between the presentation of the application praying for a prohibitory order, and its hearing the Government issued the notification referred to above. The application for a temporary prohibitory order was dismissed by us on the ground that we had no jurisdiction to grant the order after the disposal of the applications under Art. 226. We also observed that the petition praying for an order restraining the Government from issuing any notification, under S. 3 (1) of the Act, had become infructuous as the Government had already issued the notification. The petitioner now complains that the issue of the notification constitutes a contempt of this Court.

(3) Learned counsel for the petitioner firstly urged that the notification in question would in law be deemed to have come into force from the midnight of 3-12-1952 and that as during the midnight of 3-12-1952 and the pronouncement of this Court's order on 4-12-1952 at about 11.30 a.m., the prohibitory order made by this Court in 1951 was operative, the issue of the notification constituted a breach of the order issued by this Court restraining the State from issuing any notification under S. 3 (1) of the Act till the disposal of the application under Art. 226. It was secondly urged that by issuing the notification the opponents 'tied down' the hands of this Court and interfered with the freedom of this Court in passing appropriate orders on the application made after the disposal of the petitions under Art. 226 for a temporary order restraining the State from issuing any notification under S. 3 (1) of the Act.

(4) On giving my careful and prolonged consideration to the contentions advanced on behalf of the petitioner, I have come to the conclusion that this application must be rejected. The contention that inasmuch as the notification issued on 4-12-1952 would be deemed to have become operative from the midnight of 3rd December, it constitutes a breach of the prohibitory order of this Court which was then in force, is easily disposed of, if the terms of the prohibitory orders are borne in mind. By the order dated 7-12-1951 this Court directed the Government to forbear only until the disposal of the application under Art. 226 from giving effect to or acting in any manner by virtue of or under the Madhya Bharat Abolition of Jagirs Act. The order did not prohibit the Government from exercising its powers under the Act after the disposal of the applications under Art. 226 and from issuing a notification having such legal effect as has been attributed by the learned counsel to the notification of 4th December. Therefore, I am at a loss to understand how the notification in question amounts to a disobedience of the prohibitory order of 7-12-1951. Even if the prohibitory order of 7-12-1951 is read as preventing the Government from issuing after the disposal of the applications under Art. 226, a notification resuming Jagirs from the midnight of 3-12-1952, learned counsel must show that the notification of 4-12-1952 has clearly that effect and there has been a wilful breach of the prohibitory order. It is well settled that the jurisdiction in respect of contempt proceedings should be exercised with scrupulous care and only when the case is clear and beyond reasonable doubt.

Learned counsel for the applicant took it for granted that the proposition that the notification issued on 4-12-1952 became operative from the midnight of 3-12-1952 was plain beyond argument. In my opinion the question is not free from doubt

or difficulty. The rule laid down in S. 5 (3) of the General Clauses Act 1897 does not afford much help as it only applies to the construction of Acts and Regulations and is not made applicable to any notification that may be issued under an Act. The question as to when the notification in question can be said to have come into force has to be decided on the general principles. The notification in question no doubt appoints 4-12-1952 as the date of resumption of all Jagir lands and says "on and from the above date of resumption" all Jagir lands mentioned in the schedule shall stand resumed to the State. But there has been a great diversity of opinion as regards the legal effect of the use of the words "on and from" and the word "from" with reference to the computation of time and as to whether it must be treated as inclusive or exclusive of a terminus a quo. Some of the earlier English cases attempted to lay down hard and fast rules on the point. But later on, it was realised that no universal rule could be laid down on the question as to whether in computing time from an act or event, the first day, that is, the day on which the act was done was included or excluded.

In — 'Lester v. Garland', (1808) 33 ER 748 (A), Sir William Grant M. R. on a consideration of various earlier authorities observed as follows:

"It is not necessary to lay down any general rule upon this subject; but upon technical reasoning I rather think it would be more easy to maintain that the day of an act done or an event happening ought in all cases to be excluded than it should in all cases be included. Our law rejects fractions of a day more generally than the civil law does. The effect is to render it a sort of indivisible point so that any act done in the compass of it is no more referable to any one, than to any other portion of it, but the act and the day are co-extensive; and therefore the act cannot properly be said to be passed until the day is passed. But it is not necessary to lay down any general rule; whichever way it should be laid down, cases would occur, the reason of which would require exceptions to be made."

(5) Again in — 're North; Ex parte Hasluck', (1895) 2 QB 264 (B), Smith L. J. said that "in the reckoning of time each case must depend on its own circumstances and subject matter". To the same effect are the observations of Kelly C. B. in — 'Isaacs v. Royal Insurance Co.', (1870) 18 W R 982 (C) and of Chitty J. in — 'Railway Sleepers Supply Co., In re', (1895) 29 Ch D 204 (D). In Stroud's Judicial Dictionary, it is said that "from" is akin to "after" and when used with reference to computation of time, for example, from a stated day *prima facie* excludes the day of the date. There is also authority to say that the words "from" and "on and from" have the same meaning. (See — 'Sidebotham v. Holland', (1895) 1 QB 378 (E)). My object in referring to those various authorities is only to show that the question whether the day on which the notification was issued is to be included or excluded and whether the notification became operative at midnight of the 3rd December 1952 does not admit of a clear and easy answer, and that being so, the petitioner cannot say that there is a clear case of wilful disobedience for this Court to exercise the Extraordinary jurisdiction that it possesses in matters of contempt. The petitioner is not entitled to invoke this special jurisdiction of the High Court by way of proceedings for contempt of court for a decision on the important and complicated collateral question as to when the notification became operative.



(6) The petitioner's contention that the act of the Government in issuing the notification after receiving a notice of the petitioner's application praying for a prohibitory order and before its hearing amounts to a contempt of court, involves the assumption that the presentation of an application for stay or for a temporary injunction and the giving of the notice of the same to the opposite party itself operates as a stay order or a temporary injunction till the hearing of the application. I know of no authority for any such assumption. No doubt by the issue of the notification the petitioner's application for a prohibitory order was rendered infructuous. But to say that even in the absence of any interim prohibitory order from the Court, or of an undertaking by a party, it is not (sic) contempt for the party to do any act resulting in some proceedings pending before the Court being rendered infructuous and that if he does, then the act amounts to an interference with the course of justice, is to assert the proposition that a party should anticipate orders of this Court even in his legitimate actions. Such a proposition appears to me wholly unwarranted. No authority was cited by learned counsel for the petitioner in support of his contention. But I think it is relevant here to refer to a decision of the Rangoon High Court in — 'S. P. L. P. Narayanan Chettyar v. Doraikkannu', 1941 Rang LR 747 (F), which dealt with a problem somewhat similar to the one before us. In that case the Court came to a decision to appoint a receiver but did not name any officer or individual as receiver. In the meantime a party who was aware of the Court's decision to appoint a receiver collected and disbursed moneys which it was intended the receiver should collect and disburse, and thus rendered the appointment of a Receiver ineffective to a certain extent. Thereafter, contempt proceedings were instituted against the party collecting the rent.

It was held by the Rangoon High Court that for a party bound by a judgment to do anything which would make that judgment ineffective, was not in itself a contempt of court and, therefore, the act of the person, who was a party to the proceedings and who knew of the decision of the Court to appoint a receiver, in collecting and disbursing moneys did not amount to a contempt of court. The same principle applies here 'a fortiori'. Learned counsel for the petitioner characterised the action of the Government in issuing the notification as one done in "ugly haste". The action of the Government may be undignified, ill-advised, ill-considered and done in an indecent hurry. But on such considerations of propriety the jurisdiction of this Court to commit for contempt cannot be exercised. It must be remembered that the application for the grant of an order restraining the State from issuing any notification under S. 3 (1) of the Act was dismissed by us also on the ground that we had no jurisdiction to make any such order after the disposal of the petitions under Art. 226. It cannot, therefore, be maintained that the issue of the notification by the Government caused a real prejudice to the applicant and thus there was a substantial interference with the due course of justice. The fact that if a different view had been taken by the Court on the question of jurisdiction, then the Court would have found itself hampered by the notification in issuing the prohibitory order prayed for and that the notification, therefore, theoretically tendered to interfere with the administration of justice is not, in my opinion, sufficient to hold that the issue of the notification constitutes such a contempt as this court would

be justified in dealing with summarily in the exercise of its jurisdiction in contempt. As was said by Rankin C. J. in — 'Anantalal v. A. H. Watson', AIR 1931 Cal 257 (G):

"The Court's jurisdiction in contempt is not to be invoked unless there is real prejudice which can be regarded as a substantial interference with the due course of justice. It is not every theoretical tendency that will attract the action of the Court in its very special jurisdiction. The purpose of the Court's action is a practical purpose, and it is reasonably clear, on the authorities, that this court will not exercise its jurisdiction upon a mere question of propriety."

(7) It has been stated in para. 13 of the petition that the Government conceived of the idea of issuing the notification long before the delivery of the order of this Court disposing of the petitions under Art. 226 and accordingly set its machinery in motion to prepare the matter for exercising the power under S. 3 of the Act and the date of the notification was "wrongly given as 4-12-1952". I do not see anything wrong in a party keeping himself in readiness, with an intelligent anticipation of the Court's order, to take a particular action. The petitioner does not allege that the notification bearing the date 4-12-1952 was actually issued and published before the delivery of this Court's order with regard to the petitioners under Art. 226. The petitioner also complains in para. 16 that the Government have by issuing a press communique attempted to nullify the Supreme Court's order restraining the State from proceeding further under the Act. As to this, it is sufficient to say that the petitioner should address the complaint to the Supreme Court and not to this Court.

(8) For the above reasons, I am of the opinion that this application should be dismissed.

(9) SHINDE C. J.: I agree.

(10) CHATURVEDI J.: I concur.

A/D.H.Z.

Application dismissed.

A. I. R. 1953 M. B. 247 (Vol. 40, C. N. 94)  
(INDORE BENCH)

NEWASKAR J.

Dr. B. R. Choudhary, Applicant v. P. V. Bhagwat, Opponent.

Small Cause Revn. No. 25 of 1951, D/- 24-3-1953.

(a) Evidence Act (1872), Ss. 101 to 103 — Suit for rent — Part of sum claimed relating to dues in respect of electric charges — Defendant denying existence of liability — It is for plaintiff to prove by tangible evidence how sum was made up.  
(Para 5)

Anno: Evidence Act, Ss. 101 to 103 N. 37.

(b) Civil P. C. (1908), O. 38, R. 5 — Sufficiency of grounds.

The question of reasonability or justifiability of apprehension in the mind of the plaintiff regarding the fact that his dues might remain unpaid or his justifiability of his being nervous about their recovery are not factors which should weigh in determining the fact whether the attachment before judgment was applied for on sufficient grounds. The sufficiency of grounds will have to be determined with reference to the legal requirements under O. 38, R. 5.

Anno: C. P. C., O. 38, R. 5 N. 11.  
(Para 6)



†(c) Civil P. C. (1908), S. 95(1)(a) — Attachment applied for on insufficient grounds.

Where the defendant whose property is attached before judgment furnishes security and gets the property released but before the removal of attachment protests that the attachment was on insufficient grounds, he is entitled to claim compensation. AIR 1942 All 261, Distinguished.

(Para 8)

Anno: C. P. C., S. 95 N. 4.

†(d) Civil P. C. (1908), S. 95(1) — Compensation for injury. 164 Ind Cas 73 (Cal), Dis-sented from.

General damages or compensation for injury on account of pain, suffering, humiliation etc., can be awarded under S. 95. AIR 1940 Mad 77, Rel. on. (Paras 10 and 12) Anno: C. P. C., S. 95 N. 7 Pts. 2 and 3.

S. L. Dube, for Applicant; D. G. Bhalerao, for Opponent.

#### CASES CITED :

(A) ('42) AIR 1942 All 261: ILR (1942) All 360

(B) ('36) 39 Cal WN 915: 164 Ind Cas 73

(C) ('40) AIR 1940 Mad 77: 189 Ind Cas 887

(D) ('83-86) 5 WR 91: 10 Moo Ind App 563 (PC)

ORDER: This is a petition for revision filed by the defendant-petitioner against the decree of Small Cause Judge, Indore. Plaintiff P. V. Bhagwat filed a suit on 12-12-1949 for recovery of Rs. 259/2/6 in respect of arrears of rent, electric and water charges due from the defendant on account of the leased premises in the possession of the defendant. The claim 'inter alia' consisted of Rs. 4-15-0 as balance due in respect of dues of June 1949 and Rs. 2-9-0 as balance of dues of July 1949. Along with the plaint the plaintiff submitted an application for attachment before judgment supported by an affidavit. Both the application & the affidavit were based on the allegations that the defendant had closed his business of medical practice, he was a resident of other State, and the defendant himself had stated that he would sell away his truck. There were further allegations that all this, probably meant closing of business and intended disposal of truck, was meant for defeating the plaintiff's claim. An order for attachment was passed ex parte on this application and the affidavit of the plaintiff and defendant's property consisting of furniture and type-writer was attached.

The defendant thereupon appeared the next day and submitted an application complaining that the attachment was secured by misrepresentation and he offered to furnish security and prayed for its release. The security bond was furnished. This was accepted on reference to the plaintiff's counsel on 13-12-1949. The property however was delivered back to the defendant on 29-12-1949. In pursuance of notice to show cause why the order for attachment before judgment or for security be not made absolute the defendant submitted a reply denying substantially the allegations as regards the stoppage of business of medical practice, his being a resident of outside Madhya Bharat and his intended sale of the truck. He also claimed compensation for the wrongful attachment.

(2) The defendant denied the items of Rs. 4-15-0 and Rs. 2-9-0 in respect of the dues for the month of June and July 1949. The rest of the claim was admitted omitting a small item of As. 7/- for notice charges which were disallowed.

(3) The trial Court decreed the claim of the plaintiff even in respect of the items of Rs. 4-15-0 and Rs. 2-9-0. It further held, while considering the question regarding the grant of compensation to the defendant for the alleged wrongful attachment that there were reasonable grounds for apprehending for the plaintiff that the defendant would leave this place, thereby defeating his claim of arrears of rent. He further held that the defendant had not proved any special pecuniary injury. Therefore relying on — 'Gyan Prakash v. Kishorilal', AIR 1942 All 261 (A) and — 'Chandulal Seraogi v. Purna Chandra', 164 Ind Cas 73 (Cal) (B) he disallowed the claim for compensation. The defendant has now come up in revision.

(4) Mr. Dubey who appears for the petitioner has urged firstly that the finding of the Court below regarding the liability of the defendant for the items of Rs. 4-15-0 and Rs. 2-9-0 is not legal. Secondly, it is contended that the decision on the question of award of compensation under S. 95, Civil P. C. has resulted in failure of justice.

(5) As regards the first point I am inclined to hold, on the materials as they stand that the view of the lower Court is not legally supportable. The defendant had denied these items for the months of June and July 1949. In his statement on oath he denied existence of any liability in respect of any period prior to August 1949. The plaintiff therefore ought to have shown by tangible evidence how the sum was made up. The sum did not relate to an admitted monthly liability for rent but to the dues in respect of electric charges as will appear from plaintiff's notice Ex. P/1. It was for the plaintiff therefore to prove this part of the case.

The trial Court holds that the plaintiff had demanded these items by notice Ex. P/1 to which no objection was raised by a reply to that effect. It was further said that according to plaintiff, receipts for rent paid, to be paid and the balances were mentioned in the original receipts and as original receipts are not produced plaintiff would be held entitled to these sums. I am afraid this course is not permissible. Receipts Ex. P/7 and P/8 which purport to be duplicates of the original receipts are not proved to have been delivered to the defendant. A question was put to the defendant to the effect that the duplicates bore the receipts of his son which he did not admit. In his examination-in-chief plaintiff leaves these items sublimely vague. The decision therefore on these points of the lower Court cannot stand. These items are disallowed.

(6) As regards the other point the finding of the Court below is that it was natural for the plaintiff to apprehend from the circumstances of the defendant closing his place of business of medical practice, by pledging his truck and irregularity in payment of rent, that the defendant might leave this State suddenly without satisfying his dues and the mere fact that he possessed considerable valuable furniture was not enough for him as the same was liable to be disposed of any moment. It was further observed that the defendant had expressed before Mr. Pande that as his business did not flourish in Indore he might go elsewhere and this was sufficient to unsettle the plaintiff's mind. For these grounds, he holds that the attachment was obtained on sufficient grounds.

In my opinion this is far from correct. The entire approach to the question by the trial Court is erroneous. The question of reasonability or justifiability of apprehension in the mind of the plaintiff regarding the fact that his dues might



remain unpaid or his justifiability of his being nervous about their recovery are not factors which should weigh in determining the fact whether the attachment before judgment was applied for on sufficient grounds. The sufficiency of grounds will have to be determined with reference to the legal requirements under O. 38, R. 5, Civil P. C. for obtaining attachment before judgment and a finding whether they have been complied with or not.

(7) Neither the statement of plaintiff nor that of Pushpasheelrao Pande are enough to satisfy the Court that the order for attachment before judgment was obtained on sufficient grounds. The contents of the application for the purpose of the affidavit do not in any way improve the matter. There is hardly any material worth the name to establish that the defendant was about to dispose of the whole or any part of his property or was about to remove the whole or any part of his property from the local limits of jurisdiction of the Court of Small Causes, Indore, with intent to obstruct or delay the execution of any decree that may be passed against him.

(8) Mr. Bhalerao for the plaintiff contended that since the defendant furnished security and attachment was therefore withdrawn he cannot claim compensation and in support cited — 'AIR 1942 All 261 (A)'. But in the Allahabad case the defendant did not appear and show cause why the attachment should not be made. On the other hand, he paid the amount in suit and at a later stage applied under S. 95, Civil P. C. when the entire amount in suit was paid in Court. This is not the case here. The defendant appeared before the removal of attachment and protested that the attachment was on insufficient ground. No doubt the attachment was withdrawn on his furnishing security but the matter did not end there and the question with regard to validity of attachment continued to be the only material and vital issue on which parties came to grips. They led evidence and the Court gave a finding that the attachment was justifiable.

It cannot, in this case, therefore, be urged that the attachment was taken lying down and later after the Court had become 'functus officio' or in a subsequent suit the matter is sought to be agitated without an adjudication having been pressed for at an earlier stage. It would be strange result if the view were to prevail that no compensation would be claimable in case the defendant whose property is conditionally attached objects to the validity of attachment but furnishes security and gets his property released. This would mean that a person in order to claim compensation must suffer the inconvenience of allowing his goods to remain under attachment until the question of sufficiency of grounds for the attachment is determined and an order for vacating the attachment on that ground is obtained.

(9) The next point decided by the trial Court and pressed on behalf of the plaintiff before me is that no compensation would be claimable under S. 95, Civil P. C., in the absence of proof of special damages thereby meaning that the actual pecuniary loss resulting from wrongful attachment ought to be proved and that no compensation for loss of reputation or mental pain and suffering can be claimed. Reliance is placed on the cases reported in — 'AIR 1942 All 261 (A)' and — '164 Ind Cas 73 (Cal) (B)'. In the former case this point is not decided the case turning on another point which is discussed above. The latter seems to support this view. There are authorities which take a contrary view such as — 'Palanisami Goundar v. Kaliappa Goundar', AIR 1940 Mad 77 (C).

(10) Viewing the matter on the wording of S. 95, Civil P. C., the question would be whether the word injury would cover the cases of pecuniary loss or would also include other kind of injury such as one contemplated for the award of general damages. In my opinion there is nothing to limit the meaning of the word injury to actual pecuniary loss. On the other hand the use of the words "expenses or injury" would indicate actual pecuniary loss suffered as also other kind of injury in respect of which compensation can be awarded. In many cases such injury may be quite as substantial as actual pecuniary loss.

(11) In — 'Mudhun Mohan Doss v. Gokul Doss', 10 Moo Ind App 563 (D), their Lordships considered the question whether general damages apart from actual pecuniary loss can be awarded for wrongful attachment and it was held that the same were claimable. Their Lordships held:

"The principle ordinarily applied to actions of tort is, that the plaintiff is never precluded from recovering ordinary damages by reason of his failing to prove the special damage he has laid, unless the special damage is the gist of the action. Thus, in an action of slander of words actionable 'per se', when the plaintiff lays special damages, and fails to prove it, he is nevertheless entitled to such damages as the jury think right to give him. It would be otherwise if the words were not actionable 'per se'. In the present case, the gist of the action is not the special damage, but the unlawful attachment; and the plaintiff would not have been precluded from recovering ordinary damages for that actionable wrong, even if he had wholly failed to prove the special damage laid."

There is no reason why the principle underlying this view cannot be applicable to the case under consideration.

(12) I therefore hold that general damages or compensation for injury on account of pain, suffering, humiliation etc. can be awarded under Section 95, Civil P. C.

(13) In this case I consider Rs. 50/- as the sum that should be awarded on this account to the defendant.

(14) The result is that the revision is allowed. Plaintiff's claim in respect of the two items of Rs. 4-15-0 and Rs. 2-9-0 is reduced. The decree of the lower Court is modified in that respect. The defendant is awarded Rs. 50/- as compensation under S. 95, Civil P. C.

(15) The petitioner is awarded costs of this revision petition. The costs in the trial Court will be according to the success or failure of the parties.

A/V.R.B.

Revision allowed.

**A. I. R. 1953 M. B. 249 (Vol. 40, C. N. 95)**  
**DIXIT AND CHATURVEDI JJ.**

Lalaram Surajmal, Appellant v. The State.  
Criminal Appeal No. 102 of 1951, D/- 4-12-1952.

**(a) Criminal trial — Benefit of doubt.**

The principle of giving benefit of doubt to the accused operates only in those cases where there is prima facie satisfactory and extremely evenly balanced evidence on either side and the conduct of the accused is consistent with his guilt as well as innocence. Where the evidence led against the accused persons is rejected as utterly untrustworthy, there is no ques-



tion of giving the accused persons any benefit of doubt. In such circumstances, the accused is acquitted not because there is any doubt about his guilt, but because there is no evidence even *prima facie* to indicate his guilt. (Para 8)

(b) Evidence Act (1872), S. 1 — “*Falsus in uno falsus in omnibus*” — (Criminal Trial — Witness) — (Maxims).

The maxim ‘*falsus in uno falsus in omnibus*’ is not applicable to India where codified rules of evidence exist and it is open to a Court to accept a part of the evidence of a witness while rejecting the rest of it. But the principles on which the Court so acts is not that though a witness has deliberately made some false statement, he may yet be considered to be a truthful witness as regards some other statements. The Court, however, acts on the principle that certain statements of such a witness being corroborated by the probabilities of the case and other reliable evidence appear to be true and should, therefore, be accepted. AIR 1936 All 747, Ref. (Para 9)

Anno: Evidence Act, S. 1 N. 9.

(c) Evidence Act (1872), S. 1 — False statement by witness — (Criminal Trial — Witness).

Where a witness is shown to have made deliberately false statements, he is *prima facie* utterly unreliable and there is no guarantee of the truth of any statements made by such a witness. (Para 9)

Anno: Evidence Act, S. 1 N. 9.

(d) Evidence Act (1872), S. 32 (1) — First information by person who is dead — (Criminal P. C. (1898), S. 154).

A first information report made by a person in the case is admissible as substantive evidence under S. 32 (1) if he dies before the matter comes before the Court. AIR 1927 Cal 17; AIR 1943 Cal 74; AIR 1930 Lah 450, Ref. (Para 11)

Anno: Evi. Act, S. 32 N. 2; Cr. P. C., S. 154 N. 10 Pt. 2.

(e) Evidence Act (1872), S. 32 (1) — Value of dying declaration.

If a portion of a dying declaration is untrue, the rest of it cannot necessarily be rejected. However, if a part of such statement is shown to have been concocted deliberately, the Court may decline to believe the rest of it without corroboration. AIR 1936 Cal 793; AIR 1946 Nag 301, Ref. (Para 11)

Anno: Evidence Act, S. 32 N. 9.

Dey and J. P. Gupta, for Appellant; Mungre, Govt. Advocate, for the State.

#### CASES CITED:

- (A) ('50) AIR 1950 All 355: 51 Cri LJ 993
- (B) ('36) AIR 1936 All 747: 37 Cri LJ 1104
- (C) ('27) AIR 1927 Cal 17: 54 Cal 237: 28 Cri LJ 99
- (D) ('43) AIR 1943 Cal 74: 44 Cri LJ 322
- (E) ('30) AIR 1930 Lah 450: 31 Cri LJ 475
- (F) ('36) AIR 1936 Cal 793: ILR (1937) 1 Cal 475: 38 Cri LJ 243
- (G) ('46) AIR 1946 Nag 301: 47 Cri LJ 625

DIXIT J.: The appellant Lalaram and his brother Karansingh were tried by the Sessions Judge of Morena for an offence under S. 302 read with S. 34, Penal Code for the murder of

one Jalim. At the end of the trial, the learned Sessions Judge acquitted Karansingh giving him the benefit of doubt. But agreeing with the opinion of the assessors, he found the appellant Lalaram guilty under S. 302, Penal Code and sentenced him to transportation for life. Lalaram has now appealed to this Court against the conviction and the sentence.

(2) The prosecution case was that the appellant Lalaram was a servant of Sukhpal Singh, the zamindar of Kodaira, Madhopur and other villages and that in that capacity Lalaram used to take forced labour from the villagers and also recover from them illegal exactions. As a result of these acts of Lalaram, the villagers were displeased with him and persuaded him to give up the service of the zamindar. The prosecution alleged that the conduct of Sukhpal Singh the Zamindar and of his servant Lalaram was stoutly opposed by the deceased Jalim who constituted himself as a leader of the villagers and who was a close relation of the appellant. When the appellant Lalaram refused to leave the service of the zamindar, the villagers did not permit Lalaram to share with them the benefit of a patta in respect of certain lands in the zamindari of Sukhpal Singh which the villagers had obtained from the Collectorate. The prosecution alleged that on account of these reasons the relations between Lalaram and Jalim became strained and that on the evening of 8-5-51 at about 8 p.m. when Jalim was returning from the village-well with some water, the appellant Lalaram and his brother Karansingh assaulted Jalim with a sword and a farasha and inflicted on him severe injuries. It was said that Lalaram had a sword with him and Karansingh carried a farasha. The prosecution stated that Mst. Ram Devi a daughter of Jalim was with him at the time of the alleged occurrence and that when she shouted the prosecution witnesses Man Singh son of Hargyansingh P. W. 1, Sardar Singh P. W. 2, Har Prasad P. W. 6 came to the scene and witnessed the occurrence and that thereafter the accused persons ran away from the scene. The first information report was lodged by Jalim himself the same night at 2-30 in the morning in the police Station Jaora. In this report Jalim stated that there was some litigation between him and the accused persons and that earlier in the night at about 8 p. m. when he had gone to the village-well to fetch water, the accused gave him sword-blows and caused him severe injuries; that he was picked up by his cousin Mansingh and his nephew Sardar Singh and that the occurrence was witnessed by all the men and women-folk of the village. In the body of the first information report the accused persons have not been named. But in the column above it, the names of Lalaram and Karan Singh were entered as the accused persons. Jalim was then removed to the hospital for treatment. He, however, died on the afternoon on 9-5-51. A post mortem examination of the body of Jalim was held by Dr. Londhe, the medical Officer of Jaura. The doctor found multiple wounds and fractures on the body of Jalim and came to the conclusion that his death was due to these injuries. A few hours before the death of Jalim, his dying declaration was recorded at about 4-30 a. m. in the morning of 9-5-51 by Mr. Apte, the Sub-Divisional Magistrate of Jaura. In this statement Jalim said that on the previous evening, when he was bringing water and was near a chabutra Karan



Singh and one Lalai met him on the way, and then Lalai struck him with a sword and Karan Singh also gave him a lathi blow; and that at that time, no one was present but later on Man Singh and Sardar Singh came to the scene. Jalim also added in the statement that his ring was removed.

(3) The appellant Lalaram was arrested on 24-5-51. He denied having given any sword blows to Jalim. He pleaded alibi:

(4) At the trial, the evidence against Lalaram and his brother Karan Singh consisted of (1) the depositions of Man Singh P. W. 1, Sardar Singh P. W. 2, Har Prasad P. W. 5 and Mst. Ram Devi P. W. 6 who claimed to have seen the appellant and Karan Singh give blows to Jalim with a sword and a farasha (2) the dying declaration Ex. P. 2 of Jalim recorded by Mr. Apte and the report of the incident lodged with the police by Jalim himself.

(5) The deposition of Mst. Ram Devi is that she had gone with her father to the well to bring some water and when they were returning, Lalaram and his brother Karan Singh met them on the way; Lalaram who carried a sword stood on one side of Jalim and Karan Singh who had a farasha with him was on the other side of Jalim and both of them dealt several blows to Jalim and that when she shouted, Man Singh, Har Prasad and Sardar Singh who were in their homes closeby arrived on the scene. The witnesses Man Singh, Har Prasad and Sardar Singh said in their evidence that on hearing the cries of Jalim and Mst. Ram Devi, they ran to the scene of the occurrence and found that Lalaram and Karansingh were striking Jalim with a sword and a farasha respectively. None of these witnesses deposed to the precise part of Jalim's body where the blows were struck by each of the accused persons. All that they say is that Lalaram gave three blows and Karan Singh likewise gave two or three blows. All these witnesses were confronted with the statements they had made to the police in which they had omitted to mention the facts that Karan Singh was also present; that he carried a farasha with him and that he also assaulted Jalim. The explanation they gave before the learned Sessions Judge, as regards these omissions was one of simple denial that what the police recorded was not what they had told to the police. The learned Sessions Judge disbelieved the statements of these witnesses against Karan Singh. He, however, came to the conclusion that there was no reason to reject the statements of these witnesses showing the complicity of the appellant Lala Ram in the crime. The learned Sessions Judge, therefore, relying on the evidence of Man Singh, Sardar Singh, Har Prasad and Ram Devi and on the dying declaration Ex. P. 2 of the deceased found the appellant guilty of the murder of Jalim.

(6) Mr. Dey learned counsel for the appellant contended that the learned Sessions Judge having found that the statements of the alleged eye-witnesses as regards Karan Singh were not true, was not justified in regarding them as trustworthy witnesses against the appellant Lalaram; that according to Ex. P. 2 the dying declaration of Jalim, these witnesses were not present at the time of the alleged occurrence. As regards the dying declaration itself, it was said that inasmuch as the learned Sessions Judge had found the statements therein as regards Karan Singh as not true it should be

rejected in toto and that in any case there was nothing to indicate that the person Lalai named in the dying declaration as the person who gave sword blows was no other than the appellant Lalaram. Learned Counsel for the appellant also argued on the basis of — '*Har Chando v. Rex*', A I R 1950 All 355 (A) that as the prosecution put forward a definite story that the appellant Lalaram and his brother Karan Singh both assaulted Jalim with a sword and a farasha, on the acquittal of Karan Singh the prosecution cannot urge for a conviction of the appellant Lalaram for the murder of Jalim on a supposition that all the injuries received by Jalim were inflicted by him i.e. by Lalaram and that as the prosecution evidence does not disclose at all which of the injuries received by Jalim were inflicted by Lalaram, he cannot be convicted even for causing hurt to Jalim.

(7) On a consideration of the evidence on record and the contentions of the learned counsel for the appellant and of the learned Govt. Advocate for the State, I am inclined to think that the contentions advanced on behalf of the appellant are well founded and must be accepted.

(8) Dealing first, with the testimony of the alleged eye-witnesses Man Singh, Har Prasad, Sardar Singh and Mst. Ram Debi, it is clear from the judgment of the learned Sessions Judge that he has found their statements implicating Karan Singh as definitely false on the ground that the witnesses had omitted to say anything about Karan Singh in their statements before the police and had not given any satisfactory explanation of the omission. At one place the learned Sessions Judge observes that the evidence of these witnesses is altogether suspicious. Later on he has said that the statement of Sardar Singh and Har Prasad that Karan Singh attacked Jalim with a farasha is clearly false and added as an afterthought. The learned Sessions Judge says "Karan Singh ne Jalim ko farase se marane ka waka sarasar galat bataur after thought badhya hua hai." In regard to Mst. Ram Debi and Har Prasad, the learned Sessions Judge has also said that these witnesses are 'tutored' witnesses. From these remarks of the learned Sessions Judge, it is plain that he was in no doubt as to the fact that all these witnesses had made false statements as regards Karan Singh. It is no doubt true that while acquitting Karan Singh the learned Sessions Judge has said that Karan Singh should be given the benefit of doubt. But I fail to understand how when the learned Sessions Judge rejected the evidence of eye-witnesses against Karan Singh as demonstrably false and acquitted Karan Singh on the ground that there was no evidence against him, the acquittal of Karan Singh could be described as one resting on the principle of giving benefit of doubt to the accused. To my mind, the principle of giving benefit of doubt to the accused person operates only in those cases where there is prima facie satisfactory and extremely evenly balanced evidence on either side and the conduct of the accused is consistent with his guilt as well as innocence. Where the evidence led against the accused persons is rejected as utterly untrustworthy, there is no question of giving the accused persons any benefit of doubt. In such circumstances, the accused is acquitted not because there is any doubt



about his guilt, but because there is no evidence even *prima facie* to indicate his guilt.

The learned Sessions Judge was, therefore, not accurate when he described the case of Karan Singh as one of giving benefit of doubt to the accused.

(9) In accepting the evidence of the eye-witnesses against the appellant Lalaram, the learned Sessions Judge has been guided by the consideration that the maxim '*falsus in uno falsus in omnibus*' is not applicable and that the evidence of a witness who has made an untrue statement in some respect can be accepted as regards rest of what he states and that there is no valid ground for discarding the statement of the eye-witnesses that Lalaram gave sword blows to Jalim. In my opinion, the learned Sessions Judge was not right in accepting the evidence of Man Singh, Harprasad, Sardar Singh and Mst. Ram Devi as the basis of the appellant's conviction. It is true that the maxim quoted above is not applicable to India where codified rules of evidence exist and it is open to a Court to accept a part of the evidence of a witness while rejecting the rest of it. But the principle on which the Court so acts is not that though a witness has deliberately made some false statement, he may yet be considered to be a truthful witness as regards some other statements. The Court, however, acts on the principle that certain statements of such a witness being corroborated by the probabilities of the case and other reliable evidence appear to be true and should, therefore, be accepted. A Court may again consider a part of the evidence of a witness to be not free from doubt and may think it unsafe to rely on it. But the rejection of such a statement of a witness does not necessarily destroy the value of his other statements. Where, however, a witness is shown to have made deliberately false statements, there can be no doubt that he is *prima facie* utterly unreliable and there can be no guarantee of the truth of any statements made by such a witness. The circumstances, in which a Court accepts one part of the evidence of a witness while rejecting the other have been indicated in a decision of the Allahabad High Court in — '*Ashiq Ali v. Emperor*', AIR 1936 All 747 (B). It has been pointed out in that case that evidence which is merely unconvincing or doubtful does not stand on the same footing as regards perjured evidence and that here the Court considers one part of the evidence of a witness to be not free from doubt, it may well refuse to act upon it without destroying the value of the rest of it, as in doing so all that the Court implies is that it is not safe to accept it.

(10) In the present case the learned Sessions Judge has found the evidence of Man Singh, Har Prasad, Sardar Singh and Mst. Ram Devi implicating Karan Singh as tutored and false. These witnesses have not deposed to the details of the blows, inflicted by the accused persons. They have only stated in a general way that Lalaram gave two or three blows and Karan Singh gave two or three blows. Again, according to the dying declaration Ex. P. 2 it would appear that these witnesses did not actually see the assault, but came on the scene afterwards. In Ex. P. 2 Jalim stated that when he was assaulted, nobody was present and that Man Singh and Sardar Singh came afterwards. It is also remarkable that Jalim makes no mention in Ex. P. 2 of the presence of Ram

Debi who deposed that she had accompanied Jalim to the well and also returned with him. I find it difficult to believe that if Mst. Ram Debi had really accompanied her father to the well and was with him at the time of the assault, Jalim would have omitted to state specifically that she was present at the time of the assault. The prosecution also admit that there was considerable illfeeling between the villagers and the appellant Lalaram. Having regard to all these circumstances, there can be no guarantee of the truth of the statements of these witnesses implicating even the appellant, Lalaram. For all we know the witnesses might have falsely implicated the appellant Lalaram, like his brother Karan Singh. In my view, it would be very unsafe to found the conviction of the appellant Lala Ram on the evidence of such witnesses.

(11) Coming now to the evidence of the dying declaration of Jalim, it must first be stated that in this case there are two dying declarations of Jalim. The first information report which Jalim himself made in the case is admissible as substantive evidence under S. 32(1) of the Evidence Act as Jalim died before the matter came before the Court. See — '*Azimaddy v. Emperor*', AIR 1927 Cal 17 (C); — '*Emperor v. Mohammad Sheik*', AIR 1943 Cal 74 (D); — '*Kapur Singh v. Emperor*', AIR 1930 Lah 450 (E). The other dying declaration is Ex. P. 2 which was recorded on the morning of 9-5-51. There are serious discrepancies between the first information report and the dying declaration Ex. P. 2. In the first information report, it was mentioned by Jalim that both the accused persons attacked him with swords and that the incident was witnessed by all the villagers. Before the Magistrate, Jalim said that one person named Lalai gave him sword blows and Karan Singh hit him with a Lathi and that at that time no body was present. The learned Sessions Judge has not accepted the dying declaration in so far as it implicates Karan Singh. Now, it is no doubt true that if a portion of a dying declaration is untrue, the rest of it cannot necessarily be rejected. As pointed out in — '*Naimuddin Biswas v. Emperor*', AIR 1936 Cal 793 (F) as also in — '*Provincial Govt., C.P. and Berar v. Jagan Bhat Sitaram*', AIR 1946 Nag 301 (G) dying declaration cannot be discarded as a whole merely because some portions of it are untrue and it is always a question of fact as to whether a dying declaration should be relied upon or not, and if a part of such statement is shown to have been concocted deliberately, the Court would decline to believe the rest of it without corroboration. I am of opinion that the dying declaration of Jalim ought not to be acted upon for finding the appellant Lalaram guilty of the murder of Jalim, when there is no corroborative evidence and when there are signs of attempt to improve and develop the prosecution evidence at successive stages. In fact the statement of Jalim in Ex. P. 2 that one 'Lalai' struck him with a sword is hardly of any value against the appellant Lalaram. This statement does not necessarily indicate that this Lalai was no other than the appellant Lalaram. The learned Magistrate who recorded the dying declaration Ex. P. 2 did not ask Jalim as to who this 'Lalai' was. The Magistrate should have questioned Jalim so as to elicit from him a clear and unambiguous statement as to the identity of his assailant. As



it is the dying declaration Ex. P. 2 does not directly indicate the appellant. It cannot be regarded as one referring to the appellant Lalaram as there is no evidence to show that the appellant is known by the name of Lalai also and as the learned Sessions Judge has not questioned the appellant about his aliases. The report made by Jalim to the police in which he accused the appellant of striking him with a sword has also very little evidential value in the present case. From the deposition of Kamta Prasad P. W. 4 the Head Constable who took down the report, it is clear that the report is not the 'ipsissima verba' of Jalim but only a substance of the answers which Jalim gave to the various questions put to him by the Head Constable. Kamta Prasad said that some fifteen persons brought Jalim on a cot to the police station and that when he questioned Jalim for taking down the report, some of his answers were not intelligible to him. There is thus considerable room for doubting whether the report made by Jalim him by the persons who brought him to the police station, answers hinted by leading questions put to him by the Head Constable and inferences drawn by the Head Constable. These circumstances cannot be ignored in determining the value to be attached to the report of Jalim to the Police. In order to enable the Court to understand what the person making the declaration meant, it is essential that the declaration should be taken down in the exact words of the person making it. Where as in the present case it is impossible to discover how much of the report made to the police by the deceased was suggested by the persons who accompanied the deceased to the police station and by the questions put by the Constable taking down the report and how much was the production of the deceased himself, no weight can be attached to the dying declaration contained in the report. For all these reasons I do not feel that in this case the first information report by the deceased Jalim or his subsequent dying declaration Ex. P. 2 can be taken as one on which full and implicit reliance can safely be placed.

(12) In the view I take of the evidence on record, it becomes unnecessary to consider the contention of Mr. Dey that on the acquittal of Karan Singh, the appellant Lalaram cannot be found guilty of the offence of murder and even of causing any hurt. The argument is based on the decision of the Allahabad High Court in AIR 1950 All 355 (A). The point raised by the learned Counsel is no doubt very important. But the difficulty I feel in the consideration of the question in the present case is that the learned Sessions Judge while acquitting Karan Singh has not given any finding as to whether the assault on Jalim was the act of more than one person in furtherance of common intention or whether it was the appellant Lalaram alone who inflicted all the injuries found on the body of the deceased. Before proceeding to find the appellant guilty under S. 302, Penal Code the learned Sessions Judge should have given clear findings as to whether the appellant Lalaram was constructively or individually liable for the murder of Jalim. The learned Sessions Judge did not take the trouble of summoning before him Dr. Londhe who conducted the post mortem examination and ascertaining from him whether the injuries found on the body of Jalim were all sword in-

juries, and if not, which of the injuries were sword injuries and whether the sword injuries were fatal in themselves. The evidence as it is, does not, in my opinion, establish either the common intention required by S. 34, Penal Code or the injury or injuries actually inflicted by the appellant. In these circumstances, I do not think it would be proper for me to consider the correctness or the applicability to the present case of the decision of the Allahabad High Court cited by the learned Counsel for the appellant.

(13) In my opinion, the prosecution evidence is untrustworthy and it would not be safe to hold the appellant guilty of the offence of the murder of Jalim on such evidence. I would, therefore, accept this appeal and acquit the appellant Lalaram of the charge of murder.

(14) CHATURVEDI J.: I agree.

B/V.S.B.

Accused acquitted.

A. I. R. 1953 M. B. 253 (Vol. 40, C. N. 96)  
(GWALIOR BENCH)

DIXIT J.

Gordhan Das Dwarkadas, Applicant v. Phool Chand Chandmal, Respondent.

Civil Revn. No. 34 of 1952, D/- 15-12-1952.

**Houses and Rents — M. B. Sthan Niyantran Vidhan (15 of 1950), S. 7(2) — Notice under.**

The object of the legislature in requiring a notice under S. 7(2) should be given to the other party, is to afford the opponent an opportunity to reconsider his position with regard to the claim made and to settle the claim if so advised without recourse to the trouble and costs of proceedings before the Rent Controller. Where the proceedings for the fixation of the rent have already been initiated by one party after giving notice to the other, there is no question of further notice being given by the opponent to the initiator of the proceedings, of his reply claiming a fixation of the rent after a reduction or enhancement, as the case may be, in the rent.

(Para 2)

Motilal Gupta, for Non-Applicant; Diwan, for Applicant.

**ORDER:** This revision petition arises out of proceedings for the fixation of rent under 'the Madhya Bharat Sthan Niyantran Vidhan, 1950.' The facts are that on 31-5-51 Gordhan Das presented an application under S. 7(4) of the Act before the Rent Controller for the fixation of rent payable by his tenant Phool Chand alleging that the agreed rent was inadequate. On 27-7-51, the tenant put in his objections to the enhancement of the rent and also prayed that the rent be reduced as it was excessive. The tenant described his objections as a cross-suit for the fixation of the proper rent. Thereafter, the applicant landlord raised an objection that the tenant's cross-suit was not maintainable as he had failed to give to the landlord a notice under S. 7(2) of the Act of his intention to commence proceedings before the Rent Controller for the fixation of the rent. The Rent Controller accepted the objection of the landlord and held that the tenant's claim for a reduction in the rent was not maintainable as the requisite notice of the claim



had not been given to the landlord under S. 7(2). Phool Chand then appealed to the Court of the District Judge, Gwalior from the order of the Rent Controller. The learned District Judge set aside the order of the Rent Controller and directed him to entertain the tenant's claim as regards the reduction of the rent.

(2) After hearing Mr. Diwan, the learned counsel for the applicant, I think there is no force in this revision petition. Mr. Diwan's contention is that the tenant's cross-suit is not maintainable because under S. 7(2) of the Act, if a tenant desires that the rent should be reduced, he must move the Rent Controller for the fixation of the rent after giving a notice to the landlord. It is no doubt, true that if the landlord claims that the rent should be enhanced or the tenant claims that it should be reduced, the landlord or the tenant, as the case may be, has to move the Rent Controller for the fixation of rent after giving a notice in writing to the other party. But it is clear from the wording of cl. (2) of S. 7 that the notice referred to therein is for the purpose of the commencement of the proceedings before the Rent Controller for the fixation of the rent. Where the proceedings for the fixation of the rent have already been initiated by one party after giving notice to the other, there is no question of further notice being given by the opponent to the initiator of the proceedings, of his reply claiming a fixation of the rent after a reduction or enhancement, as the case may be, in the rent. It must be noticed that the object of the legislature in requiring a notice under sub-s. (2) of S. 7 should be given to the other party is to afford the opponent an opportunity to reconsider his position with regard to the claim made and to settle the claim if so advised without recourse to the trouble and costs of proceedings before the Rent Controller. If therefore, where a landlord has already commenced proceedings for the fixation of the rent after alleging that the rent being paid to him is inadequate there is hardly any point in requiring the tenant to give a notice to the landlord, of his claim in reply that the rent should be one lower than what is being actually paid by him.

(3) Likewise, it is meaningless to require a landlord to give a notice of his claim for enhancement of the rent where a tenant has already initiated proceedings for the fixation of the rent after alleging that the rent being paid by him is excessive. It must be noted that the proceedings before the Rent Controller under Ss. 7 and 9 of the Act are primarily for the fixation of the 'proper rent' and not for the enhancement or reduction of the rent payable by the tenant to the landlord. In determining what is a proper rent in proceedings initiated by the landlord, the Rent Controller is not debarred from reducing the rent being paid by the tenant. So also when the proceedings for the fixation of rent have been commenced by the tenant, the Rent Controller can come to the conclusion that the proper rent would be one higher than that actually being paid by the tenant. To accept the contention of the learned counsel for the applicant that in the present case the tenant's claim in reply for a reduction in the rent is not maintainable as he has failed to give a notice of the same to the landlord, would be to hold in effect that in a claim by the landlord for the fixation of the rent, the Rent Controller has no jurisdic-

tion to reduce it and that similarly in a claim by the tenant the Rent Controller can only reduce the rent and not enhance it and that the proceedings for the enhancement or the reduction of it are independent proceedings and not integral parts of proceedings for the fixation of proper rent. These conclusions are not warranted by the language of section 7 of the Act.

(4) For these reasons and without expressing any opinion on the question whether the notice under S. 7(2) is the foundation of the jurisdiction of the Rent Controller, I would uphold the order of the District Judge, Gwalior and dismiss this revision petition with costs.

B/H.G.P.

Revision dismissed.

**A. I. R. 1953 M. B. 254 (Vol. 40, C. N. 97)  
(INDORE BENCH)**

SHINDE C. J.

Purshottam Vijaya and others, Applicants v. Dilipsinghi and another, Opponents.

Criminal Ref. No. 143 of 1951, D/- 6-8-1952.

(a) **Criminal P. C. (1898), Ss. 247, 259 — Appearance of complainant.**

Appearance of the complainant contemplated both under Ss. 259 and 247 is personal appearance. The presence of the complainant's pleader is not enough to avoid the consequence specified under both these sections. AIR 1936 All 658 and AIR 1926 Mad 1009, Ref. (Para 2)

Anno: Cr. P. C., S. 247 N. 5 Pt. 1; S. 259 N. 4.

(b) **Constitution of India, Art. 362 — Nature and enforceability of Art. 13, of the Covenants of Madhya Bharat Rulers — (Interpretation of Statutes — (Civil P. C. (1908) Pre.) — (Covenants of Madhya Bharat Rulers, Art. 13).**

The covenant is an agreement between the rulers of Gwalior, Indore and certain other States in Central India. The Government of India gave its concurrence and guarantee to this Covenant. But this Covenant is only an agreement and not a statute. AIR 1952 Madh-B 57 (FB), Rel. on.

The function of the Judiciary is to interpret the law and to enforce the due observance of it. Unless and until, therefore, the agreement is elevated to the status of law by the legislature Courts cannot enforce the observance of it.

(Para 4)

Anno: C. P. C., Pre. N. 7.

†(c) **Constitution of India, Art. 362 — Exemption from personal appearance as complainant of Ruler of Sailana State — (Covenants of Madhya Bharat Rulers, Art. 13) — Criminal P. C. (1898), Ss. 197-A, 259.**

In pursuance of the power given by Art. 362, Parliament incorporated S. 197A in the Criminal Procedure Code by which the prosecution of rulers of former Indian States is inhibited except with the previous sanction of the Central Government. By the same section provisions of sub-s. (2) of S. 197 are also made applicable to the Rulers of former Indian States. But no other privilege has been provided for by legislation. It follows, therefore, that the privilege of exemption from personal attendance in Court as a complainant has



not been provided for by the law. No such exemption, therefore, can be legally granted to the Ruler of Sailana State even assuming that he enjoyed the privilege of exemption from personal attendance in Courts outside Sailana State even as a complainant. (Para 4)

Anno: Cr. P. C., S. 259 N. 5.

Dubey, for Applicants Nos. 1, 2 and 3; D. P. Bhargava, for Potdar; Karanjkar, for Opponent No. 1; Govt. Advocate present.

#### CASES CITED :

- (A) ('36) AIR 1936 All 658: 37 Cri LJ 1028
- (B) ('26) AIR 1926 Mad 1009: 27 Cri LJ 988
- (C) ('52) AIR 1952 Madh-B 57: ILR (1952) Madh-B 178 (FB)

**ORDER:** This is a reference by the Sessions Judge, Indore under S. 438, Criminal P. C. The short facts which have given rise to this reference are as follows: His Highness the Raja of Sailana Shree Dilipsinghji filed a complaint under S. 500, Penal Code, against Shree Motilal Potdar, Shree Purshottam Vijaya, Shree Krishnakant Vyas and Shree C. M. Shah in the Court of the Additional District Magistrate, Indore. Along with the complaint Shree Dilipsinghji also filed an application stating that the complainant was the ruling chief of Sailana State before the merger of the State into Madhya Bharat, and as such his privileges have been guaranteed under Art. 13 of the Covenant; the complainant therefore should be exempted from personal attendance in Court. This application was granted by the Court 'ex parte'. On 14-7-1951 the accused as summoned presented themselves in Court. Purshottam Vijaya accused 2 submitted an application and contended that according to law the claim of the complainant for exemption from personal appearance cannot be accepted. The learned Additional District Magistrate heard the arguments of both the parties and held that the contention raised on behalf of Purshottam Vijaya could not be upheld. Against that order the accused filed a revision before the Sessions Judge, Indore who being of the opinion that the order of the learned Magistrate was illegal has made this reference.

(2) Before proceeding to determine the question whether the complainant is entitled to the privilege of exemption from personal attendance in Court it is necessary to examine the position of law in respect of attendance in general. Under S. 259, Criminal P. C. it is specifically laid down that when the proceedings have been instituted upon complaint and upon any day fixed for the hearing of the case the complainant is absent, the Magistrate may, in his discretion discharge the accused at any time before the charge has been framed provided the offence is compoundable or is non-cognizable. In summons cases S. 247, Criminal P. C. provides that when summons has been issued on complaint, and upon the day appointed for the appearance of the accused, the complainant does not appear the Magistrate shall acquit the accused, unless for some reason he thinks proper to adjourn the hearing. Appearance of the complainant contemplated both under Ss. 259 and 247 is personal appearance. The presence of the complainant's pleader is not enough to avoid the consequences specified under both these sections vide — 'Piraglal v. Rustamsingh', AIR 1926 All 658 (A) and — 'Tonkya v. Jagannatha',

AIR 1926 Mad 1009 (B). Section 198, Criminal P. C. lays down that no Court shall take cognizance of an offence falling under Chap. 19 or Chap. 21, Penal Code or under Ss. 493 to 496 of the same Code except upon a complaint made by some person aggrieved by such offence. The said section makes exception only in the case of pardanashin women and persons under the age of 18 years and persons who are lunatic or idiots or who are from sickness or infirmity unable to make a complaint. The complaint filed in this case is under Chap. 21, Penal Code. Consequently the complaint must be filed by a person aggrieved by such offence, unless the person is covered by any of the exceptions given in section 198. All these sections point only to one conclusion and that is that the complainant must be present in Court in person.

(3) The complainant in his application dated 31-1-1951 states that under Art. 13 of the Covenant all his privileges as a ruler have been safeguarded and consequently he should be given an exemption from personal attendance in Court. Article 13 itself does not specify what privileges have been guaranteed under the said Article. Article 13 of the Covenant reads as follows:

"The Ruler of each covenanting State, as also the members of his family, shall be entitled to all the personal privileges, dignities and titles enjoyed by them, whether within or outside the territories of the State, immediately before the 15th day of August, 1947."

The Article only states in general that the rulers and the members of their family shall be entitled to all the personal privileges, dignities and titles enjoyed by them whether within or without the territories of their respective States immediately before the 15th day of August, 1947. There must be, therefore, some evidence to show what personal privileges the complainant enjoyed both within and without the territory of Sailana State. No evidence was produced by the complainant before the arguments of the parties were heard. It appears from the record that the arguments were heard on 23-7-1951. On 31-7-1951 one Madanlal filed an affidavit stating that he was a Shirstedar of the Diwan of Sailana and afterwards household officer and that in Sailana State His Highness was exempted from personal attendance in Court. It does not appear that an opportunity was given to the opposite party to produce any evidence, in rebuttal. Yet the learned Magistrate relied upon the affidavit in passing the order. This course followed by the learned Magistrate was improper. However, the affidavit only states that the complainant had a personal privilege of exemption from personal attendance in all the Courts in Sailana. Madanlal who was only a household officer is not likely to know the exact nature of the privileges enjoyed by the complainant. Even if it be conceded that he had this knowledge, he only states that the complainant had this privilege in the Courts of Sailana State. There is no evidence to show that even as a complainant the ruler of Sailana had the privilege of exemption from personal attendance in Court. In any case there is no evidence to support his claim for exemption outside Sailana State.

(4) Even if it be postulated that the Ruler of Sailana enjoyed the privilege of exemption from personal attendance in Courts outside



Sailana State even as a complainant, we have to see if such a privilege can be claimed now. Article 13 of the Covenant safeguards the privileges enjoyed by the rulers before 15-8-1947. The Covenant is an agreement between the rulers of Gwalior, Indore and certain other States in Central India. The Government of India gave its concurrence and guarantee to this Covenant. But this Covenant is only an agreement and not a statute. In — 'Shree Ram Dube v. the State', AIR 1952 Madh B 57 (FB) (C), Dixit J. at page 76 observed as follows:

"The Covenant is not a statute. It is as its name implies a compact between the signatories to the Covenant, the object of which is to secure the welfare of the people of the region by the establishment of a new State comprising the territories of the Covenantee States with a common Executive, Legislature and Judiciary."

Consequently unless this agreement is cloaked in the garb of law by the legislature it cannot be given effect to. The function of the Judiciary is to interpret the law and to enforce the due observance of it. Unless and until, therefore, the agreement is elevated to the status of law by the legislature Courts cannot enforce the observance of it. With a view to give effect to this agreement the framers of the constitution included Art. 362 in the Constitution. Article 362 lays down as follows:

"In the exercise of the power of Parliament or of the Legislature of a State to make laws or in the exercise of the executive power of the Union or of a State, due regard shall be had to the guarantee or assurance given under any such Covenant or agreement as is referred to in clause (1) of Art. 291 with respect to the personal rights, privileges and dignities of the Ruler of an Indian State."

In pursuance of the power given by Art. 362 Parliament incorporated S. 197(a) in the Criminal Procedure Code. By this section the prosecution of rulers of former Indian States is inhibited except with the previous sanction of the Central Government. By the same section provisions of sub-s. (2) of S. 197 are also made applicable to the Rulers of former Indian States. But no other privileges has been provided for by legislation. It follows, therefore, that the privilege of exemption from personal attendance in Court as a complainant, has not been provided for by the law. No such exemption, therefore, can be legally granted to the complainant. In my judgment, therefore, the order of the learned Additional District Magistrate was clearly wrong.

(5) I, therefore, accept the reference and set aside the order of exemption from personal attendance granted to the complainant by the trial Court.

A/D.R.R.

Reference accepted.

A. I. R. 1953 M. B. 256 (Vol. 40, C. N. 98)  
(GWALIOR BENCH)

CHATURVEDI J.

Bhagirath Singh, Applicant v. Parmai and others, Opponents.

Criminal Reference No. 30 of 1952, D/- 8-1-53.

Criminal P. C. (1898), S. 250—Applicability.

Section does not apply to proceedings under S. 107 — Compensation cannot be ordered against person who petitions under that section because person against whom action is sought is not accused of any offence. Case law referred to. (Para 1)  
Anno: Cr. P. C., S. 250 N. 1.

Dy. Govt Advocate and Kalare, for Applicant.

#### CASES CITED.

- (A) ('10) 7 Ind Cas 290: 7 All LJ 743
- (B) ('93) 1893 All WN 114: 15 All 365
- (C) ('01) 2 Bom LR 339: 25 Bom 48
- (D) ('23) AIR 1923 All 332 (1): 45 All 363: 24 Cri LJ 228
- (E) ('24) AIR 1924 All 269: 46 All 109: 25 Cri LJ 750
- (F) ('27) AIR 1927 All 531: 49 All 750: 28 Cri LJ 604
- (G) ('35) AIR 1935 Lah 29: 1935 Cr C 20

ORDER: This is a reference by the learned Sessions Judge of Bhind recommending the cancellation of an order passed under S. 250, Cr. P. C. by a Second Class Magistrate of Lahar. The order was passed in proceedings under S. 107, Cr. P. C. The complainant had made an application to the Magistrate asking him to order Parmai and three others to furnish security to keep peace. A date was fixed for taking evidence, but on that date the complainant adduced no evidence, and, the Magistrate dismissed the application & ordered the complainant to pay costs to the four persons regarding them as accused. The wording of S. 250 is clear that an order for compensation can be made only in cases instituted by a 'complaint' as defined in the Code or upon information by a Police Officer to a Magistrate, where a person is accused of an offence triable by a Magistrate. A 'complaint' means an allegation made to a Magistrate with a view to his taking action that some person has committed an offence, and an 'offence' means any act or omission punishable by any law for the time being in force. In view of the definition of the word "offence" in the Code, it is clear that a person in respect of whom information has been laid before a Magistrate to the effect that he is likely to commit a breach of the peace or is otherwise liable to the provisions of S. 107 of the Code is not a person accused of any offence. Therefore an order for payment of compensation cannot be made against a man, who has petitioned a Magistrate to take action under S. 107 of the Code. Section 250 therefore cannot be applied to the proceedings under S. 107 of the Code. I am fortified in this view by many rulings reported in — Ram Sukh Rai v. Mahadeo Rai, 7 All LJ 743 (A); — 'Queen Empress v. Lakhpat', 15 All 365 (B); — 'In re Govind Hanmant', 25 Bom 48 (C); — 'Ram Badan Singh v. Janaki', AIR 1923 All 332 (1) (D); — 'Ghariba v. Emperor', AIR 1924 All 269 (E); — 'Bajinath v. Kalicharan', AIR 1927 All 531 (F) and — 'Rohel v. Kaura', AIR 1935 Lah 29 (G). I therefore accept the reference on this point and set aside the order of compensation. The amount if paid will be refunded.

C/M.K.S.

Reference accepted.



A.I.R. 1953 MADH.-B. 257 (Vol. 40, C.N. 99)

(GWALIOR BENCH)

(FULL BENCH)

SHINDE C. J., DIXIT AND NEWASKAR JJ.

Madhaorao Ramrao and others, Applicants v. State of Madhya Bharat.

Civil Misc. Cases Nos. 11 to 21 of 1952, D/-1-9-1953.

(a) Constitution of India, Art. 295(1) — Obligation to maintain irregular forces i.e., Shiledars of erstwhile Scindia State, if it at all constitutes a statutory right of the shiledars, rests, in view of the correspondence between the Union and the State of Madhya Bharat, on the State of Madhya Bharat and not upon the Union. (Paras 15, 16)

(b) Constitution of India, Arts. 31, 19 and 226 — "Property" — Payments made to irregular forces (Shiledars, etc.) by Scindias, are not property — Nature of payment — Govt. of Madhya Bharat can stop these payments — No infringement of fundamental right — No writ can issue — (Interpretation of Statutes — Orders having force of law and merely administrative orders — Distinction) — (Civil P. C. (1908), Preamble).

Held after considering the scheme of the Shiledari Service (Irregular Forces of the Scindia State), and the Orders of the Maharaja of Scindia, namely "Kalambandi Intijam Mahaleme Irregular Behede Shiledari, Smt. 1969 (1912 A.D.) and the subsequent similar Kalambandi of Smt. 1991 (1934 A.D.) issued by the last ruler, and the Notification, dated 31-3-1929 issued by Army Headquarters, in pursuance of the resolution by the Council of Regency, that the payments made to the Shiledars were made for service only and they were no hereditary grants as such. The mere hereditary character exhibited in the enlistment of the new cadets could not mean that it was property belonging to the particular Shiledar or Ekkans. Provision for payment of the maintenance allowance to widow or minor children of the deceased Shiledar did not necessarily mean that there was any proprietary interest in the deceased Shiledar as regards the payments which he used to receive. This could only be regarded as compassionate allowance. Consequently, the payments made to these Shiledars did not constitute property belonging to them whether the same be, as Bachat holders, Headquarter Shiledars or Ekkans. The provisions in the two Kalambandis were in the nature of recognition schemes of administrative nature and did not involve conferment of or recognition of a statutory right. These payments could not also be classed as hereditary grants burdened with services. The stoppage of these payments or some of them by the executive order did not involve infringement of their fundamental right and the Headquarters Shiledars, the Shiledars, and Ekkans were not entitled to seek redress through any of the writs provided for by Art. 226 of the Constitution.

(Paras 36, 38, 39, 42)

Per Dixit J.: One test which may usefully be adopted to differentiate between orders and rules made by a Ruler of a State in his capacity as the supreme executive authority from those made in his capacity as the supreme legislative authority is to see whether the order or rule was enforceable in a Court of law by the person or persons affected thereby and whether the construction or interpretation of the rule or order was a matter for the Court or for the administrative or executive authorities. If the rule is not enforceable in a Court of law and if its construction is a matter for the administrative authority and not for the Court, then clearly the rule cannot be called a statute or a rule having the force of a statute.

(Para 45)

The Kalambandi of 1991 was not a statute according to the law-making machinery or custom of Gwalior State and according to the forms and solemnities required in that State for authentication of a statute. There is nothing in the Kalambandi to lend any colour to the suggestion that the Kalambandi conferred on Shiledars or their heirs a right enforceable in a Court of law, with regard to their appointment or their conditions of Shiledari service.

(Para 45)

Anno: Civil P. C., Pre. N. 7.

P. R. Das, P. W. Sahastrabudhe and N. K. Shejwalkar, for Applicants; K. A. Chitale, Advocate-General, for the State.

## CASES REFERRED TO :

- (A) ('67-70) 13 Moo Ind App 438: 2 Sar 588 (PC) (Pr 39)
- (B) ('31) AIR 1931 PC 157: 132 Ind Cas 736 (PC) (Pr 39)
- (C) ('53) AIR 1953 Madh-B 97 (Pr 46)

## NEWASKAR J.:

These are petitions under Article 226 of the Constitution submitted by Madhaorao Phalke and others in all 11 in number.

(2) Of these 11 petitions one is by 'Bachat-holder' — a term which will be explained hereafter, 5 are by what are known as 'Head-quarter Shiledars', 2 by 'Shiledars', 2 by 'Ekkans' and one by a 'Maintenance-holder'.

(3) The petitioners belong to the families of Shiledars and Ekkans of former Gwalior State.

(4) The case of the petitioners is that their ancestors accompanied the Scindias in their conquest towards the north nearly 200 years ago and in recognition of exemplary services rendered by them and their descendants in the past and in view of the fact that they might be required at any time to render further services they were 'entitled as of right' to receive 'a fixed sum of money' per month from the Government from generation after generation and that this right had been recognised in various statutes, orders, rules and regulations having the force of statutes. Petitioners particularly referred to and relied upon "The Regulation for Administration of the Department of Irregulars Samvat 1991 (1934 A. D.), the orders dated 31-3-1929 issued from the Army Headquarters under the authority of Council of Regency and Gazette Notification of the year 1942 A. D."

(5) The petitioners complain that the cash payments aforesaid to which they were entitled as of right as indicated above were stopped by the Government of Madhya Bharat under an Executive Order dated 18-4-1952 issued in the name of Rajpramukh, that this action is beyond the powers of the Government or Rajpramukh and prejudicially affects their fundamental right to property.



The petitioner further alleged that they caused notices to be served on the Madhya Bharat Government, one by each petitioner, calling upon the said Government, to refrain from enforcing the said order but obtained no redress. The petitioners therefore prayed:

(a) that a writ in the nature of mandamus or alternatively directions or order or writ under Article 226 of the Constitution may be issued calling upon the respondents (viz., the State of Madhya Bharat and the Government of Madhya Bharat Revenue Department) to show cause why they should not forbear from giving effect to, or acting in any manner by virtue of, or under the said order dated 18-4-52 and

(b) that a peremptory order in terms of prayer (a) be made if no such cause is shown:

(6) In the return submitted on behalf of the respondents it was contended that the disputed payments could not be reckoned as 'property' within the meaning of Article 31 of the Constitution of India but were in the nature of emoluments for military service. It was further submitted as a matter of historical retrospect that the Scindia's Army among other ranks and military officers, comprised of Head-quarter Shiledars, Shiledars and Ekkans who had fought and were expected to fight under their Liege-Lord whenever occasion arose. This, according to the respondents, was an irregular force organised for Military aid and was maintained by former Gwalior Government and later by the State of Madhya Bharat to secure aid for maintenance of peace and military action. It was further submitted that originally aforesaid Shiledars and Ekkans were expected to maintain and provide troopers with their own equipments and received cash payments commensurate with their obligations and later were allowed to offer substitutes called 'Bargirs' whose expenses were deducted from these emoluments.

It is contended that after the commencement of the Constitution 'Defence' was taken over by the Union and in this changed Constitutional context there was no occasion to continue these irregular forces and the State of Madhya Bharat therefore by an executive order discontinued these payments thus disbanding the force which they were entitled to do. It is, therefore, urged that the alleged right to receive cash-payments under the circumstances mentioned in the petition is neither property nor was it conferred under a statute or under any rule, order or regulation having the force of a statute and that the State had every power to stop the payment by an executive order.

(7) On these respective submissions of both the parties the following questions arise for consideration:

Firstly, do the payments in question constitute property within the meaning of Article 31 of the Constitution?

Secondly, is it the statutory right of the petitioner to receive the payments in dispute?

Thirdly, is the right now available against the respondents?

(8) Mr. P. R. Das who appeared on behalf of the petitioners contended that this right to receive cash payments either as Bachat-Holders, as Head-quarter Shiledars or as maintenance-holders which vested in the petitioners and others in similar position was conferred in consideration of the services rendered and to be rendered by certain families to the Scindia Rulers and was recognised in various orders of the Rulers which amounted to statutes as they emanated from sovereign power. He therefore urged that the same amounted to pro-

perty within the meaning of Article 31 of the Constitution of India and is the fundamental right of the petitioners.

He further urged that this fundamental right to receive cash payments being a statutory right could not be affected by an executive order and the action of the Madhya Bharat Government or Raj Pramukh in ordering stoppage to these payments is ultra vires as no right recognised by a statute can be affected merely by an executive order. In order to explain his contention that the right in question is a statutory right he referred to the History of various steps taken to organise these irregular forces on a sounder footing and the recognition given to the rights vested in the families of the petitioners in the orders on the subject by the Scindia Rulers. He particularly drew our attention to the two land-marks in the process of reorganisation of the forces of irregulars as these Shiledars and Ekkans constitute, viz., the reorganisation scheme set down in the 'Kalambandi' of Samvat 1969 and that contained in the 'Kavayad' of Samvat Year 1991. He also referred to the Notification dated 31-3-1929 issued from Army Headquarters under the authority of the Council of Regency in general and Paras 1 and 2 of the same in particular. In these Paras 1 and 2 it is expressed thus

'the Shiledari' force is an ancient one and the ancestors of the present holders had on several occasions from the date of the founding of Scindia dynasty rendered meritorious services and obtained 'Asamis' and having regard to their well established right and their present economic plight the Council has sanctioned the scheme (contained therein) to ameliorate their lot'.

(9) All this, counsel contended, makes two things clear. Firstly it indicates that the cash payments were not merely the remuneration for the services to be rendered but were payable in recognition of past services to the family of the Rulers and for the services to be rendered in future if occasion arises and secondly it recognises this payment as a right and as such property. These according to the counsel were grants recognised by statutes with obligation of service attached to them and are not salaries for future services pure and simple. The petitioners are, therefore, entitled according to the learned counsel, to a declaration that the action of the Madhya Bharat Government is ultra vires and trenches upon the fundamental right of the petitioners and an injunction to them, restraining them (from) putting their threat regarding stoppage of these payments into execution.

(10) On the other hand the learned Advocate-General drew our attention to the passages from the well known work on Maratha History such as (1) Administrative System of Marathas by Dr. Sen, (2) Military System of Marathas by the same author and (3) Sardesai's History of Marathas and contended that these Shiledars and Ekkans originally constituted an irregular military force. These Shiledars brought their own horses and men and were maintained at State expenses. These Shiledars were remunerated with cash payments at least in the case of Scindia Army and had to render military service when occasion arose either for internal security or meet the threat of aggression or War. He further urged that in their true nature and context they were not grants burdened with service but were services remunerated with cash payments. Their origin and continuance were administrative in nature and liable to be stopped by an administrative order & was neither vested right of the petitioner nor property within the meaning of Article 31 of the Constitution. Executive Gov-



ernment of Madhya Bharat had, therefore, a perfect right to stop these payments wholly or to such an extent as they pleased.

(11) At the outset I felt difficulty in following the propriety of this writ against the Executive Government of the State of Madhya Bharat because according to the contents of the petitions and the return submitted by the Government the obligation alleged had a reference to military forces and, in the absence of agreement between the State and the Union, the liability if any, would devolve upon the Union as according to Sch. VII List I this would be included in item No. 2 viz., Naval, Military and Air Force, and other armed forces of the Union.

(12) Article 295 (1) of the Constitution of India runs as follows:

"(1) As from the commencement of this Constitution — (a) all property and assets which immediately before such commencement were vested in any Indian State corresponding to a State specified in Part B of the First Schedule shall vest in the Union if the purposes for which such property and assets were held immediately before such commencement will thereafter be purpose of the Union relating to any of the matters enumerated in the Union List, and (b) all rights, liabilities and obligations of the Government of any Indian State corresponding to a State specified in Part B of First Schedule, whether arising out of any contract or otherwise, shall be the rights, liabilities and obligations of the Government of India, if the purpose for which such rights were acquired or liabilities or obligations were incurred before such commencement will thereafter be the purposes of the Government of India relating to any of the matters in the Union List, subject to any agreement entered into in that behalf by the Government of India with the Government of that State".

(13) We, therefore, called upon the State of Madhya Bharat to disclose whether there is any agreement between the State and the Union on the subject. Thereupon the learned Advocate General laid before us correspondence which took place between the Government of India and various Raj Pramukhs.

(14) In the correspondence thus admitted there is D. O. letter No. F3 D/50 dated 17-1-1950 from the Government of India addressed to Raj Pramukhs of Rajasthan, Madhya Bharat, Pepsu and Saurashtra, Para 9 of which reads as follows:

"The Central Government will not be financially concerned with (a) non-Indian States Forces units and personnel (b) hereditary military pensions, and (c) pensions of non-Indian States Forces military personnel retiring on or after 1st April 1950".

Further there is a copy of letter No. F 218/49/D. 1 (a) dated 9-3-50 issued from the Government of India to the Chief of Army Staff and Commander-in-Chief, Indian Army which contains the following communication:

"The President is pleased to sanction the following arrangements in connection with State Forces of Union States:

(1) With effect from 1st April 1950 Government of India will assume complete financial liability in respect of the I. S. units of these States existing at the time".

Madhya Bharat Force order regarding division of Madhya Bharat Force F. O. No. 106/50 dated 6th April 1950 indicates that:

- (1) 1st Regiment Shiledari
- (2) 2nd Regiment Shiledari and
- (3) Beda Risala Ekkans

are included in the category of purely non-I. S. F. units.

(15) No specific agreement bearing on the point has been produced before us but it appears from the documents referred to above that the financial obligations pertaining to these non- I. S. F. units continue with the State Government and this may be assumed to be the agreement between the State and the Union. It is significant that in the return submitted on behalf of the State no challenge is based on the ground that obligation with respect to the claim of the petitioners, if it exists at all, rests with the Union Government. Further had this been the attitude taken by the State Government action for disbanding that force and for stoppage of these payments would not have been taken by the Executive Government of the State but by the Central Government. The executive order of the State moreover makes a provision for continuance of Nemnuks in the case of widow or minor children of deceased Shiledars and also Shiledars and Ekkans who are suffering from physical infirmity or disability.

(16) I am, therefore, clear that if the payments claimed by the petitioners constitute their statutory right and hence property the obligation with respect to them will rest upon the State and not upon the Union.

(17) The only point, therefore, that remains to be considered is whether the payments claimed by the petitioners constitute their statutory right and property. I shall consider this question, therefore, in somewhat details.

(18) As a matter of history Scindias were Military Governors of Peshwas who ruled from Poona and Scindias' Army was in its origin part of the Army of Peshawas and some light will be thrown on the origin and nature of these irregular forces which at the time of commencement of the Constitution assumed the character of (I) First Regiment Shiledari (II) Second Regiment Shiledari and (III) Beda Risala Ekkans from the historical account of the Peshawa's Army.

(19) Dr. Sen the well known historian in his work on Military System of Marathas at page 80 says: "The Cavalry of Peshwa consisted of four classes:

1. The Khasgi Paga
2. The Shiledars.
3. The Ekas or Ekkans and
4. The Pendharis."

(20) These Shiledars brought in their own horses and men and were remunerated by the State while the Ekkans or Ekkandas were volunteers who joined the Maratha Camps bringing their own horses and accountments. They too were paid in cash in proportion to the value of their horse. During the period of military action these payments were stopped and they were allowed to have a share in the spoils of war.

(21) Scindias after the northern conquest by them as the Military Generals of Peshwas were appointed Military Governors and retained their Army which included regular and irregular forces such as Shiledars and Ekkans.

(22) Hereditary character of service in the Government was a marked characteristic in some of the services during the Maratha Regime, and hereditary nature in these irregular forces was not an exception.

(23) After Scindias became independent of the Central control of Peshwas these forces became their forces but retained their essential characteristics.

(24) Army of Scindias no doubt consisted of these Shiledars and Ekkans besides regular State forces.



Some of these Shiledars were stationed at the Head Quarter (viz. Gwalior) and were termed Head Quarter Shiledars. Others were Shiledars and Ekkans and were posted in various Districts of Gwalior State both far and near. These latter Shiledars were required to render active service and were used for keeping peace and order. No materials were placed before us to indicate what was the nature of service which was expected of the Head-Quarter Shiledars in the early stages of Scindia but from the printed orders of His Highness Madhaorao Scindia of Samvat Year 1969 and known as 'Kalambandi' Intajam Mahakme Irregular Behede Shiledari Samvat 1969' and subsequent similar Kalambandi of 1991 issued at the time of the last Ruler it appears that these Head Quarter Shiledars were not required to render any active Military Service. All that was expected of them was to keep themselves fit militarily by subjecting themselves to drill and to receive cash payments mentioned against them in these Kalambandis. They represented a reserved force which might be required to do active service any time.

(25) In the Kalambandi of Samvat Year 1969 (1912 A. D.) which was intended to reorganise this irregular force and put it on a proper footing weeding out abuses that had crept therein, these Shiledars and Ekkans were divided into different groups:

1. Shiledars of 10 Paigas (Battalions)
2. Head-Quarter Shiledars.
3. Pandit Shiledars.

From the Shiledars of 10 Paigas consisting of 1250 horsemen active service was expected. They were stationed at different districts of Gwalior State and could be utilised for maintenance of peace and order. These horsemen were drawn mainly from hereditary Shiledars. Though provision was made for employing outsiders in case the particular family became extinct.

(26) If particular Shiledar in the Paigas became infirm or disabled his next heir answering the requisite qualifications could be given the job and if there be no such person the office would be given to an outsider. During the minority of an heir of a Shiledar other person called 'Aiwwaji' could be employed who would be given full pay of the post and maintenance would be given to the minor. Rule regarding succession was laid down.

(27) In case of Head Quarter Shiledars no duty apart from their performing the drill was expected. The succession to them was similar to that of other Shiledars.

(28) In Section 54 it is mentioned that 'as the Shiledars Asami is for service the same could not be attached in execution of a decree of a creditor'.

(29) As regards Pandit Shiledars i. e., those Shiledars who were found to be unsuitable for Military jobs they were employed as the Head Quarter in the clerical staff of the Head-quarter or were posted at various stations where these forces were placed.

(30) In the Kalambandi of 1934 A. D. all these provisions were practically reiterated with the only difference that in the case of infirm or disabled Shiledars system of offering substitutes known as Bargirs was recognised and they were given a portion of cash payments payable to Shiledars and the balance known as 'Bachat' was liable to be taken by the infirm or disabled Shiledars. In the case of minor Shiledar Bargirs would be employed who would be paid portion of the pay of Shiledar and the rest would be credited to the State and the minors would be paid maintenance at a scale fixed by the Government. Similar provision was made for Pandit Shiledars.

(31) Provision was also made for establishment of right to succeed to the office of the deceased Shiledar in case of disputed claims.

(32) In S. 36 of this 'Kalambandi' again emphasis is laid that Shiledari Asami being for service, is not liable to attachment for the debts of a creditor.

(33) In the Notification issued in pursuance of a resolution by the Council of Regency a reference is made in Cl. (1) that Made Shiledari service is ancient and the ancestors of the holders of (most of) the present holders of office had done meritorious service and obtained the Asamis. In Cl. (2) it is stated that having regard to their rights and their pitiable financial plight the council had decided to ameliorate their condition and made the following provision etc.

(34) Then follows the detailed provision for the purpose. In the year 1942 further measures were taken for increasing the pays of the pensions of Beda Risala Ekkans.

(35) Thus having regard to all these Kalambandis and orders the following things are clear:

- (I) There are no Sanads supporting the claim of the petitioners as hereditary grants.
- (II) The Shiledars are primarily intended as a part of the Military Service.
- (III) The enlistment to these is hereditary in the sense that so long as a person from the family of the holder of the office is available the office would go to him. The manner of succession being laid down by the order of the Ruler in accordance with the pre-existing practice. If there are several sons only one of them gets it and there is no rule of primogeniture strictly so called.
- (IV) Initially substitutes were allowed in case of those who cannot render service themselves for special reasons but later practice grew even amongst others and this gave rise to practice of paying 'Bachat' to the Shiledar and fixed proportion of pay to the substitute or Bargirs.
- (V) In the case of Head-quarter Shiledar no definite service was expected but Military fitness by resorting to drill was necessary.

(36) Having regard to all these circumstances as they appear from the reorganization schemes contained in the two Kalambandis and notification from Army Head Quarter it is clear that the payments were for service only and there were no hereditary grants as such. The mere hereditary character, exhibited in the enlistment of the new cadets cannot mean that it was property belonging to the particular Shiledar or Ekkans. Moreover new enlistment was permissible to maintain the strength of the force. No doubt Head-quarter Shiledars were not required to render any tangible service and cash payment to them was sumptuous and secure and certain consideration probably of past service might have been involved in their case but essential character of service never changed and throughout they were only treated as part of the Shiledar & Ekkans Bedas. The provision for drill was intended to ensure their military preparedness.

(37) It is also apparent that the payments varied as the standards of living conditions changed as also the value of money, although, it appears that in the case of head quarter Shiledars and Ekkans this remained uniform at least from Samvat Year 1959 upto the date of stoppage.

(38) Provision for payment of the maintenance allowance to widow or minor children of the



deceased Shiledar does not necessarily mean that there was any proprietary interest in the deceased Shiledars as regards the payments which he used to receive. This can only be regarded as compassionate allowance.

(39) I am therefore of the opinion that the payments claimed by the petitioners do not constitute property belonging to them whether the same be, as Bachat holders, Head-quarter Shiledars or Ekkans. The provisions in the two Kalambandis are in the nature of recognition schemes of administrative nature and do not involve conferment of or recognition of a statutory right. I am also of the opinion that these payments claimed cannot be classed as hereditary grants burdened with services. During the course of argument our attention was drawn to two rulings of their Lordships of the Privy Council viz., — 'Alexander John Forbes v. Meer Mohamed Tuquee', 13 Moo Ind App 438 (PC) (A) and — 'Lakhamgouda Basavprabhu v. Baswantrao', AIR 1931 PC 157 (B).

(40) Both these cases pertain to grants of land evidenced by Sanad and the question involved therein was whether they were the cases of grant of land burdened with services or grants of office remunerated by the use of land.

(41) These cases are not of much assistance in arriving at the true nature of these payments. It is difficult to call them grants and place them on the footing of grants supported by Sanads and burdened with services. In the latter cases service was ancillary and grant was the principal thing. This is not so in the present case. Ancillary character of service in the case of Head-quarter Shiledars was not in its inception but appeared at a later stage.

(42) I am, therefore, inclined to the view that the petitioners have neither any statutory right nor property in the payments claimed by them as Bachats, maintenance amount or salaries as Head Quarter Shiledars, Shiledars and Ekkans. The stoppage of these all or some of them by the executive Order did not involve infringement of their fundamental right and are not entitled to seek redress through any of the writs provided for by Art. 226 of the Constitution from this Court.

The petitions are therefore dismissed.

(43) SHINDE, C. J.: I agree.

(44) DIXIT, J.: I agree that these petitions should be dismissed. I think it is of assistance in approaching the matters which arise in these petitions to state and emphasise the real nature of "Kalambandi Intzam Mahakame Irregulars" Samvat 1991 of the former Gwalior State, on which the petitioners substantially base — and I think exclusively — their claim to receive a fixed sum of money from the State of Madhya Bharat. On behalf of the applicants Mr. Das contended that the Kalambandi was a statute and gave to the petitioners a right to get a fixed sum of money every month from the opponent State and this statutory right could not be taken away by an executive order. Learned counsel for the petitioners conceded that if the Kalambandi is not a statute, then he must fail.

The first main question to be determined is, therefore, whether the Kalambandi is a statute or rules having the force of a statute, or whether it is merely a collection of executive directives. Mr. Das suggested that the Kalambandi was a statute because it was an act of the sovereign body of the former Gwalior State and contained a preamble repealing the Kalambandi of 1969.

In reply the learned Advocate-General submitted that the provisions of the Kalambandi themselves made it clear that the Kalambandi was no more than a set of administrative rules; that the enumeration in S. 2 of the Kalambandi of the names of particular persons entitled to salaries specified therein was inconsistent with the Kalambandi being a statute, and that the Kalambandi of Samvat 1969 which was superseded by the Kalambandi of Samvat 1991, was treated by His Highness Maharaja Madhavrao Scindia as administrative orders and as such was amended by him by a direction in Vol. III 'Darbar Policy' (English version) relating to the Police and Military departments at page 16.

(45) In my judgment, the petitioners have failed to establish the fact that the Kalambandi of 1991 is a statute according to the law making machinery or custom of Gwalior State and according to the forms and solemnities required in that State for authentication of Statute. The fact that the Kalambandi was issued by the sovereign is by means conclusive of the nature of the Kalambandi. I confess that while dealing with orders or rules issued by the Rulers of some of the Covenanted States, where there was no organized legislature and where the supreme legislature and executive functions were vested in one person. I have always found some difficulty in distinguishing between administrative orders or rules, and statutes or rules or orders having the force of a statute. A preamble is not a distinctive feature or an essential part of a statute. It is also found in policy proclamations, notices and deeds. It is merely a preliminary statement explaining the reasons by the writing. It makes no difference to the administrative, executive or statutory character of a rule whether there is a preamble to it any more than whether it affects the public at large or affects a particular person by name.

To my mind, one test which may usefully be adopted to differentiate between orders and rules made by a Ruler of a State of the type referred to above in his capacity as the supreme executive authority from those made in his capacity as the supreme legislative authority is to see whether the order or rule was enforceable in a Court of law by the person or persons affected thereby and whether the construction or interpretation of the rule or order was a matter for the Court or for the administrative or executive authorities. If the rule is not enforceable in a Court of law and if its construction is a matter for the administrative authority and not for the Court, then clearly the rule cannot be called a statute or a rule having the force of a statute.

Applying this test to the provisions of the Kalambandi of Samvat 1991, I think there is no other conclusion to which this Court could come, than that the Kalambandi is not a statute or a set of rules having the force of a statute. A study of the provisions of the Kalambandi shows that it primarily and in substance contains directions relating to the constitution, strength, enrolment and conditions of service of irregular Army. The title of Kalambandi suggests that the rules embodied therein are for the government and administration of "the Department of Irregulars". Section 1 of the Kalambandi deals with the strength and constitution of the force. Section 2 enumerates the names of certain Shiledars entitled to receive salaries mentioned in the section as members of the force. Section 3 declares the eligibility of Shiledars to "Officer-posts" in the force and says when appointed to such a post a Shiledar would get only the salary attached to the post. Sec-



tions 4 to 15 relate to the training of 'Pandit Shiledar', the loan of colours to processions, the size of horses in the force, uniform arms, equipment, drill, barrack-accommodation, accounts, duties of the Commanding Officer, leave, supervision and inspection of forces and the employment of the force for the keeping of peace and order.

I do not think, it can be disputed that the above provisions of the Kalambandi are merely administrative directives. Sections 13 to 32 lay stress on the maintenance of the strength of the force and provided for the filling up the vacancies in the force in the manner indicated therein on the death, infirmity or disability of a Shiledar. Under these provisions a person claiming to be an heir of the deceased Shiledar could not say that he was entitled as of right to fill a vacancy or to get some money grant instead. The recognition of an heir to fill a vacancy, the appointment of a substitute, the payment of 'Bachat' were all made subject to the approval of the Inspector General of Army and in some cases of the Darbar. The provision in the Kalambandi that a vacancy caused by the death, disability or infirmity of Shiledar would be filled by appointing his heir, did not alter the position that the appointment of a Shiledar was at the discretion and during the pleasure of the Darbar.

There is, in my view, nothing in the Kalambandi to lend any colour to the suggestion that the Kalambandi conferred on Shiledars or their heirs a right enforceable in a Court of law, with regard to their appointment or their conditions of Shiledari service. It laid emphasis on the performance of the service and not on the individual who was to perform the service. The mere inclusion in the Kalambandi of provisions (Ss. 36 and 37) exempting from attachment the 'Shiledari Asami' and certain payments and articles in execution of a decree cannot, in my opinion, give statutory force of the material provisions alluded to above.

(46) I think a complete answer to the question whether the Kalambandi of Samvat 1991 in a statute is furnished by the argument of the learned Advocate General that the Kalambandi of Samvat 1969 which it repealed, was itself amended by His Late Highness Madhavrao Scindia by giving an administrative directive in his publication known as Darbar Policy. In volume III of 'Darbar Policy' relating to "Police and Military departments" he observed at page 16 that S. 48 of that Kalambandi as it was worded did not "convey the real object in view" and directed that "it should, therefore, be read as given below & the Kalambandi should as well be corrected accordingly." Again in Appendix No. III of the volume it is stated at page 237 that "the wording of S. 48 in the Kalambandi of 1969 was not very lucid; the section has accordingly been redrafted (as above) in this Policy to remove any misunderstanding on the subject and to bring out clearly the object which the Darbar have in view and it should be read and complied with as now given". The 'Darbar Policy' as has now been held by this Court in — 'Malojirao v. State of M. B.', AIR 1953 Mad-B 97 (C), is not a statute but a statement of principles which were intended to be followed in executive action.

If, therefore, the Kalambandi of 1969 was regarded by the Ruler who issued it as administrative rules and as such capable of amendment by a administrative direction, it follows that the Kalambandi of 1991 which repealed the previous Kalambandi is no more than a set of administra-

tive rule. The petitioners produced before us a copy of a decision given on 1-10-34 by the Council of Regency (Gwalior State) in a dispute about Shiledari succession. It was said that by that decision the Council held that the Kalambandi was a statute law. On a perusal of that decision, I find that the Resolution passed by the Council in that dispute nowhere says that the Kalambandi is a statute law. In that dispute the Army Member and the Law Member of the Council no doubt expressed the opinion that the Kalambandi was a statute. But there is nothing in the Resolution of the Council to show that the opinion of these members was adopted by the Council and ultimately became the decision of the Sovereign body functioning at that time in the quondam Gwalior State.

(47) On the question whether the payments were made to the petitioners because they were as of right entitled to it, I agree with my brother Newaskar J., who after a close analysis of the provisions of the Kalambandis of Samvat 1969 and 1991, and after reference to the history and origin of Shiledari system, has reached the conclusion, that the payments were for service only and not hereditary grants and that they did not constitute property belonging to the petitioners. The suppliants hold no sanads of any hereditary grant. The Kalambandis did not confer on them any hereditary right to cash payments or to any office.

Even if it is assumed that the applicants were grantees of an office to which certain payments were attached by way of remuneration, then on the principle laid down in the Privy Council decisions, 13 Indian Appeals and 1931 PC 157, *prima facie* the payments could be stopped on the maintenance of Irregular forces by the opponent State and the performance of service therein by the applicants under the provisions of the Kalambandi becoming impossible by reason of the orders issued by the Resident from time to time under Art. 259 (1) of the Constitution of India.

(48) For these reasons, these petitions, in my opinion, should be rejected.

A/R.G.D.

Petitions dismissed.

A. I. R. 1953 MADH.-B. 262 (Vol. 40, C. N. 100)  
(GWALIOR BENCH)

CHATURVEDI J.

Kanhaiyalal Sewaram, Appellant v. State.  
Criminal Appeal No. 59 of 1952, D/- 6-3-1953.

(a) Evidence Act (1872), S. 33 — Necessity to record finding.

Before the Sessions Judge can transfer a statement he must record a finding that any of the circumstances enumerated in S. 23 existed and unless he is so satisfied on evidence led before him, the power vested in him under S. 33 cannot be exercised.  
(Para 4)

Anno: Evidence Act, S. 33 N. 1.

(b) Evidence Act (1872), S. 118 — Duty of Court.

Where a witness is declared incapable of giving evidence owing to insanity it is the duty of the Court to record its finding that the witness is prevented by his lunacy from understanding the questions put to him and giving rational answers to them. The fact that the witness had become incompetent to



testify and so incapable of giving evidence must be proved strictly. (Para 4)

Anno: Evidence Act, S. 118 N. 1.

(c) Penal Code (1860), Ss. 304, 319 and 323 — Deceased receiving only two injuries which were not grievous — Injuries only remoter cause of death — Accused can be convicted under S. 323 and not under S. 304. (Para 5)

Anno: Penal Code, S. 304 N. 1; S. 319 N. 1.

Shahashrabudhe, for Appellant; Govt. Advocate, for the State.

#### CASES CITED:

(A) ('44) AIR 1944 Lah 377: 46 Pun LR 135

(B) ('46) AIR 1946 PC 1: 72 Ind App 270 (PC)

JUDGMENT : The appellant Kanhaiyalal and his son Ramlal (who is only 17 or 18 years old) have been convicted by the learned Additional Sessions Judge, Shajapur, under S. 304, Penal Code and have been sentenced to five year's rigorous imprisonment each.

(2) The prosecution story in brief is that on 10-7-1952 in the noon, in a field in village Patlaoda P. S. Shujalpur, District Shajapur, both the accused approached Siddu who was working there. Kanhaiyalal had an axe with him and gave a blow on the head of Siddu with the blunt side of the axe. Ramlal appellant had a 'pirani' (bamboo stick, sometimes with an iron blade) and gave a blow to the deceased with it. It is alleged that the deceased Siddu had beaten Kanhaiyalal's son Moti in the morning and so these two accused had gone to the field to take revenge from him. Siddu died then and there. A 'post-mortem' was performed next day i.e., on 11-7-1952 in Shujalpur by Dr. Lajpatrai P. W. 1 who deposed that Siddu had two external injuries only. The first injury was contused wound  $1\frac{1}{2}$ " x  $\frac{1}{4}$ " on frontal region of the scalp and 2 inches deep, but the injury did not reach the bone. The next injury was contusion 8" x  $\frac{3}{4}$ " vertical on back of lower part of chest. The doctor was of opinion that Siddu was very weak otherwise he would not have died as a result of these injuries. According to him the death was the result of shock and haemorrhage due to rupture of spleen and concussion of brain, which could have occurred due to his falling on the ground.

(3) At the time when the two appellants are alleged to have given blows on the body of the deceased, Siddu, only two persons were present in the field and these are cattle grazers, Rama P. W. 2 and Madhva P. W. 16. The first information report was lodged by the wife of the deceased, Nadan Bai P. W. 13, on 11-7-1952 at 8 P. M., though the distance of the scene of occurrence from Police Station Shujalpur is hardly 5 miles. In this report the names of the two accused had been mentioned.

(4) Out of the two witnesses, Madhva, P. W. 16 was not produced before the learned Sessions Court. His statement in the committing Court had been transferred to the Sessions file under S. 33, Evidence Act. It is well settled that before the Sessions Judge can transfer a statement he must record a finding that any of the circumstances enumerated in S. 33 existed and unless he is so satisfied on evidence led before him, the power vested in him under S. 33 cannot be exercised. — *Saudagar Singh v. Emperor*, AIR 1944 Lah 377 (A). When a

witness is material (in this case the eye witness Madhva was a material witness) justice requires that the witness, if possible, be examined in the trial in the presence of the accused. The learned Sessions Judge has admitted the evidence of an absent witness on the application of the Public Prosecutor, and the application alleged that something had gone wrong with the mind of the witness Madhva and that he was not in a condition that he may answer the questions correctly in the Court. A report of the Assistant Medical Officer Shujalpur was also submitted to the Court along with the application. This report dated 7-10-1952 that after some days' observations in the Hospital, full report could be sent. During these days, the learned Sessions Judge was recording the evidence in the case and he could have easily seen the eye-witness himself, when he was at Shajapur, in order to satisfy himself whether he was competent to testify and could understand the questions put to him. The explanation appended to S. 118, Evidence Act is quite clear on the point that a lunatic when he is in lucid intervals is not incompetent to testify, if he can understand and rationally answer the questions put to him. The Doctor could have been, but was not examined in the Court. The Police constable Kanhaiyalal P. W. 15 and P. W. 3 Bhanwarji were procured in the Court and as lay men they said "his mind had gone wrong". This may mean nothing.

The learned Judge did not care to arrive at the finding whether it was a case of general or partial insanity, whether the delusions were multifarious and of the wildest and most irrational character, abundantly indicating that the mind was diseased throughout or, while the mind may have been overpowered by delusions, though may be the offspring of mental disease and so far constituted insanity, yet left the individual in all other respects rational and capable of transacting the ordinary affairs and fulfilling the duties and obligations incidental to the various relations of life, and, during lucid intervals, the witness was not prevented by partial unsoundness of the mind from understanding the questions put to him and giving rational answers to them. From a perusal of the judgment of the learned Sessions Judge, it appears, though not clearly, that the learned Judge was of opinion that the witness was incapable of giving evidence because of insanity.

In such cases the provisions of S. 118 could not have been ignored, and in my opinion, where a witness is declared incapable of giving evidence owing to insanity it is the duty of the Court to record its finding that the witness is prevented by his lunacy from understanding the questions put to him and giving rational answers to them. The fact that the witness had become incompetent to testify and so incapable of giving evidence must be proved strictly. As their Lordships observed in — *Chainchal Singh v. Empress*, AIR 1946 PC 1 (B) in a civil case a party, if he chooses, can waive the proof, but in a criminal case strict proof ought to be given that the witness is incapable of giving evidence. Their Lordships further observed that the fact that the counsel of the accused consented to the evidence of the witness being read under S. 33 in the Sessions Court does not do away with the necessity of the Court being



satisfied by proof that the witness was incapable of giving evidence.

In my opinion the learned Sessions Judge was wrong in admitting the evidence of Madhya P.W. 16 under S. 33, Evidence Act, without himself seeing the witness or without examining the doctor who had sent the report to the Public Prosecutor. It is clear that sufficient foundation was not laid for the reception of the previous deposition of Madhya in this case and I have therefore to exclude it from consideration.

(5) Thus only one eye-witness Rama P. W. 2 remains. He deposed that he saw from a distance of 210 steps the two appellants beating the deceased and that appellant Kanhaiyalal gave a blow on the head of the deceased. The learned Sessions Judge has believed this witness and there is nothing in the arguments of Mr. Sahasrabudhe, learned counsel for the appellants, which may incline me to a view about the credibility of the witness different from that taken by the learned Sessions Judge. At noon time in July a person of normal eye-sight can see clearly from such a distance. There were however, only two injuries on the body of the deceased & these injuries were not grievous. The medical evidence was to the effect that these injuries could not have ordinarily produced death. If the injuries can be called only the remoter cause of death, and death of the deceased is not proximately connected with the act of violence, the appellants cannot be held responsible for causing death, and cannot be credited with the knowledge that such bodily injuries as the deceased sustained were likely to cause his death. It follows that the appellants cannot be convicted for an offence of culpable homicide not amounting to murder. I am, therefore, of opinion that the conviction of the appellants must be altered to one under S. 323, Penal Code from that under S. 304, Penal Code.

(6) I therefore allow the appeal to this extent that I alter their conviction from S. 304 to one under S. 323, Penal Code and reduce the sentence of appellant Kanhaiyalal from 5 years to one year's rigorous imprisonment. It appears that Ramlal appellant is only 17 or 18 years old and has undergone nearly four months rigorous imprisonment. In my opinion this is sufficient to meet the ends of justice and therefore I reduce his sentence from 5 years rigorous imprisonment to that already undergone. Ramlal is therefore to be released forthwith if not required to be detained under any other process of law.

B/V.R.B.

Appeal partly allowed.

**A. I. R. 1953 MADH.-B. 264 (Vol. 40, C. N. 101)**  
**(GWALIOR BENCH)**

DIXIT J.

Shrichand Heeralal Vaishya, Applicant v. Santosh Kumar Devi Prasad, Non-applicant.

Civil Revn. No. 156 of 1952, D/- 5-3-1953.

**Civil P. C. (1908), O. 21, R. 58 — Objection after sale.**

An executing Court has no jurisdiction to entertain a claim under O. 21, R. 58 after the execution sale has taken place. AIR 1937 Cal 390; AIR 1942 Bom 263, Foll.; AIR

1942 Mad 41 (FB), Ref.; AIR 1931 Mad 782; AIR 1938 Nag 475, Not foll. (Para 3)

Anno: Civil P. C., O. 21, R. 58 N. 5.

Shivdayal, for Applicant; Motilal Gupta, for Non-applicant.

**CASES CITED:**

- (A) ('37) AIR 1937 Cal 390: 172 Ind Cas 503
- (B) ('42) AIR 1942 Bom 263: ILR (1942) Bom 636
- (C) ('31) AIR 1931 Mad 782: 55 Mad 251
- (D) ('38) AIR 1938 Nag 475: ILR (1940) Nag 306
- (E) ('42) AIR 1942 Mad 41: ILR (1942) Mad 336 (FB)

**ORDER:** This is an application to revise an order of the Civil Judge Second Class Kolar holding that an objection preferred by the non-applicant 'Santosh Kumar' under O. 21 R. 58 after the execution sale can be inquired into. The sale took place on 26-11-1951. The non-applicant filed this objection on 6-12-1951. The sale was confirmed on 19-7-1952.

(2) The short point for consideration in this revision petition is whether the lower Court has jurisdiction to entertain a claim under O. 21 R. 58 after the execution sale has taken place. Mr. Shivdayal learned counsel for the applicant relying on the authority of the decisions in — 'Sasthicharan v. Gopalchandra', AIR 1937 Cal 390 (A); and 'Ningauda v. Nabi Sahab Abalal', AIR 1942 Bom 263 (B) contended that it was incompetent to an executing Court to entertain an application under O. 21 R. 58 after the sale has actually taken place. He argued that on the sale of the property, it was ipso facto released from attachment and, therefore any investigation after the sale into the claim of the third party objecting to the attachment and sale was meaningless. In reply Mr. Motilal Gupta commended to me for acceptance the view of the Madras and Nagpur High Courts that an attachment subsists till the confirmation of the sale and that, therefore, the consideration or investigation of a claim under O. 21 R. 58 is not barred after the sale. Mr. Gupta referred me to the decisions reported in — 'Jagannatham v. Pydayya', AIR 1931 Mad 782 (C); 'Ramchandra v. Kayam Hussain', AIR 1938 Nag 475 (D).

(3) On a consideration of these decisions, I am inclined to accede to the contention put forward on behalf of the applicant that an executing Court has no jurisdiction to entertain a claim under O. 21 R. 58 after the execution sale has taken place. To my mind the question has been so exhaustively dealt with in — 'AIR 1937 Cal 390 (A)' and 'AIR 1942 Bom 263 (B)' that I feel there is hardly anything that I can usefully add to the reasoning given in those decisions to support the conclusion that such a claim cannot be entertained after the sale. In the Bombay case, the Madras and the Nagpur decisions have been discussed and it has been pointed out that the decision of the Madras High Court in 'AIR 1931 Mad 782 (C)' which formed the basis of the decision in — 'AIR 1938 Nag 475 (D)' is contrary to the observations of the Madras High Court in a later case namely, 'Cannanore Bank Ltd. v. Pattarkandy Aralan-veettil Madhavi', AIR 1942 Mad 41 (F B) (E). In that case it was observed that the dismissal of an objection under O. 21 R. 58 presented after the Court had sold the attached property



on the ground that the Court had no jurisdiction to entertain it can scarcely be regarded as an adverse order which was required to be set aside under O. 21 R. 63. I would only add that when a party objects to an attachment under O. 21 R. 58, the objection is in effect that the attached property being his own, is not liable to be sold. It follows, therefore, that an investigation of a claim under O. 21 Rule 58 must precede the sale of the property & not follow it. If the legislature intended to permit after sale the investigation of a third party to the sale of the property attached, then O. 21 Rule 58 would not have been placed before the provisions regarding sale; one would have then found appropriate provisions for setting aside a sale on objections of a third party inserted in the Civil Procedure Code after the provisions regarding sale.

(4) Learned Counsel for the non-applicant laid some stress on the fact that O. 21 R. 58 empowered the Court to refuse to investigate a claim or objection if it was designedly or unnecessarily delayed, & said that this showed that an objection made after sale could be entertained. There is no force in this contention. The fact that the Court is empowered to refuse to investigate a claim or objection on the ground of delay and that the Court has also been given the power to postpone the sale is no way inconsistent with the conclusion that the investigation could not be made after the sale. The proviso in O. 21 R. 58 (1) and sub-rule (2) only mean that the Court can decline to investigate the claim if it is made just before the sale and that it can also postpone the sale, if the claim cannot be disposed of before the sale is actually held.

(5) In this case it is noteworthy that the sale has now been confirmed and it cannot now be argued even on the basis of the Madras and Nagpur decisions, that the attachment subsists. That being so, the executing Court has clearly no jurisdiction to investigate and determine the non-applicant's objection under O. 21 R. 58. Learned Counsel for the non-applicant was unable to show any authority to support the proposition that an objection under O. 21 R. 58 can be dealt with even after the confirmation of the sale.

(6) For the above reasons the order dated 25-8-1952 of the learned Civil Judge Second Class Kolaras is set aside and the objection of the non-applicant under O. 21 R. 58 is dismissed. Having regard to the question involved in this petition, I make no order as to costs of this petition.

B/V.S.B.

Ordered accordingly.

**A. I. R. 1953 MADH.-B. 265 (Vol. 40, C. N. 192)**  
**(GWALIOR BENCH)**

**DIXIT AND CHATURVEDI JJ.**

State v. Deewaki Nandan, Respondent.

Criminal Appeal No. 90 of 1951, D/- 2-9-1952.

(a) **Cotton Textile (Control of Movement) Order (1948), S. 3 — General permit Cl. 2 — 'Personal luggage' — Distinguished from business luggage and parcel. (1871) L. R. 6 Q. B. 612, Rel. on. (Para 7)**

(b) **Cotton Textile (Control of Movement) Order (1948), S. 3 — Notification under, No. 15**

**Tex. 1/49 (C. T.) dated 17-2-51, contravention — Magistrate not putting accused question in examination under S. 342, Cr. P. C. as regards weight of cloth exceeding 20 pounds in weight — No inference can be drawn against accused from statement of constable in evidence that weight was 66 pounds — Accused cannot be held guilty of contravention of S. 3 — (Cr. P. C. (1898), Ss. 342, 423). (Para 8)**

Anno: Cr. P. C., S. 342 N. 35; S. 423 N. 23.

Shiv Dayal, for the State; Anand Bihari Mishra, for Respondent.

**CASE CITED:**

(A) (1871) LR 6 QB 612; 40 LJQB 300

**DIXIT J.:** This is an appeal under Section 417 Criminal P. C. from a decision of the Sessions Judge Gwalior in an appeal acquitting the respondent Devaki Nandan who had been convicted by the Railway Magistrate Lashkar of an offence under Section 7, Essential Supplies (Temporary Powers) Act, 1946.

(2) The charge against the respondent Devakinandan was that on 19-4-51, he travelled by a passenger train from Agra to Morena and carried with him 22 pairs of Dhories without obtaining a permit in that behalf from the competent authority, and thus contravened Clause 3 of the Cotton Textile (Control of Movement) Order 1948 made by the Central Government under Section 3, Essential Supplies (Temporary Powers) Act, 1946. The accused admitted having transported by rail from Agra to Morena 22 pairs of Dhories on 19-4-51. He also admitted that he had no permit. But he pleaded that he was taking these Dhories in connection with the marriage of his sister and that he was not aware that a permit was required for the transport of Dhories. On these facts, the learned Magistrate found him guilty under Section 7 (1) of the Act. The accused then preferred an appeal against the conviction and sentence to the Sessions Judge Gwalior. In appeal the learned Sessions Judge referred to the provisions of the Madhya Bharat Cotton Textile (Control of Movement) Order of 1948 and observed that under Section 3 of this Order the export of cloth from Madhya Bharat except under and in accordance with a general or special permit issued by the Textile Commissioner was prohibited and that there was no restriction on the import of the cloth into Madhya Bharat, and that as the act of the accused in bringing 22 pairs of Dhories from Agra to Morena was an importation of the cloth, he had committed no offence.

(3) After hearing Mr. Shiv Dayal learned Deputy Government Advocate for the State, I have formed the opinion that this appeal must be dismissed. The learned Sessions Judge was no doubt palpably wrong in determining the guilt or innocence of the accused with reference to the provisions of the Madhya Bharat Cotton Textile (Control of Movement) Order 1948 which was not in force on the date of the alleged occurrence and which had already been repealed in 1950 by the extension to the State of Madhya Bharat, of the Cotton Textile (Control of Movement) Order 1948 made by the Central Government under the Central Act, namely, the Essential Supplies (Temporary Powers) Act 1948 which Act was also extended to this State on 17-8-50. The learned Sessions Judge overlooked the fact that the charge framed by the Railway Magistrate against the accused distinctly mentioned that he was being charged for the contravention of the order made by the Central Government under the Essential Supplies (Temporary Powers) Act, 1946.



(4) The question for determination in this appeal is, whether the respondent has contravened Section 3, Cotton Textiles (Control of Movement) Order 1948. This section is as follows:

"No person shall transport or cause to be transported by rail, road, air, sea or inland navigation from any place in India to any place therein any cloth, yarn or apparel except under and in accordance with (1) a general permit notified in the Gazette of India by the Textile Commissioner;

or

(2) a special transport permit issued by the Textile Commissioner."

(5) A general permit in pursuance of this section was notified by the Textile Commissioner on 13-8-49. (Ministry of Industries and Supplies New Delhi) 15 (Tex, 149) dated 13-8-1949.

(6) Clause 1 of this permit divided India into various zones mentioning the State of Uttar Pradesh and the State of Madhya Bharat as two separate zones. Clause 2 of the general permit provided that.....

"Any person may transport or cause to be transported by rail, road, air, sea, or inland navigation cloth or yarn as part of his personal luggage from any place in any zone to any other place in that or any other zone."

(7) For the purposes of Cotton Textile (Control of Movement) Order 1948 "cloth" has the same meaning as it has in the Cotton Textile (Central) Order 1948 and it is clear from the definition of cloth given in the latter Order that Dhoties are included as given in the definition of Cloth. It will thus be seen from the above provisions that the transport by rail of one pair of Dhoti or of 22 pairs of Dhoties as a part of one's personal luggage did not constitute an offence under the general permit which was produced before the Railway Magistrate. It is not disputed that the appellant carried the Dhoties in a hold-all bedding and in a hand bag. The learned Deputy Government Advocate, however, says that as the accused was not carrying the dhoties for his own personal use and as he could not be supposed to carry 22 pairs of Dhoties for his use, it cannot be held that he was carrying these pairs of Dhoties as part of his personal luggage. I am unable to accede to this contention. The word 'luggage' as used in cl. 2 of the general permit must be contra-distinguished from the word "parcel" and so also the word "personal" must be distinguished from the word "business". The expression "personal luggage" would then include whatever a passenger takes with him for his personal use or convenience according to the habits of the particular class to which he belongs, either with reference to the immediate necessities or ultimate purpose of the journey. See — *Macrow v. Great Warters Rly. Co.*, (1871) LR 6 Q. B. 612 (A).

It must be noted that cl. 2 of the General Permit does not provide that the cloth being transported must be for one's own personal use. It refers to the transport of the cloth as part of personal language. If, therefore, a person carries cloth, not for business but to make a gift of it to his relatives, along with other articles for his own personal use or convenience in a hand bag, portmanteau or a hold-all, it cannot be said that he is not carrying the cloth as part of his personal luggage. The fact that he does not propose to use the cloth himself is immaterial. In the present case there is nothing to indicate that the statement of the accused that he was taking the Dhoties in connection with his sister's marriage is not true and

that in fact he was transporting them for business. In the absence, therefore, of any restriction in cl. 2 of the General Permit which was before the Magistrate as to the limit of cloth that can be carried as a part of one's personal luggage, the act of the accused in transporting 22 pairs of Dhoties from Agra to Morena does not constitute any offence.

(8) But the learned Deputy Government Advocate after the close of the arguments and while the case was pending for judgment drew my attention to a notification No. 15 Tex. 1/49 (C. T.) dated 17-2-51 issued by the Textile Commissioner under S. 3 of the Cotton Textile (Control of Movement) Order 1948, by which clause 2 of the General Permit issued on 13-8-49 was modified so as to permit a passenger to carry cloth or yarn as part of his personal luggage only up to the limit of 20 pounds in weight. Under this Notification, there can be no doubt that the transport of cloth or yarn as part of one's personal luggage from any place in any zone to any other place or any other zone constitutes a contravention of S. 3 of the Cotton Textile (Control of Movement) Order 1948, if the cloth or the yarn transported exceeds 20 pounds in weight. But I do not think that in the present case the State can take advantage of this notification to secure the conviction of the respondent, because the notification in question was never placed and proved before the Railway Magistrate with the result that though the constable who arrested the respondent deposed that the weight of Dhoties was 33 seers that is, 66 pounds, the learned Magistrate did not put to the accused any question in the examination under S. 342, Criminal P. C., as regards the weight of the Dhoties. No inference, therefore, can be drawn against the respondent from the statement of the Constable that the weight of the Dhoties was 66 pounds. In these circumstances, the respondent cannot be held guilty of the contravention of S. 3 of the Cotton Textile (Control of Movement) Order 1948 on the material on the record. Having regard to the fact that the omission on the part of the Railway Magistrate to question the accused as to the weight of the Dhoties he was carrying, was one solely on account of the default of the prosecution in failing to produce and prove before the Magistrate the Notification No. 15 of 17-2-51, I do not think this Court would be justified in ordering a retrial of the accused.

(9) For the foregoing reasons, this appeal must, in my opinion, be dismissed.

(10) CHATURVEDI, J.: I agree.

C/D.H.

Appeal dismissed.

A. I. R. 1953 MADH.-B. 266 (Vol. 40, C. N. 103)  
(GWALIOR BENCH)

SHINDE J.

Bhanwarlal Mansukhlal, Applicant v. The State.

Criminal Revn. No. 164 of 1950, D/- 7-2-51.

Criminal P. C. (1898), S. 426 (1)—Operation of bail.

The section does not restrict operation of bail only for the period the appeal is pending.  
(Para 2)

Anno: Cr. P. C., S. 426 N. 6.

Patankar, for Applicant; Govt. Advocate, for the State.

ORDER: The Sessions Judge Shujalpur ordered the surety bond of the applicant to be



forfeited. Against that order the surety has filed this application in revision.

(2) The learned counsel for the applicant has urged only one point before me. He argues that under S. 353, Gwalior Criminal P. C. bail can be taken only for the period the appeal is pending. As the judgment of the appellate Court has been delivered, the surety cannot be called upon to produce the accused. Section 353, Gwalior Criminal P. C. is equivalent to S. 426, Indian Criminal P. C. The section runs as follows:

"(1) Pending any appeal by a convicted person the appellate Court may, for reasons to be recorded in writing, order that the execution of the sentence or order appealed against, be suspended and also, if he is in confinement, that he be released on bail or on his bond."

The language of the section does not justify the inference that bail can be taken only for that period during which the appeal is pending. All that the section lays down is that the Court is authorised to release a convicted person, if in confinement, on bail during the pendency of the appeal. The order of releasing the accused on bail can be passed while the appeal is pending. But the section does not restrict operation of bail only for the period the appeal is pending. This argument, therefore, has no substance. It may also be mentioned here that the learned Judge, who decided the appeal, in his judgment directed the lower Court to take proper steps to make the accused undergo the remainder of the sentence. Hence it cannot be said that the surety is being called upon to produce the accused after the judgment was delivered. The argument of the learned counsel, therefore, cannot be accepted.

(3) The application in revision is, therefore, dismissed.

B/V.R.B.

Revision dismissed.

A. I. R. 1953 MADH.-B. 267 (Vol. 40, C. N. 104)  
(INDORE BENCH)

SHINDE C. J. AND NEWASKAR J.

Shantilal Hastmal, Applicant v. Raghuraj-singh Dashrathsing and others, Opponents.

Civil Misc. Appln. No. 49 of 1952, D/- 17-7-53.

**Constitution of India, Art. 227 — Interference under — (Representation of the People Act (1951), Ss. 83 (2), 85).**

It is for the Election Tribunal to determine whether the forms of Schedules attached to the election petition fulfil the legal requirements of the Representation of the People Act under which the Tribunal acts. That is the very issue which the Tribunal has to determine before proceeding further to determine, the issues involved in the petition and the reply thereof on merits. The jurisdiction of the Tribunal does not depend upon the facts whether the Schedules are properly verified or not but is independent of it. The Legislature in giving the Tribunal power to dismiss the petition for failure of the petitioner to supply Schedules duly verified in the manner laid down in the Code of Civil Procedure has empowered the Tribunal to determine whether the Schedules are duly verified or not and while in so doing even if it arrived at an erro-

neous decision it could not be said to have acted in a manner calling for the interference by the High Court in exercise of its powers of superintendence as in that case it would be acting as a Court of appeal to correct errors of law. Case law discussed.

(Para 20)

D. C. Bharucha and S. R. Joshi, for Applicant; S. M. Samvatsar, for Opponents Nos. 1 and 5; K. A. Chitale, Advocate-General, for the State.

#### CASES CITED:

- (A) ('51) AIR 1951 Cal 193 (SB)
- (B) ('53) AIR 1953 SC 58: 1953 SCR 302 (SC)
- (C) ('53) AIR 1953 Madh B 197: Madh B L J 1953 HCR 187
- (D) (1888) 57 LJQB 513: 21 QBD 313
- (E) ('52) AIR 1952 SC 319: 1952 SCR 696 (SC)
- (F) ('52) AIR 1952 SC 179: 1952 SCR 519 (SC)

NEWASKAR J: Petitioner Shantilal Chaudhary, an Advocate of Rajgarh and opponents Nos. 1 to 6 were nominated as candidates in the last general elections for the general seat prescribed for constituency No. 49 for Madhya Bharat Legislative Assembly. Out of these 7 candidates opponents Nos. 4, 5 and 6 withdrew their candidature and opponent No. 1 Raghurajsingh Dashrathsingh was declared elected after contest.

(2) On 22-4-1952 petitioner submitted an election petition under S. 80, Representation of the People Act calling in question opponent No. 1's election on the ground that the same had been procured by the commission of 'major corrupt practices etc.' This was received in the office of Election Commissioner on 25-4-1952. The petition was accompanied by Schs. A to G containing the particulars of these corrupt and illegal practices.

(3) The Election Commission by their Secretary's letter dated 21-6-1952 called upon the petitioner to show cause why the petition should not be dismissed under S. 85 of the Act as Schs. A to G referred to above had not been duly verified as provided by S. 83 (2).

(4) The petitioner thereupon submitted verification to all the aforesaid Schedules by getting them typed on a single sheet of paper. The Election Commission then admitted the petition and forwarded the same to the Election Tribunal for trial on merits.

(5) The Election Tribunal thereupon fixed on 20-9-1952 as the date for hearing the petition which was later adjourned to 22-10-1952 and on this date opponent Raghurajsingh and opponent Kailashnarayan in their written statement raised a preliminary objection that the Schs. A to G were not verified as required by law and the petition was liable to be dismissed on that ground alone.

(6) After hearing arguments on this objection the Tribunal by its order dated 1-12-1952 held that the Schedules could be permitted to be verified even at that stage and accordingly granted permission to 'add to several Schedules necessary verifications i.e. to verify every single Schedule'. In compliance with this leave the petitioner filed several pieces of paper each containing verification in respect of each of the Schedules without actually appending verification underneath each of the Schedules. These several loose sheets were ordered to be filed by the order of the Chairman dated 7-11-1951.

(7) On 28-11-1952 respondent 1 repeated his objection that the Schedules were still not duly verified and hence the allegations of fact contained in them could not be adjudicated upon.



(8) This objection was upheld by the Tribunal after hearing arguments on the point by its order dated 28-11-52.

(9) The present petition under Art. 227 of the Constitution is directed against this order of the Tribunal.

(10) The main contention raised by the learned counsel Mr. S. R. Joshi for the petitioner is that the view of the Tribunal that it was essential to append the verification underneath each individual Schedule is manifestly erroneous and has resulted in obvious miscarriage of justice because the petitioner now, if the decision of the Tribunal stands, will be wholly prevented from proving the allegations of facts contained in the Schedules aforesaid.

(11) Before considering the correctness or otherwise of the view of the Tribunal on this question of verification, we shall have first to see whether the decision such as this can very well be assailed by resorting to power of this Court under Art. 227 of the Constitution.

(12) The question with regard to the meaning and scope of Art. 227 of the Constitution has been subject of consideration both before the Supreme Court and High Courts of States including this Court.

(13) In — '*Dalmia Jain Airways Ltd. v. Sukumar Mukherjee*', AIR 1951 Cal 193 (A) it has been held that 'Superintendence' does not vest the High Court with unlimited power to correct all species of hardship. The word has gathered legal force and signification. It does not involve responsibility of the superintending tribunal for correctness of the decision of inferior Courts either in fact or in law.

(14) If the inferior Court, after hearing the parties, comes to an erroneous decision, on a matter within its jurisdiction the Court having power of superintendence never interferes.

(15) The only mode of questioning the propriety of such a decision is by way of an appeal where one is provided or not at all.

(16) The general superintendence conferred by this Constitutional provision over all jurisdictions subject to appeals, involves a duty to keep them within bounds of their authority, to see that they do, what their duty requires them to do and that they do it in a legal manner.

(17) In — '*D. N. Banerji v. P. R. Mukherjee*', AIR 1953 SC 58 (B) Chandrasekhara Aiyar J. has remarked:

"Unless there is any grave miscarriage of justice or flagrant violation of law calling for an intervention, it is not for the High Court under Art. 226 or 227 of the Constitution to interfere."

(18) In — '*Jamuna Prasad v. Lachhiram*', AIR 1953 Madh B 197 (C) a Division Bench of this Court has considered this question. The judgment in this case was given by Dixit J. with which the learned Chief Justice concurred. In this decision following words of Lord Esher M. R. in — '*R. v. Income-tax Special Purposes Commr.*', (1888) 21 Q B D 313 (D) were quoted with approval:

"When an inferior Court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the Legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain thing, it shall have jurisdiction to do such thing, but not otherwise. There it is not for them conclusively to decide whether

that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The Legislature may entrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the Legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the Legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were so to decide without any appeal being given, there is no appeal from such exercise of their jurisdiction."

In Para. 14 of the judgment the learned Judge further on held:

"The law to be gathered from the Supreme Court decisions relied upon by the opponents — '*Ebrahim Aboobakar v. Custodian General of Evacuee Property, New Delhi*', AIR 1952 SC 319 (E) and — '*Parry & Co. Ltd. Dara House, Madras v. Commercial Employees Association Madras*', AIR 1952 SC 179 (F) and especially from the English cases referred to above, is that, if a certain state of facts has to exist before an inferior Tribunal has jurisdiction to do certain things, the Tribunal must, to enable itself to obtain jurisdiction, find that those facts exist. The Tribunal cannot give itself jurisdiction by a wrong decision on them and the Superior Court may by means of proceedings for certiorari, inquire into the correctness of the decision. The decision as to those facts is collateral because, though the existence of jurisdiction depends thereon, it is not the main question which the Tribunal has to decide. If on the other hand the Tribunal is given jurisdiction to determine certain facts and those facts form a part of the very issue which the Tribunal has to decide and the Act constituting the Tribunal gives it the power to come to a final decision on that matter then the decision of the Tribunal cannot be treated as one going to its jurisdiction and cannot, therefore, be questioned in any Court."

(19) The ratio decidendi of these cases is that where there is any grave miscarriage of justice and flagrant violation of law or where the Court or Tribunal failed to act within bounds of its authority or contrary to the provisions of law prescribing the mode of its acting and which has materially affected its decision the High Court might interfere to remedy obvious error or grave injustice. It may also interfere where machinery of law has been harnessed 'fraudulently' by a party to achieve his end or the Court or the Tribunal has acted contrary to the principles of natural justice. But it certainly cannot be exercised where the effect of such interference would be practically to exercise powers of an appellate Court when in fact no appeal is provided. Nor can it be exercised on the ground that the order or decision is erroneous on merits.



(20) Applying these tests to the present case it is clear that it is for the Election Tribunal to determine whether the forms of Schedules attached to the election petition fulfil the legal requirements of the Act under which the Tribunal acts. That is the very issue which the Tribunal has to determine before proceeding further to determine the issues involved in the petition and the reply thereof on merits. The jurisdiction of the Tribunal does not depend upon the facts whether the Schedules are properly verified or not but is independent of it. The Legislature in giving the Tribunal power to dismiss the petition for failure of the petitioner to supply Schedules duly verified in the manner laid down in the Code of Civil Procedure has empowered the Tribunal to determine whether the Schedules are duly verified or not and while in so doing even if it arrived at an erroneous decision it could not be said to have acted in a manner calling for the interference by the High Court in exercise of its powers of superintendence as in that (case?) it would be acting as a Court of appeal to correct errors of law.

(21) It is contended by Mr. Joshi that if it is assumed that the view of the Tribunal is incorrect then there is no remedy to avoid the harm and the injury is substantial and material. He further submitted that grave injustice in this case will result by reason of a technical view of the matter involved which is erroneous inasmuch as a party will be entirely shut out and prevented from proving the corrupt practices relied upon in the petition.

(22) I have anxiously considered these submissions but I feel having regard to the settled law bearing on the question as discussed above, our interfering will only be tantamount to one for correcting an error of law and nothing more. All erroneous decisions in a way affect adversely one or the other of the parties. The circumstances giving rise to the present state of things were brought about by the petitioner himself.

(23) The result is that the present petition for exercise of powers of this Court under Art. 227 of the Constitution cannot be entertained. It is accordingly dismissed with costs to opponents Nos. 1 and 5. Counsel's fee to be taxed at Rs. 50/-.

(24) SHINDE C. J.: I agree.

A/D.H.Z.

Petition dismissed.

**A. I. R. 1953 MADH.-B. 269 (Vol. 40, C. N. 105)**  
**(GWALIOR BENCH)**

SHINDE C. J.

Bhagga and others, Appellants v. Jorawarsingh, Respondent.

Second Appeals Nos. 129 to 131 of 1950,  
D/- 10-4-1953.

**(a) Tort — Malicious prosecution — Burden of proof.**

In an action for malicious prosecution, the plaintiff has to prove (a) that he was prosecuted by the defendant; (b) that the proceedings complained of terminated in favour of the plaintiff; (c) that the prosecution was instituted without any reasonable and probable cause; and (d) that it was due to a malicious intention. AIR 1926 PC 46, Foll. (Para 3)

**(b) Civil P. C. (1908), S. 100 — Concurrent finding of fact.**

A concurrent finding of fact that there was absence of reasonable and probable

cause for the prosecution, based on evidence is binding in second appeal.

(Para 3)

Anno: C. P. C., Ss. 100 and 101 N. 39 and 54.

**(c) Tort — Malicious prosecution — Proof of malice.**

Malice can be inferred in certain circumstances from absence of reasonable and probable cause. If a prosecution is launched with the knowledge that the accused has committed no offence then whatever may be the motive which actuates the prosecutor, the prosecution would be considered to be due to malicious intention in law. (1892) 2 QBD 718 and AIR 1936 Mad 547, Rel. on.

(Para 3)

Mungre, for Appellants; Bhagwanswaroop, for respondent.

**CASES CITED :**

(A) ('26) AIR 1926 PC 46: 1 Luck 215 (PC)

(B) (1892) 61 LJ QB 151: 2 QB 718

(C) ('36) AIR 1936 Mad 547: 59 Mad 887

**JUDGMENT:** These three appeals arise out of the suits filed by Baldeosingh, Bhagga and Parshadi for damages on the ground of malicious prosecution. The facts briefly are that Jorawarsingh filed a complaint against Baldeosingh, Bhagga and Parshadi on the ground that they cut and stole a Babool tree which was in the possession of the complainant. That complaint was dismissed on the ground that it is not proved that the accused stole the Babool tree from the possession of the complainant. A revision was also filed before the Sessions Judge. But that was also disallowed. Consequently Baldeosingh, Bhagga and Parshadi filed suits for damages on the ground of malicious prosecution. The trial court decreed the suits and granted damages to Baldeosingh to the extent of Rs. 300/- and Parshadi and Bhagga to the extent of Rs. 50/- each. In appeal, the District Judge allowed the appeal and set aside the decree of the trial court. Consequently, all the three plaintiffs have filed these appeals.

(2) As the points involved in the cases were the same, both the lower courts disposed of the cases by one judgment. As similar points have been raised before me in all the three appeals, I propose to dispose of all the three appeals by one judgment.

(3) The lower appellate court has taken the view that the plaintiffs have not proved how Baldeosingh came to own the tree. The lower court has also stated in its judgment that the plaintiffs-appellants have not adduced any evidence to prove that the complainant was actuated by malice. It may be said at once that the question of ownership is absolutely immaterial for the decision of this case. What the plaintiff has to prove in such cases is (a) that he was prosecuted by the defendant; (b) that the proceedings complained of terminated in favour of the plaintiff; (c) that the prosecution was instituted without any reasonable and probable cause; and (d) that it was due to a malicious intention. (Vide — 'Balbhaddar Singh v. Budri Sah', AIR 1926 PC 46 (A)). That the plaintiffs were prosecuted and that they were acquitted is not disputed in this case. What we have to see is whether there was any reasonable and probable cause for launching the prosecution and whether the plaintiff was actuated in instituting the proceedings by malice.



The trial court has definitely found that the prosecution was launched without reasonable and probable cause. This finding of the trial court is based on the facts found on the evidence that the tree, at the time of cutting, was in the possession of Baldeosingh plaintiff, and consequently no theft could be committed of the tree. This finding has not been reversed by the lower appellate court. Consequently this finding is binding on me. All that has to be determined now, therefore, is whether the prosecution was due to a malicious intention. It must be admitted at once that there is no evidence on record to prove that Baldeosingh was actuated by malice in launching the criminal proceedings. But malice can be inferred under certain circumstances from absence of reasonable and probable cause.

In — 'Brown v. Hawkes', (1892) 2 QB 718 (B), Cave J. observed as follows:

"Now malice, in its widest and vaguest sense, has been said to mean any wrong or indirect motive; and malice can be proved, either by shewing what the motive was and that it was wrong, or by shewing that the circumstances were such that the prosecution can only be accounted for by imputing some wrong or indirect motive to the prosecutor."

The same learned Judge further observed:

"Of course, there may be such plain want of reasonable and probable cause that the jury may come to the conclusion that the prosecutor could not honestly have believed in the charge he made, and in that case want of reasonable and probable cause is evidence of malice."

The same proposition was affirmed in — 'Karuppanna Pillai v. F. W. Haughton', AIR 1936 Mad 547 (C). King J., who delivered the judgment of the court, observed as follows:

"The situation reduced to its simplest terms is this, that the Chairman knew that the appellant had committed no offence and that in spite of that knowledge he decided to prosecute him. His motive for doing so may have been not to gratify a personal spite but to promote what he thought the best interests of the Municipality. But the fact remains that he prosecuted a person who, he knew, was not guilty of any offence. That being the case, it seems to us clear that there cannot have been any reasonable or probable cause for the prosecution, and whatever his motive may have been, to have embarked upon a prosecution of this kind without reasonable or probable cause must amount to malice in law."

Both these cases have laid down a proposition that if a prosecution is launched with the knowledge that the accused has committed no offence then whatever may be the motive which actuates the prosecutor, the prosecution would be considered to be due to malicious intention in law. In the present case the possession of the tree was with plaintiff Baldeosingh. Bhagga and Parshadi were the servants of Baldeosingh. They cut the tree which was in the field of Baldeosingh. Jorawarsingh, therefore, could not honestly have believed in the charge of theft which he made against the present plaintiffs. Consequently, absence of reasonable and probable cause in this case is evidence of malice. In these circumstances, even the requirement of malicious intention is satisfied in this case. The suits must, therefore, be decreed.

(4) In the result the appeals are allowed and the decrees of the lower appellate courts are set aside. The decrees of the trial courts are restored. Appellants to get their costs throughout.

B/K.S.B.

Appeals allowed.

A. I. R. 1953 MADH-B. 270 (Vol. 40, C. N. 106)  
(Gwalior Bench)

CHATURVEDI J.

Shankar Singh Ganpat Singh, Applicant v. Gajraj Singh Kishori Singh, Opponent.

Civil Revn. No. 122 of 1950, D/- 25-2-1953.

Tenancy Laws — Quanoon Mal, Gwalior, (Smt. 1983), Ss. 119, 130 and 377 — Decision by Revenue Court in partition proceeding — Jurisdiction of Civil Court — Res judicata — (Civil P. C. (1908), S. 11, Expl. IV).

Taking the provisions of Ss. 119, 130 and 377, Gwalior Quanoon Mal, into consideration along with the principle incorporated in Expl. 4 to S. 11, C. P. C., there is no escape from the conclusion that a Civil Court is not competent to decide the question of title after the termination of the partition proceedings in a Revenue Court. Case law referred. (Para 8)

Anno: C. P. C., S. 11 N. 33.

Patankar and Hargovind Mishra, for Applicant; Krishna Bahadur and Vidyasagar, for Opponent.

CASES REFERRED TO:

- (A) ('21) AIR 1921 Oudh 132(2): 63 Ind Cas 272
- (B) ('23) AIR 1923 All 369: 71 Ind Cas 292
- (C) ('24) AIR 1924 Oudh 317: 75 Ind Cas 868
- (D) ('27) AIR 1927 All 635: 103 Ind Cas 360
- (E) ('31) AIR 1931 All 462: 53 All 568

ORDER: This is plaintiff's revision against the decree dated 24-2-1950 passed by the learned District Judge, Shajapur, in second appeal affirming the decrees of the first Appellate Court and of the trial Court dismissing the plaintiff's suit for a declaration of title. The dispute relates to two annas share in a zamindari in village Berakhedi-ghat, parganna Basoda, District Bhilsa. It was alleged in the plaint that in 1912 a four annas share was purchased from one Krishna Singh jointly by the father of the plaintiff and that of the defendant for a sum of Rs. 231/-. The defendants' father Kishore Singh at that time had no money with him and so the plaintiff's father Ganpat Singh had to pay Rs. 115/8/- on behalf of Kishore Singh to Kishan Singh. The father of the defendant could not pay the said sum of Rs. 115/8 to the father of the plaintiff and therefore by a deed dated 24-12-1912 he relinquished his rights in the said zamindari and abandoned his possession over it. The said deed could not be registered and a formal sale deed could not be executed when Kishore Singh and Ganpat both died. Thereafter in the Khewat the defendant Gajraj Singh was recorded as owner of two annas share, the property remaining joint in the name of the co-sharers. The plaintiff filed a suit for declaration of title on the basis of adverse possession for more than 12 years and wanted that the defendant's name should be struck off from the Khewat and that the partition proceedings should be stayed. The suit was resisted by the defendant on the ground that the partition proceedings had come to an end and thereafter the plaintiff's suit for



declaration of title could not be entertained. The substantial point in issue was does the decision in partition suit in the court of Assistant Collector (Naib Suba) operates as *res judicata*? This issue was decided in favour of the defendant and the suit was dismissed by the trial Court and both the appellate Courts have upheld this decision. The plaintiff has now come to this Court in revision.

(2) Mr. Patankar, on behalf of the plaintiff petitioner contends that the revenue Court has not made any inquiry in the plaintiff's title, nor has it given any decision as to the ownership of the property. He urges that the question of title was not directly and substantially in issue in the Revenue Court in partition proceedings.

(3) From the arguments of the learned counsel on both the sides it appears that the provisions of S. 377 Qanoon Mal, Gwalior, Samvat 1933, have been overlooked. For the decision of this suit S. 377 is important which rendered into English, runs as follows:

"(1) Those suits which are cognizable by the Revenue Courts under this Act will not be entertained in Civil Courts until there is clear direction to that effect in this Act.

(2) Once a question by a competent Court is decided between the parties to a suit, that decision will operate as *res judicata* in subsequent suits between the same parties or their representatives."

(4) In the Gwalior Act, (i. e., Qanoon Mal) partition proceedings are governed by chapter 9. Section 119 (1) mentions that an application for partition can be made only by a co-sharer whose name and share have been entered in the Khewat and who is not shown in the Khewat as "Gair Quabiz" (without possession). It appears from the proceedings that when the defendant made an application under S. 119 for partition of his share in the zamindari in dispute, the plaintiff petitioner had raised an objection that the defendant had never been in possession of the zamindari and so he could not file an application under S. 119. After inquiry, it was decided on 9-10-1937 that Gajraj Singh defendant had been in possession of the zamindari, and that the entry in Khewat to that effect is correct. The objection of the plaintiff was overruled and one Amin Sheopujan Singh was appointed for actual partitioning the shares. The question is; whether after the partition, a Civil Court is competent to decide the question of title. A perusal of S. 130 of Qanoon Mal Gwalior leads me to the conclusion that a Civil Court has only a limited jurisdiction for the purpose of deciding the question of proprietary title raised in the course of partition proceedings. When an objection regarding title is filed in a partition proceeding, three courses are open to the Revenue Court, (a) to decline to grant the application for partition until the question is determined by a competent Court, (b) to require any party to the case to institute a suit in a competent Court, or (c) to proceed to enquire into the merits of the objection and decide it as a Civil Court.

(5) The competence of a Civil Court to decide the question of title, therefore, depends upon the choice exercised by the Revenue Court. If the latter Court passes an order under cl. (a) or cl. (b), the Civil Court has authority to try and decide the question of title but it is a condition precedent that an order under either cl. (a) or cl. (b) should be made. On the other hand, if the Revenue Court takes an action under cl. (c) and proceeds to determine the question of title itself the jurisdiction

of the Civil Court is wholly ousted. In case no order is passed under cl. (a) or cl. (b), it can be presumed that the Assistant Collector (Naib Suba) followed the third course under S. 130, Gwalior Qanoon Mal. From a perusal of the provisions of this section, read with the provisions embodied in S. 377, it will be manifest that a suit to decide a question of proprietary title in the course of the partition proceedings, cannot be entertained by a Civil Court unless and until it has authority from the Revenue Court to entertain it.

(6) Mr. Patankar draws my attention to the provisions of S. 112 and S. 233 (k), U. P. Land Revenue Act (No. 3 of 1901) and from the absence of such provisions in the Gwalior Qanoon Mal Samvat 1933, he thinks that the rulings of Allahabad High Court & Oudh Chief Court reported in—'Ram Lakhan Singh v. Rampal Singh', AIR 1921 Oudh 132 (2), (A) — 'Deoki Dube v. Umandat Dube', AIR 1923 All 369 (B) — 'Bhagwan Dutt v. Brij Bhakhan', AIR 1924 Oudh 317 (C) — 'Mukandlal v. Nawbatlal', AIR 1927 All 635 (D) & — 'Ram Rekha v. Lallu Missir', AIR 1931 All. 462 (E) and relied upon by the Courts below have no material bearing upon the question in this revision. I do not subscribe to this view. In my opinion, S. 130 of Qanoon Mal, Gwalior, corresponds to S. 111, U. P. Land Revenue Act, and there is no substantial difference between the two. Section 112, U. P. Land Revenue Act of 1901, of course, lays down that the decrees passed by the Collector shall be held to be the decrees of the Court of Civil jurisdiction of the first instance and shall be open to appeal to the District Judge or to the High Court. It is true that there is no provision for appeal to the District Judge or to the High Court in Gwalior Qanoon Mal, but this alone cannot be considered to be of such significance when it is clearly mentioned in cl. (c) of S. 130, Gwalior Qanoon Mal that the Officer in charge of partition can decide the question of title "as a Civil Court". It would follow that the decrees of the said Officer passed in partition suit would be considered to be decrees of a Court of Civil jurisdiction, irrespective of the fact whether appeals from them lie or do not lie to the District Judge or to the High Court.

(7) Then S. 233 (k), U. P. Land Revenue Act, 1901, only lays down that a Civil Court cannot take cognizance of a suit for partition except as provided in Ss. 111 & 112. The same result is achieved in Gwalior Qanoon Mal by S. 130 read with the provisions embodied in S. 377 adverted to above. As a general statement of law I am disposed to agree to the remarks of Mukherjee J. at p. 465 of — 'AIR 1931 All. 462 (E)' that the first question involved in partition proceedings is a question of title. The court has to declare the title of the respective parties before it, and after it has declared the title, it has to proceed to divide and distribute the property. A perusal of chapter 9 of the Gwalior Qanoon Mal will then show that as soon as an application is made for partition, notice is to be given to the co-sharers and a date is to be fixed for their appearance. They have to file an objection, if any, to the partition. If no question of title is raised by them at this stage, then the nature and extent of the interest of the several parties before the Court is to be declared. This order would amount to making of a preliminary decree for partition in a Civil Court. It is only after passing of this preliminary decree that the property is divided and shares are allotted. If any party fails to raise any question of title, having had an opportunity to do so, he would be barred from doing so at a later stage by reason of the principle incorporated in explanation 4 to S. 11, Civil P. C.



(8) Taking the provisions of Ss. 119, 130 and 377, Gwalior Quanoon Mal, into consideration along with the principle incorporated in Expl. 4 to S. 11, C. P. C., there is no escape from the conclusion that a Civil Court is not competent to decide the question of title after the termination of the partition proceedings in a Revenue Court. In this view of the matter I dismiss the revision with costs.

B/D.R.R.

Revision dismissed.

A. I. R. 1953 MADH.-B. 272 (Vol. 40, C. N. 107)  
(INDORE BENCH)

ABDUL HAKIM KHAN J.

Chakrapani Laltpasad, Applicant v. Bihari-lal Mahabir and another, Opponents.

Small Cause Revn. No. 135 of 1950, D/- 9-4-1953.

(a) Civil P. C. (1908), O. 22, R. 9 and S. 141 — Applicability to revision proceeding — AIR 1949 Lah 186 (FB); AIR 1949 Mad 435, Dissented from.

Where any of the parties to a revision dies, the suit abates under O. 22. Steps, therefore, should be taken for setting aside the order of abatement under O. 22, R. 9, which applies to a revision proceeding by virtue of S. 141, before applying for substitution of legal representative. AIR 1949 Lah 186 (FB); AIR 1949 Mad 435, Dissented from. (Para 4)

Anno: C.P.C., O. 22, R. 9 N. 11; S. 141 N. 2 Pt. 28.

(b) Civil P. C. (1908), S. 141 — Applicability. AIR 1949 Lah 186 (FB), Dissented from.

The words "all proceedings" occurring in S. 141 embrace proceedings of all character, original as well as those that are not original. The word "all" is a comprehensive term. Thus, a revision is a proceeding to which S. 141 applies. AIR 1949 Lah 186 (FB), Dissented from. (Para 5)

Anno: C. P. C., S. 141 N. 2 Pts. 8 and 28.

Tambe, for Applicant; Goyal, for Opponents.

#### CASES CITED:

(A) ('49) AIR 1949 Lah 186: Pak LR (1948) Lah 225 (FB)

(B) ('49) AIR 1949 Mad 435: ILR (1949) Mad 566

ORDER: During the pendency of this revision, the opponent Biharilal died and within the period of limitation prescribed by law, no steps were taken to bring the legal representatives of the opponent on record. An application for bringing the legal representatives on record should be filed according to Article 176, Limitation Act, in three months. But the applicant filed it after about 16 months when the revision had abated.

(2) The counsel for the applicant without praying for setting aside the order of abatement, has

filed an application for bringing the legal representatives of the deceased on record. It is being objected to by the other party and it is said that it is not possible to proceed with the case without the order of abatement being first set aside. But it is urged on behalf of applicant that Order 22 Rule 9 does not apply to revisions that have abated. In support of this, the learned counsel for the applicant has cited — 'Mahomed Sadaat Ali Khan v. Administrator Corporation of city of Lahore', AIR 1949 Lah. 186 (A) and — 'Manickam v. Ramanathan Chettiar', AIR 1949 Mad 435 (B). With very great respect, I beg to differ.

(3) In the first place we have to decide whether on the death of any of the parties a revision abates or not? It is conceded that a revision does abate. The very fact of abatement of a revision implies that Order 22, Civil P. C. has been applied. Furthermore, the very prayer of the applicant to bring the legal representatives of the deceased on record impliedly invokes Order 22 because the legal representatives are brought on record under Order 22, C. P. C.

(4) I am of opinion that if any of the parties to a revision dies, the suit abates under Order 22 Civil P. C., and that steps should be taken for setting aside the order of abatement under Order 22 Rule 9 Civil P. C. My reason for applying O. 22 Rule 9 in revisions is that Section 141, Civil P. C. has been enacted for precisely such a purpose. It read thus:

"The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of Civil Jurisdiction."

There can be no two views that the proceedings in revision are of a civil nature and that they are proceedings in a court of civil jurisdiction.

(5) The Lahore High Court in its Full Bench decision reported in — 'AIR 1949 Lah. 186 (A)', has expressed the view that Section 141 is so drafted as to enable the court to apply the procedure in regard to suits to such proceedings as are in pari materia with suits and thus original in character. But with very great respect I beg to point out that the words "all proceedings" occurring in Section 141 embrace proceedings of all character, original as well as those that are not original. The word "all" is a comprehensive term and I see no reason why its meaning should be restricted. I have, therefore, no hesitation in saying that a revision is a proceeding to which Section 141, Civil P. C. applies and in this view of the matter Order 22 and the rules thereunder apply to it as well.

(6) I, therefore, hold that the revision having abated, the applicant should first file an application for setting aside the order of abatement.

A/V.S.B.

Ordered accordingly.

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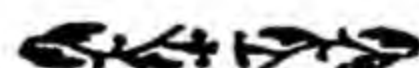
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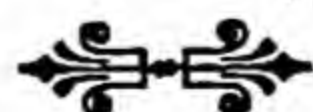
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# MADRAS HIGH COURT

1953

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" " K. Subba Rao, B.A., B.L.

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156	" " 594	329	" " 788	446	1953 " 767	658	" " 821	815	" " 183
158	1953 " 173	332	" " 725	448	1952 " 782	659	" " 38	818	" " 197
159	1952 " 827	333	1953 " 389	450	" " 235	669	1952 " 865	825	1952 " 771
160	" " 860	336(1)	1952 " 825	453			1953 " 178	834	1953 " 661
			" " 834	454				839	" " 1



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1	1952 M	186	168	1952 M	43	369	1952 M	821	583	1953 M	370	743	1953 M	241
13	" SC	12	169	" "	591	373	1954 "	116	585	" "	342	750	1954 "	169
16	" M	253	172	" "	594	375	1952 "	763	587	" "	615	751	1953 "	999
19(1)	" "	79	174	" "	656	376	" "	769	591	1952 "	808	752	1952 SC	235
19(2)	" "	126	176	" "	565	378	1954 "	129	592	" "	776	762	" "	123
20	" "	92	191	" "	863	381	1952 "	790	594	" "	779	777	1953 M	219
23	1951 "	1012	183	" "	860	384	1953 "	827	598	" "	670	779	" "	289
25	1952 "	203	194	" "	827	387	" "	436	599	1953 "	10	780	1954 "	86
53	" "	531	196(1)	" "	807	389	1952 SC	167	602	" "	550	781	1953 "	268
55	" "	529	196(2)	1953 "	396	393	" "	149		" "		782	" "	84
56	" "	149	200	1952 "	814	397	" "	196	604(1)	1954 "	80	783	" "	1007
57	" "	299	206	1953 "	39	402	" "	159	604(2)	1953 "	333	784	" "	146
59	1954 "	135	209	1952 SC	64	409	" "	165	608	" "	179	787	" "	240
60	1951 SC	484	217	1953 M	399	411	" M	727	813	" "	1006	789	" "	28
62	" "	316	219	1952 "	855	420	1953 "	174	615	" "	832	792	" "	210
64	1952 M	229	219	1952 "	561	421	1954 "	182	616	1954 "	72	796	" "	102
66	" "	180	220	" "	26	424	1952 "	872	617	1953 "	357	799	" "	366
67	1951 SC	467	225	1953 "	812	429	" "	192	618	" "	25	802	" "	152
69	1954 M	15	227	1952 "	62	431	" SC	179	619	1952 "	734	805	" "	238
72	1952 "	395	231	1954 "	833	437	" "	143	621	1953 "	13	806	" "	369
88	1953 "	184	234	1952 "	89	439	" M	856	626	" "	183	808	" "	816
89	1952 "	605	235	" "	413	442	" SC	170	628	" "	203	809	1954 "	71
90	1954 "	188	236	1953 "	837	451	" "	153	631	" "	822	811	1953 "	223
91	1953 "	175	237	1952 "	835	455	" "	119	634	" "	32	814	" "	22
92(1)	" "	173	241	" "	831	460	" "	75	642	" "	190	817	" "	71
92(2)	1954 "	165	244	" "	413	492	" "	115	650	" "	246	822	" "	164
94	1952 "	545	247	1953 "	54	496	1953 M	234	658	" "	86	823	" "	475
97	" "	555	253	1952 "	871	497	1952 "	786	664	1952 "	771	824	" "	217
99	1953 "	208	259	" "	578	500	" "	778	670	1953 "	661	826	" "	79
100	1952 "	784	261	1954 "	181	501	" "	18	675	" "	636	833	" "	129
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104	" "	47	264	" "	800	507	1952 SC	319	684	1953 "	185	839	" "	375
110	" M	474	266	" "	880	511	" "	225	688	1952 "	806	840	" "	320
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142	" "	288	298	1952 "	613	545	1952 SC	335	699	" "	228	865	" "	159
143	" "	479	299	" "	168	552	" "	329	701	" "	817	868	" "	548
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150	" "	54	346	1954 "	188	561	" "	356	721	" "	197	878	" "	182
155	" "	27	349	1953 "	993	562	" "	821	727	" "	213	891	" "	138
156	" "	52	351	1952 "	825	564	" "	826	728	" "	214	897	" "	151
160	" "	105	354	1953 "	400	566	" "	358	731	" "	80	902	" "	609
162	1954 M	184	357	" "	725	575	1952 "	865	733	" "	230	906	" "	142
163	" "	247	358	1952 "	1004	577	" "	798	738	" "	1	907	" "	1002
165	" "	271	362	" "	61	580	1954 "	819	741	" "	74	908	" "	451
166	" "	143	364	" "			" "	74	745	" "	204	912	" "	888
167	" "	221	365	" "						" "	78		" "	



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935	" " 540	953	" " 360	963	1953 " 549	970	" " 371	981	" " 421
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22	" " 241	121	" B 290	258	" C 344	349	" " 784	458	" B 261
28	" " 282	129	" A 488	278	1952 B 151	353	" A 928	490	1953 C 314
33	1951 Raj 150(2)	149	" Punj 80	293	" " 330	369	" M 658	497	" " 299
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- (83) 6 Mad. 60 = 1 Weir 657 (F.B.), *Queen v. Sidappa* Held dissented by 21 Mad. 360 (F. B.) in A. I. R. 1953 All. 353.
- (05) 28 Mad. 197, *Pyligantam v. Rama Doss* Overruled in A. I. R. 1953 S. C. 125.
- (05) 28 Mad. 216, *Abdul Karim v. Badrudeen* Dissented from in A. I. R. 1953 Mad. 897.
- (11) 9 Ind. Cas. 54 = 21 Mad. L. J. 453 = 9 Mad. L. T. 263, *Rangaswami Iyengar v. Srinivasa Iyengar* Dissented from in A. I. R. 1953 Mad. 726.
- (12) 14 I. C. 277 = 11 Mad. L. J. 383, *Kamalathammal v. C. V. Shrinivasa Chariar* Dissented from in A. I. R. 1953 Raj. 121.
- (15) A. I. R. 1915 Mad. 1159 = 16 Cri. L. J. 263 = 1915 Mad. W. N. 269 = 17 Mad. L. T. 191 = 2 Mad. L. W. 233 = 28 Ind. Cas. 156, *Mahomed Kasim v. Emperor* Dissented from in A. I. R. 1953 Assam 35 (F. B.).
- (18) A. I. R. 1918 Mad. 120 = 41 Mad. 622 = 45 Ind. Cas. 98 = 34 Mad. L. J. 396; *Srinivasa Upadhya v. Ranganna Bhatta* Dissented from in A. I. R. 1953 Bom. 318.
- (18) A. I. R. 1918 Mad. 212 = 40-Mad. 977 = 45 Ind. Cas. 257 = 19 Cri. L. J. 497, *Kottayya v. Venkayya* Dissented from in A. I. R. 1953 Orissa 257.
- (18) A. I. R. 1918 Mad. 258 = 44 Ind. Cas. 428 = 34 Mad. L. J. 32, *Vellayappa v. Krishna* Dissented from in A. I. R. 1953 Bom. 403.
- (18) A. I. R. 1918 Mad. 391 = 41 Mad. 151 = 22 M. L. T. 330 = 33 M. L. J. 575 = 6 M. L. W. 517 = 1917 M. W. N. 785 (F. B.), *Venkatachalapati Rao v. Kameshwaramma* Dissented from in A. I. R. 1953 Nag. 176.
- (21) C. S. No. 420 of 1921 (Mad.) Dissented from in A. I. R. 1953 Mad. 897.
- (24) A. I. R. 1924 Mad. 90 = 47 Mad. 136 = 73 Ind. Cas. 1054 = 45 Mad. L. J. 153 = 1923 Mad. W. N. 681, *Krishna Reddy v. Thanikachala* Overruled in A. I. R. 1953 S. C. 198.
- (24) A. I. R. 1924 Mad. 223 = 76 Ind. Cas. 805 = 45 Mad. L. J. 827 = 18 Mad. L. W. 863 = 33 Mad. L. T. 205, *Ramanadha Iyer v. Nagendra Iyer* Dissented from in A. I. R. 1953 Nag. 227.
- (24) A. I. R. 1924 Mad. 494 = 47 Mad. 483 (F. B.), *Meyappa Chettiar v. Chidambaram Chettiar* Dissented from in A. I. R. 1953 All. 173 (F. B.).
- (25) A. I. R. 1925 Mad. 1210 = 49 Mad. 18 = 49 M. L. J. 590 = 23 M. L. W. 418 (F. B.), *Gopala Krishnayya v. Lakshmana Rao* Dissented from in A. I. R. 1953 Bom. 356.
- (26) A. I. R. 1926 Mad. 258 = 92 Ind. Cas. 615 = 23 M. L. W. 85 = 1925 M. W. N. 886, *Varadacharlu v. Narasimha Charlu* Dissented from in A. I. R. 1953 Cal. 377.
- (27) A. I. R. 1927 Mad. 846 = 50 Mad. 770 = 53 Mad. L. J. 329 = 26 Mad. L. W. 227 = 39 Mad. L. T. 339 = 165 Ind. Cas. 159, *Raja Surya Rao v. Raja Ramarao* Dissented from in A. I. R. 1953 Mad. 897.
- (33) A. I. R. 1933 Mad. 795 = 145 Ind. Cas. 965 = 65 Mad. L. J. 588 = 38 Mad. L. W. 610 = 1933 Mad. W. N. 1377, *Official Assignee, Madras v. Sampath Naidu* Overruled in A. I. R. 1953 Mad. 637 (F. B.).
- (36) 1936 Mad. W. N. Cr. 235 = 1936 Mad. W. N. 1351, *Emperor v. Narayanaswami Naidu* Dissented from in A. I. R. 1953 Mad. 574.
- (38) A. I. R. 1938 Mad. 130 = 39 Cri. L. J. 266 = (1937) 2 Mad. L. J. 862 = 46 Mad. L. W. 709 = 173 Ind. Cas. 26, *In re Venkataramia* Dissented from in A. I. R. 1953 Kutch 54.
- (42) Appeal No. 213 of 1942 (Mad.), *Dist. Board of Commerce for The Hindu Religious Endowments, Madras v. Parasaram Veeraraghavacharyulu* Overruled in A. I. R. 1953 S. C. 195.
- (43) A. I. R. 1943 Mad. 246 = 206 I. C. 356 = 1942 M. W. N. 703 = (1942) 2 M. L. J. 668 = 55 M. L. W. 823, *Natarajan Chettiar v. Perumal Ammal* Dissented from in A. I. R. 1953 Pat. 129.
- (43) A. I. R. 1943 Mad. 390 = 44 Cri. L. J. 568 = 206 Ind. Cas. 577 = 1943 Mad. W. N. 60 = 56 Mad. L. W. 69 = (1943) 1 Mad. L. J. 126, *In re Piramanayaga Pandaram* Dissented from in A. I. R. 1953 Orissa 227.
- (43) A. I. R. 1943 Mad. 708 = 211 I. C. 206 = 1943 M. W. N. 478 = 1943-2 M. L. J. 282 = 56 Mad. L. W. 487, *Satyanarayana v. Narasamma* Dissented from in A. I. R. 1953 Pat. 129.
- (45) A. I. R. 1945 Mad. 294 = I. L. R. (1946) Mad. 39 = 1945-1 M. L. J. 463 = 58 M. L. W. 204 = 1945 M. W. N. 220, *Arumuga Mudaliar v. Balasubramania Mudaliar* Overruled in A. I. R. 1953 Mad. 781 (F. B.).



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- (46) A. I. R. 1946 Mad. 337=I. L. R. (1946) Mad. 795 = 1946-1 Mad. L. J. 17 = 1946 Mad. W. N. 195, Chellamma v. Ramkrishnarao  
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- (46) A. I. R. 1946 Mad. 434=227 Ind. Cas. 496=1946-2 Mad. L. J. 72 = 1946 Mad. W. N. 422 = 59 Mad. L. W. 319, Viswa Sundara Row v. Kusala Ramayya  
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- (47) A. I. R. 1947 Mad. 68=1946-2 Mad. L. J. 229=231 Ind. Cas. 276=59 Mad. L. W. 520 = 1946 M. W. N. 609, Umar Pulawar v. Dawood Rowther  
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- (48) A. I. R. 1948 Mad. 16=48 Cri. L. J. 963 = I. L. R. 1948 Mad. 434=1947 Mad. W. N. 523=1947-2 Mad. L. J. 117=60 Mad. L. W. 421, In re Abdul Karim  
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- (48) A. I. R. 1948 Mad. 452=61 Mad. L. W. 359=1949 M. W. N. 336, Vellayan Chettiar v. Receivers, O. A. Narayanaswami Iyer  
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- (48) A. I. R. 1948 Mad. 496=1948-1 Mad. L. J. 241, In the matter of Viswanathan Chettiar  
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- (49) A. I. R. 1949 Mad. 435=I. L. R. (1949) Mad. 566 = 1948-2 Mad. L. J. 521, Manickam v. Ramanathan Chettiar  
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- (49) A. I. R. 1949 Mad. 742 = 1949-1 Mad. L. J. 514 = 62 Mad. L. W. 316, Murahari Rao v. Bapayya  
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- (50) O. S. A. No. 34 of 1947, D/- 17-3-1950 (Mad.)  
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- (50) A. I. R. 1950 Mad. 16=1949-1 Mad. L. J. 395 = 62 Mad. L. W. 276=1949 Mad. W. N. 224, Kesanna v. Venkamma  
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- (50) A. I. R. 1950 Mad. 151 = 1949-2 Mad. L. J. 517, Salma Bi v. Mohammad Ebrahim Sahib  
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- (50) A. I. R. 1950 Mad. 321 = 1950-1 Mad. L. J. 63 = 1950 M. W. N. 7=63 M. L. W. 21, Lakshmi Ammal v. Narayana Swami  
(1) Dissented from in A. I. R. 1953 Bom. 342.  
(2) Dissented from in A. I. R. 1953 Mad. 712.
- (51) A. I. R. 1951 Mad. 191 = 1951-1 Mad. L. J. 527 = 1951 Mad. W. N. 445 = 1951 Mad. W. N. Cr. 125 = 64 Mad. L. W. 620=52 Cri. L. J. 744, C. P. Sarathy v. State of Madras  
Reversed in A. I. R. 1953 S. C. 53.
- (51) A. I. R. 1951 Mad. 572 = I. L. R. 1950 Mad. 339 = 62 Mad. L. W. 635 = 1949-2 Mad. L. J. 88 = 1949 Mad. W. N. 424 = 1949-19 Com. Cas. 138, Jawahar Mills Ltd. Salem v. Sha Mulchand and Co. Ltd.  
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- (51) A. I. R. 1951 Mad. 809 = 1951-1 Mad. L. J. 364 = 64 Mad. L. W. 321 = 1951 Mad. W. N. 316, Veerayamma v. Venkanna  
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- (52) Writ Petn. No. 599 of 1952, D/- 16-9-1952 (Mad.)  
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- (52) A. I. R. 1952 Mad. 305 = (1951) 19 I. T. R. 261, Commr. of Income-tax v. Thiagaraja Chetty & Co.  
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- (53) A. I. R. 1953 Mad. 54=1952-1 Mad. L. J. 540=65 Mad. L. W. 377=1952 Mad. W. N. 253, Sambandam v. General Manager, South Indian Railway  
Dissented from in A. I. R. 1953 Pat. 92.
- (53) A. I. R. 1953 Mad. 66=1953 Cri. L. J. 256=1952-2 M. L. J. 725=65 M. L. W. 892, Public Prosecutor v. A. K. Gopalan  
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- (53) A. I. R. 1953 Mad. 91 = 65 Mad. L. W. 1024 = 3 S. T. C. 396 = 1952-2 Mad. L. J. 593 = 1952 Mad. W. N. 861 = 1952 Mad. W. N. (Cr.) 249 = 1953 Cri. L. J. 290, Poppatlal Shah v. State of Madras  
Reversed in A. I. R. 1953 S. C. 274.
- (53) A. I. R. 1953 Mad. 206=1952-2 Mad. L. J. 436=65 Mad. L. W. 897, St. Joseph's A. and M. Works v. Maria Soosai Pillai  
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# THE ALL INDIA REPORTER 1953 Madras High Court

A. I. R. 1953 MADRAS 1

SATYANARAYANA RAO AND RAJAGOPALAN JJ.

Nadar Transports Tiruchirapalli by its Managing Partner, Appellant v. The State of Madras, represented by the Secretary to Government, Home Department, Madras and others, Respondents.

Letters Patent Appeal No. 72 of 1952, D/-8-4-1952.

**(a) Constitution of India Art. 226 — Certiorari — Exercise of discretion by Central Road Traffic Board — Reduction of number of permits issued to person — No apparent error on face of order — Interference with discretion exercised — (Motor Vehicles Act (1939), S. 64).**

Where the Central Road Traffic Board in the exercise of its discretion reduces the number of bus permits issued to a person the High Court, in the absence of error apparent on the face of the order, cannot interfere with the discretion exercised even if the grounds given in support of the order are such as would not have appealed to it, if it were considering the matter for the first time.

(Para 5)

Anno: Civ. P. C. App. III, Constn. of India, Art. 226 N. 13; Mot. Veh. Act, S. 64 N. 1.

**(b) Motor Vehicles Act (1939) S. 64 — Scope — Right of appeal under Cls. (a) and (f).**

Clauses (a) and (f) of S. 64 are intended to apply to different situations. Cl. (a) is confined only to cases where a person is aggrieved by the refusal of the Regional Transport Authority to grant a permit to him or is aggrieved by any condition attached to a permit granted to him. There may be a person who while applying for the grant of a permit for himself has also objected to the grant of a permit to the other. In such a case if the permit is refused to him he would fulfil the conditions of both Cls. (a) and (f). There may be a person who though he had not applied for a permit to himself, was a person who provided transport facilities and opposed the grant of a permit to another, & if the permit is granted to the other, notwithstanding that he did not apply for a permit he would be entitled to prefer an appeal against the order under Cl. (f), though he would not answer the description in Cl. (a) as a person aggrieved by the refusal of the

Regional Transport Authority to grant a permit and though he opposed the grant of the permit only formally and not by a representation in writing as required by S. 57 sub-ss. (3) and (4).

(Para 6)

Anno: Mot. Veh. Act S. 64 N. 1.

**(c) Motor Vehicles Act (1939), S. 64 — grounds that can be urged and considered by Appellate authority.**

The restriction in S. 57 (4) that no representations should be considered by the Regional Transport Authority is confined to the hearing before the Regional Transport Authority, and it does not extend to the appellate authority. In urging the grounds in the appeal against the grant of a permit the opposer is not confined to the representations, if any, made by him before the Regional Transport Authority and the power of the appellate authority namely, the Central Road Traffic Board in considering the grounds urged against the order is not confined only to the representations, if any, made before the Regional Transport Authority. The appellate authority has unrestricted powers to deal with the appeal and consider the grounds available in the records which require reconsideration. No doubt the appellate authority cannot consider grounds or objections not urged by anybody before Regional Transport Authority, but even if one person urged objections to the grant of the permit, it would be open to another person who had not urged those objections to take advantage of them and urge them as grounds of appeal before the appellate authority, and the appellate authority would be free to consider not only the representations, if any, made by the appellant but also by other parties who were parties to the proceedings before the Regional Transport Authority.

(Para 7)

Anno: Mot. Veh. Act, S. 64 N. 1.

K. Bhashyam, C. A. Vaidhyalingam, T. Venkatadri and K. Ramachandra Rao, for Appellant; Govt. Pleader and M. N. Nambiar, for Respondents.

SATYANARAYANA RAO J.: This is an appeal against the judgment of our learned brother, Subba Rao J., dismissing an application for the issue of a writ of certiorari to quash the orders of the State of Madras and the Cen-



## 2 Madras

1 Traffic Board dated 14-5-51 and 10-2-51 respectively. Our learned brother, in the 51 respondent under appeal, has set out the facts judiciously and it will be sufficient to more of ourselves in this judgment to such of facts as are essential for the disposal of this Letters Patent Appeal.

(2) The appellant, Nadar Transports, Tiruchirapalli, and the third respondent, Shanmugham Pillai, were competitors for permits to run buses on two routes, route 1-A and route 8. In the first instance, the Regional Transport Authority issued two permits to the appellant for route 1-A and one to the respondent for the same route and granted one permit in route 8 to the appellant. This order was subsequently cancelled and there was a fresh notification on the 1st October 1950, in which the number of the buses to run in route No. 8 was increased from one to two.

The Regional Transport Authority granted five permits to the appellant for routes 1-A and 8, i.e., three permits to ply three buses in route 1-A and two permits to ply two buses in route 8. Before the Regional Transport Authority, the third respondent did not make any representations against the grant of the permits to the appellant.

The order granting five permits to the appellant was the subject matter of an appeal by the third respondent to the Central Road Traffic Board, which modified the order of the Regional Transport Authority by granting two permits for route 8 to the respondent and restricting the appellant's right to three permits in route 1-A. There was an application to revise this order to the State of Madras under S. 64-A and that application was unsuccessful. Thereafter the appellant approached this court with an application to issue a writ of certiorari quashing the proceedings of the Government.

The matter was heard by Subba Rao J. and before him three questions were raised on behalf of the appellant: (1) Shanmugham Pillai, the third respondent did not apply for permits, and therefore, the Central Road Traffic Board had no power to issue two permits to him; (2) As Shanmugham Pillai did not file any written representation before the Regional Transport Authority under S. 57 (4) of the Motor Vehicles Act he had no right of appeal against that order under S. 64 of the said Act; (3) the order of the Regional Transport Authority is vitiated by an error apparent on the face of the record. On all the points the learned Judge decided against the appellant. He found on the first point that in fact the two applications filed by the respondent were treated as applications for two permits and the enquiry proceeded on that basis. This point however is not now pressed before us.

(3) On the second point he found that the appellant had an undoubted right of appeal as he was an aggrieved party under S. 64-A of the Act. On the third point he was not satisfied that there was any error apparent on the face of the record to attract the jurisdiction of this court to quash the order of the Government by a Writ of Certiorari.

(4) Before us Mr. K. Bhashyam, the learned advocate for the appellant, argued only two points. In the first place he urged that there was an error apparent on the face of the record; and secondly that the respondent had no right of appeal against the order of the Regional Transport Authority to the Central Road Tra-

ffic Board, and in any event as he made no representations before the Regional Transport Authority objecting to the grant of a permit to the appellant, he was precluded from raising any ground attacking the order of the Regional Transport Authority as being invalid and unjust.

(5) As regards the first point, it was claimed that the statement in the order of the Central Road Traffic Board, that the appellant was a new entrant and that therefore he should not be given permits for five buses at one and the same time, was an obvious error, as he was running buses on temporary permits even by that time, and what is more, the respondent also was in a similar position, and they ought not to have made any invidious distinction between the respondent and the appellant on that ground. In a sense the appellant undoubtedly was a new entrant, for, it was admitted that before 25-4-1949 the date of the first order of the Regional Transport Authority under which two permits for route 1-A and one permit for route 8 were granted to the appellant, he did not run any bus and had no experience of bus service. The reason that he was a new entrant was given by the appellate authority for reducing the number of permits from 5 to 3 and not for excluding him altogether from the grant of permits. They also gave as an additional reason that the respondent was an efficient operator. For these reasons, they granted two permits for route 8 in favour of the respondent. There is no error apparent on the face of that order, and the discretion exercised by the Central Road Traffic Board cannot be interfered with by this court in a writ of certiorari even if the grounds that have been given in support of the order are such as would not appeal to us if we are considering the matter for the first time. The objection, therefore, that the order was vitiated by an error apparent on the face of the record, must be overruled, and we agree with the learned Judge that there is no substance in this contention.

(6) The second objection resolves itself into two parts. In the first place the question is raised whether the respondent had a right of appeal at all to the Central Road Traffic Board. The second aspect raises the question of the scope and limit of the power of the appellate authority in disposing of the matter. Two subsections of S. 64 of the Motor Vehicles Act are relevant in this connection. Under sub-sec. (a) "any person aggrieved by the refusal of the Provincial or a Regional Transport Authority to grant a permit, or by any condition attached to a permit granted to him," and under sub-sec. (f) "any person.....who, having opposed the grant of a permit, is aggrieved by the grant thereof....." "may, within the prescribed time and in the prescribed manner, appeal to the prescribed authority who shall give such person and the original authority an opportunity of being heard."

The respondent was undoubtedly an aggrieved person as the regional transport authority refused to grant him a permit for route 8, and he would therefore be entitled to prefer an appeal against the order granting a permit in favour of the appellant.

Under sub-sec. (f) the respondent was a person providing transport facilities; but the question is whether he can be treated as a person who opposed the grant of a permit. The



argument urged is that under S. 57, sub-ss. (3) and (4) a person objecting to the grant of a permit to another is required to make his representations in connection therewith within thirty days from the date of publication of the application or the substance thereof in the prescribed manner, and if he fails to make a representation within the time permitted by law, he is precluded from making any further representations to the Regional Transport Authority objecting to the grant of the permit to the other. Of course, the representation must be made in writing before the appointed date, furnishing also simultaneously a copy to the applicant. The argument is that, as the third respondent made no representation before the Regional Transport Authority objecting to the grant of a permit in favour of the appellant, he cannot be described as a person who opposed the grant of a permit, and therefore the respondent could not have claimed a right of appeal to the Central Road Traffic Board.

Sec. 64, sub-secs. (a) and (f) are intended in our opinion to apply to different situations. Sub-sec. (a) is confined only to cases where a person is aggrieved by the refusal of the Regional Transport Authority to grant a permit to him or is aggrieved by any condition attached to a permit granted to him. There may be a person who while applying for the grant of a permit for himself has also objected to the grant of a permit to the other. In such a case, if the permit is refused to him he would fulfil the conditions of both sub-secs. (a) and (f). There may be a person who though he had not applied for a permit to himself, was a person who provided transport facilities and opposed the grant of a permit to another, and if the permit is granted to the other, notwithstanding that he did not apply for a permit he would be entitled to prefer an appeal against the order under sub-sec. (f), though he would not answer the description in sub-sec. (a) as a person aggrieved by the refusal of the Regional Transport Authority to grant a permit. The language used in sub-sec. (f) is restricted only to opposition to the grant of a permit, for it says "having opposed the grant of permit". It does not say that he should be a person who made also a representation in writing opposing the grant of a permit to the other as required by S. 57, sub-secs. (3) and (4). A person, without filing any written representation objecting to the grant of a permit to another, might formally object to the grant of a permit, and even such a person, if he satisfies the other requirements that he is a person providing transport facilities, might possibly have a right of appeal. The view taken therefore by Subba Rao J. that the third respondent had a right of appeal under sub-sec. (a) in the present case is undoubtedly correct.

(7) There remains the further question, whether, in urging the grounds in the appeal, the respondent was confined to the representations, if any, made by him and whether the power of the appellate authority in considering the grounds urged against the order is to be confined only to the representations, if any, made by the respondent before the Regional Transport Authority, or whether the appellate authority has unrestricted powers to deal with the appeal and consider the grounds available in the records which require reconsideration. The right of appeal is conferred upon an appellant, and the power of the appellate authority is not

restricted in any manner either by the provisions of S. 64 or by any of the rules made under the power conferred by the Act. The last clause of S. 64 says that the appeal should be preferred within the prescribed time and in the prescribed manner to the prescribed authority, and the prescribed authority, in this case, the Central Road Traffic Board, should give such person, i.e., the person who is aggrieved by the order, i.e., the appellant before it, and the original authority, i.e., the Regional Transport Authority, an opportunity of being heard.

"Prescribed" means of course prescribed by the rules made under the Act and there are no rules made under the Act so far as we are able to see (and our attention was not drawn to any rule) which restricts the powers of the appellate authority in dealing with the matter and confines it only to the grounds, if any, urged by the aggrieved person before the Regional Transport Authority. The opportunity to be given no doubt, is restricted to the person who is aggrieved by the order i.e., the appellant and the original authority; but if a permit was already granted to a person, it will be opposed to all principles of natural justice to cancel that permit without giving the grantee an opportunity of being heard. It is perhaps for this reason we are told that the uniform practice adopted by the Central Road Traffic Board is to issue notice to the person to whom the Regional Transport Authority has granted a permit and that procedure we think is the proper procedure.

The restriction in S. 57(4) that no representations should be considered by the Regional Transport Authority is confined in our opinion to the hearing before the Regional Transport Authority, and it does not extend to the appellate authority. We do not thereby mean that it is open to the appellate authority to consider grounds or objections not urged by anybody before the Regional Transport Authority, but even if one person urged objections to the grant of the permit, it would be open to another person who had not urged those objections to take advantage of them and urge them as grounds of appeal before the appellate authority, and the appellate authority would be free to consider not only the representations if any made by the appellant but also by other parties who were parties to the proceedings before the Regional Transport Authority. In other words, their discretion is unfettered in the sense that it is open to them to consider all the grounds which were on record when the matter received consideration before the Regional Transport Authority. We think, therefore, that the contention that the respondent was not entitled to raise the objections which he raised before the Central Road Traffic Board, as he did not raise them before the Regional Transport Authority cannot be upheld. In the result the Letters Patent Appeal is dismissed with costs Rs. 250.

A/M.K.S.

Appeal dismissed.

#### A. I. R. 1953 MADRAS 3

GOVINDA MENON AND KRISHNASWAMI  
NAYUDU JJ.

British India Steam Navigation Co. Ltd., by agents Messrs. Binny and Co. (Madras) Ltd., Appellants v. T. P. Sokkalal Ram Sait by agent K. A. Hariganga Ram, Respondent.

C. C. C. Appeal No. 27 of 1950, D/- 1-4-1952.



(a) Carriers' Act (1865) S. 2 — Carriage of goods in high seas — Act has no application in view of definition of common carrier in S. 2. (Para 7)

Anno: Carriers' Act S. 2 N. 1.

(b) Carriage of Goods by Sea Act (1925) — Carriage of goods by sea — Law applicable in India before Act, was common law of England as applicable to common carriers and not the provisions of Contract Act relating to bailment. 18 Cal. 620 (PC); 32 Mad. 95; AIR 1915 Mad. 833; AIR 1928 Bom. 5; AIR 1931 Sind 124. Relied on. — (Contract Act (1872) Ss. 151 and 152). (Paras 9, 11 and 13)

Anno: Contract Act, Ss. 151 and 152 N. 2.

(c) Carriage of Goods by Sea Act (1925) Sch. Art. 1(c) and Art. VI — Deck Cargo at owner's risk — Art. VI does not apply — Carriage of such cargo is not governed by Contract Act — Such cargo not being "goods" within meaning Art. 1(c), carriage of such goods is not governed by Carriage of Goods by Sea Act, 1925, but by English common law, i.e. by the terms of the contract embodied in the bill of lading — Liability of the common carrier in such case is not affected by Ss. 151 and 152, Contract Act — (Contract Act (1872) Ss. 151 and 152). (Paras 14, 15)

Anno: Contract Act, Ss. 151 and 152 N. 2.

(d) Common carriers — Carriage by sea — Carriage of deck cargo at owner's risk — Contract embodied in Bill of Lading exonerating carrier, or its agents and servants from liability for loss due to negligence or otherwise — Short delivery — Carrier held not liable for loss.

Where the goods were sent by ship on high seas as deck cargo on the contract embodied in the Bill of Lading which contained a Clause that the contract was not governed by the Carriage of Goods by Sea Act but by the terms of the Bill of Lading and that the carriers and their agents or servants or any of them would not be liable whatever, in case of carriage of live animals and/or deck cargo, for any loss or expense connected therewith, however caused, and whether due to negligence, unseaworthiness or otherwise, if some of the goods are found missing at the destination, the non-delivery amounts to "loss" within the meaning of the contract and by virtue of the exemption clause in the contract, the carriers are not liable for the loss even if it is due to negligence on their part or on the part of their servants. (The contract was not governed by the Contract Act, Ss. 151, 152 or by Carriage of Goods by Sea Act 1925). (1917) AC 148 Relied. Case law reviewed. (Paras 4, 26)

King and Partridge, for Appellants; T. R. Arunachalam and R. Mathurbhutham, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

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 (28) AIR 1928 Bom 5: (52 Bom 37) 12  
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 (11) 38 Cal 28: (9 Ind Cas 364) 14  
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 (09) 32 Mad 95: (1 Ind Cas 977) 12, 14, 22  
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 (1895) 2 QB 301: (64 LJ QB 707) 23  
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 (1932) 1 KB 490: (101 LJ KB 521) 24  
 (1937) P 130: (106 LJ P 81) 24, 26

GOVINDA MENON J.: The defendants in O. S. No. 711 of 1948 on the file of the City Civil Court, Madras, appeal against the decree of the learned Additional City Civil Judge awarding a sum of Rs. 1804 being the price of 44 bags of beedi leaves short delivered to the plaintiff at the Madras harbour from S. S. "Howra" in which 1532 bags of beedi leaves had been shipped for transit from Vizagapatam to Madras.

(2) The plaintiffs were the consignees of 1,532 bags of beedi leaves shipped at Vizagapatam for being carried to Madras by S. S. "Howra". The defendants are the British India Steam Navigation Co. Ltd. by agents Messrs. Binny and Co (Madras) Ltd who are the owners of the ship in which these bags were carried. Out of the 1532 bags shipped at Vizag the evidence is to the effect that only 1488 bags were delivered at the Madras harbour, 44 bags being not traceable and hence short delivered. The suit was laid for recovering the price of these 44 bags and as stated above, the lower court granted a decree for a sum of Rs. 1804. Against that decree, the defendants have appealed. The only contest between the parties is with regard to the liability of the defendants for the price of the 44 bags short delivered.

(3) Ex. A. 30 is the Mate's receipt which shows that the 1532 bags of beedi leaves, the contents of some of the bags being exposed at the mouths, were stowed on deck at shippers' risk. The correspondence shows that on the complaint made on behalf of the plaintiffs, the defendants tried their utmost to find out how and where the 44 bags were lost and they were not able to find out the cause of the loss. In Ex. A. 7 dated 3rd December 1947, the defendants wrote to the plaintiffs' agent that they have made enquiries at all the ports at which the vessel called but could not trace the bags at all. There are similar letters, Ex. A. 15 regarding the search made for the goods, Ex. A. 16 where reference was made to the Calcutta principals and by Ex. A. 17 the defendants complained to the Traffic Manager, Madras Port Trust, that these and other missing bags of beedi leaves must have been delivered in error to others after they were landed and the Traffic manager was requested to investigate this shortage thoroughly. Ex. A. 18 is a further reminder to the Traffic Manager. After some correspondence between the plaintiffs and the defendants as well as between the defendants and the Port Trust and other authorities, finally by their letter dated 14-5-1948 the defendants disclaimed their liability for the amount and stated that they were unable to entertain the claim and accept any responsibility on the ground that the bill of lading was subject to the shippers' risk and contained a clause that the common carrier is not liable for the loss. The clause on which the defendants rely is type-



written and is pasted at the end of the printed bill of lading. It reads as follows.

"Notwithstanding anything to the contrary herein contained live animals and/or deck cargo are received, kept and carried at the sole risk of the owner thereof, and neither the carrier, (which expression includes both the owner of the ship and the operating ship owner for the time being) nor any stevedors, wharfinger nor any agent or servant of any of them nor any other person whomsoever for whom the carrier may be responsible shall be under any liability whatever for the goods, nor for any loss or expense connected therewith however caused and whether due to negligence, unseaworthiness or otherwise. Shippers and all concerned are, therefore, advised to see that their insurance policies cover all and every risk whatsoever whether ashore or afloat and are made without recourse to the carrier or any of the parties aforementioned".

On account of this special clause in the bill of lading, the defendants contended that the plaintiffs had notice and knowledge to the effect that neither the carrier, nor the agent or servant, or any persons for whom the carrier may be responsible, shall be under any liability whatever for the cargo, nor for any loss or expense connected therewith, however caused, and whether due to negligence, unseaworthiness or otherwise. The defendants further pleaded that the loss has not arisen by reason of their negligence or any of their agents or servants and that in any event any claim founded on such negligence is not maintainable by reason of the special contract between the parties.

(4) The lower court has held, relying upon —*Wills v. Great Western Rly. Co.*, (1914) 1 K. B. 263 that when consignment which was booked at owner's risk arrived at its destination and some of the goods were found missing, and the plaintiff made a claim upon the defendant for the non-delivery of a part of the goods, such non-delivery would not amount to "loss" within the meaning of the contract and that the plaintiff was entitled to damages. Apparently the attention of the learned Judge was not invited to the fact that this decision is no longer good law in England, because though this decision was confirmed by the Court of Appeal in —*Wills v. Great Western Rly.*, (1915) 1 K. B. 199, when the matter was taken up to the House of Lords, in their decision reported in —*Great Western Rly. v. Wills*, (1917) A. C. 148, the House of Lords reversed the judgment under appeal before them and held that non-delivery of part of the consigned goods was loss within the meaning of the contract. We have therefore to take it that the non-delivery in this case would amount to loss.

(5) Our attention has been invited to a few cases under the Indian Railways Act, viz, —*East Indian Rly. Co. v. Jogpat Singh*, 51 Cal 615 —*M. and S. M. Rly. Co. Ltd. v. Subbarao*, 43 Mad 617 and —*Sheo Dayal Niranjana Lal v. G. I. P. Rly. Co.*, 49 All 236, for the interpretation of the term "loss" in risk notes, and the opinion expressed therein is that the railway company is liable if the goods are lost in transit involuntarily or through inadvertences and that the word "loss" does not mean pecuniary or other loss suffered by the owner of the goods through being wrongfully deprived of the possession, use, or enjoyment thereof, but means loss of the goods while in transit, and such loss occurs whenever the railway company to which the goods have been consigned for conveyance involuntarily or through inadvertence loses possession of the goods. This argu-

ment was intended to show that the non-delivery was loss. There is no reason why the same interpretation should not be used when the carriage of goods is by sea.

(6) The argument advanced on behalf of the plaintiff is that since the defendants have not shown that the common carrier, or their agents, or servants were not guilty of any negligence, it should be presumed that the non-delivery of part of the goods must make them liable for damages.

(7) What we have to decide is whether the dispute in the present case is governed by the statutory law in India or by the English Common Law, and if it is the English Common Law, what exactly is the nature of that law in regard to contracts of kind. The defendants have disclaimed their liability on account of the special contract as alleged by them in paragraphs 4 and 4 (a) of their written statement. The Carriers' Act, 1865, (Act III of 1865) was the first statutory enactment in India by which common carriers are enabled to limit their liability for loss, or of damage to, property delivered to them to be carried. But in this Act "common carrier" is defined as a person other than the Government, engaged in the business of transporting for hire property from place to place, by land or in land navigation for all persons indiscriminately. Therefore, in view of the fact that carriage in the present case was on the high seas, Act III of 1865 will not apply. The other statute relating to common carriers is the Indian Carriage of Goods by Sea Act, 1925 (Act XXVI of 1925) enacted on the lines of the English Act of 1924, 14 and 15 George V, Ch. 22 a comparison of the two statutes shows that they are practically identical. The English Act contains six sections whereas the Indian Act contains one more, viz, S. 7 which speaks of saving and operation. With regard to the schedules and rules, the two enactments are in *pari materia*. Article 1, sub-clause (c) of the schedule of both the Acts defines "Goods" as follows:

"Goods include goods, wares, merchandises, and articles of every kind whatsoever, except live animals and cargo which by the contract of the carriage is stated as being carried on deck and is so carried."

The appellants contend that the bags of beedi leaves in question being carried on deck at shippers' risk, are exempt from the carriage of goods by Sea Act on account of the definition of "goods" contained in Art. 1, sub-clause (c) and that on account of the special exemption clause in the bill of lading they are exempt from the liability for the loss or damages arising out of any cause whatsoever. It is further contended that this provision has been held to limit the liability for loss arising out of their own, or their servants' negligence as well. In short, the argument on behalf of the appellants is that since the Carriage of Goods by Sea Act does not apply the only law governing the parties in a matter like this is the English Common law and under the English Common law, according to precedents and decided cases as well as text book writers it is open to the carrier to contract himself out of the liability by special provisions as has been done in the bill of lading, Ex. A. 29. He further contends that the parties have agreed with regard to the law applicable as found in clause 16 of the Bill of lading, which is to the following effect:

"Law applicable. The contract evidenced by the Bill of lading shall be governed by the Laws of England and in accepting this bill of lading the shippers and consignees expressly accept and agree to all its stipulations, exceptions and conditions whether written, stamped or printed as fully as if signed by him or them."



We have to find out how far this contention is justified.

(8) But the respondent's learned counsel maintains that even in the case of deck cargo the rule relating to Carriage of Goods by Sea Act applies. He invites our attention to the fact that the word "goods" has not been defined among the sections of the Act but only in the rules under the schedule and that Article VI of the rules should apply. If that is so, any contract like the one in question, totally exempting the common carrier from liability is opposed to the special conditions postulated in Art. VI and in any event Sec. 23 of the Contract Act applies to this case as the contract in question is opposed to public policy. Total extinguishment of liability due to any cause whatsoever should not be condoned as it is a matter which is opposed to public policy. It is argued that the meaning of the word "goods" though it is narrower in the schedule and rules, is much wider so far as the Act is concerned.

(9) That prior to the passing of the Carriage of Goods by Sea Act in 1925, the common law of England was applicable to common carriers and not the provisions of the Indian Contract Act relating to bailments is clear from previous decisions of this court as well as other High courts. In the — *'Irawaddy Flotilla Co. v. Bugwandas'*, 18 Cal 620 (P. C.) at p. 628 their Lordships of the Privy Council observe as follows:

"Notwithstanding the able arguments of the learned counsel for the appellants, it seems to their Lordships that there are several considerations, not all of equal weight, but all pointing in the same direction, which lead irresistibly to the conclusion that the Act of 1872 was not intended to alter the law applicable to common carriers."

(10) Again at page 631 their Lordships observed: "These considerations lead their Lordships to the conclusion that the Act of 1872 was not intended to deal with the law relating to common carriers and notwithstanding the generality of some expressions in the chapter on bailments, they think that common carriers are not within the Act."

(11) The provisions of the Indian Contract Act referred to above are Ss. 151 and 152, the former of which makes it obligatory that the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed, and S. 152 absolves the bailee, in the absence of any special contract, from any responsibility for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in S. 151. The effect of these two sections is that if the bailee takes reasonable care of the goods, then he will be absolved from liability for the loss or destruction of the goods but he is bound to take reasonable care of the goods bailed as his own goods. According to their Lordships' decision in — *'The Irawaddy Flotilla Co. v. Bugwandas'*, 18 Cal 620 (P. C.) these sections would not apply to common carriers so far as India is concerned. There are passages in this judgment which makes it applicable to carriages on the high seas also.

(12) In — *'Sheik Mahamad Ravuther v. The British India Steam Navigation Co Ltd.'*, 32 Mad 95, two of the learned Judges who constituted the Bench of three, were of opinion that it is the English Common Law that applied and not the Indian Contract Act. But the third Judge, Sankaran Nair J. took a different view, though on the facts of the case he agreed with White C. J. Both White C. J. and Sankaran Nair J. held on the

construction of the Bill of Lading, that the liability of the common carrier at that stage was specially provided for by a clause and they could not invoke in aid the general negligence clause in the body of the document and that they were not exempted from liability for negligence. But Wallis J. took a different view. Sankaran Nair J. held that the rule of English law, which allows ship owners to exempt themselves, by express contract, from liability for negligence cannot be applied in India, as it is inconsistent with the provisions of the Indian Contract Act and the manifest intention of the Legislature in enacting such provisions. Then the learned Judge referred to Ss. 148 and 151 of the Contract Act. He was further of opinion that a contract limiting such liability will be opposed to the public policy and void under S. 23 of the Contract Act, as it will be against the interests of the mercantile community and not necessary in the interests of the ship-owners. Though there may be something to be said in favour of the view taken by Sankaran Nair J. still we feel that we are bound by the consensus of authority in this court as well as other High Courts. In — *'Bombay Steam Navigation Co, Ltd. v. Vasudev Baburao'*, AIR 1928 Bom 5 and — *'Haji Shakoor Gany Firm v. Firm of Volkart Bros'*, A. I. R. 1931 Sind 124 the view taken is that the English Common law is applicable. It has to be remembered that both these decisions are after the passing of the Carriage of Goods by Sea Act.

(13) In *'Kariandan Kumber v. The British India Steam Navigation Co'*, 38 Mad 941, Sadasiva Aiyar and Tyabji JJ. considered this aspect of the case at great length and came to the conclusion that the English law is applicable. At page 945, Sadasiva Aiyar J. observes thus:

"As I am myself always inclined not to travel beyond Indian cases and Indian Statutes unless I am convinced that they are clearly not applicable, I would have gladly referred the questions of the applicability of the Contract Act, where it differs from the English Common law to a Full Bench, if I did not feel that I am concluded by the pronouncement of the Privy Council on this question. In the — *'Irawaddy Flotilla Co v. Bugwandas'*, 18 Cal 620 (P. C.), their Lordships have clearly approved of the decision of the Full Bench in — *'Moothorakant Shaw v. The Indian General Steam Navigation Co'*, 10 Cal 166 (F. B.) and disapproved of the contrary decision in — *'Kuverji Tulsidas v. The G. I. P. Rly. Co'*, 3 Bom 109. The effect of their Lordships' decision in the — *'Irawaddy Flotilla Co v. Bugwandas'*, 18 Cal 620 (P. C.) seems to me to be 'that the duties and liabilities of a common carrier are governed in India by the principles of the English common law on that subject' (except where they have been departed from in the case of some classes of common carriers by the Carriers Act of 1865 or by the Railway Acts of 1878 and 1890) and 'that notwithstanding some general expressions in the chapter on Bailments, a common carrier's responsibility is not within the Indian Contract Act of 1872'".

Tyabji J. also says the same thing at page 953: ".... It is not open to this court to say that the liability of such carriers as we have to deal with in this case is governed by S. 151 of the Indian Contract Act, after the decision of the Privy Council in the case of the — *'Irawaddy Flotilla Co v. Bugwandas'*, 18 Cal 620 (P. C.). In that case, the Privy Council had to decide whether the view of the Bombay High Court as expressed in — *'Kuverji Tulsidas v. Great Indian Peninsular Railway Co'*, 3 Bom 109 was correct or the view of the Calcutta High Court in — *'Moo-*



thara Kant Shaw v. The Indian General Steam Navigation Co', 10 Cal 166 and they said that they were compelled to decide in favour of the view of the Calcutta High Court and against that of the High Court of Bombay. In deciding against the view of the High Court of Bombay, they decided against the argument on which the appellant relied. They decided that the liability of carriers such as we have to deal with is not governed by the sections of the Indian Contract Act, relating to bailees".

We may also refer in this connection to a recent decision of the Travancore Cochin High Court in — 'Orient Ship Supply Co Ltd. v. Kalamarsand Co', 5 D. L. R. (Trav. C.) 346 where the learned Judges discussed the various cases on the topic. Therefore it can be taken as settled that prior to the enactment of the Carriage of Goods by Sea Act in 1925, the Common law of England was the law applicable so far as India was concerned. Does it make any difference to the law applicable after the passing of that Act? This Act was passed as a result of the International Conference on Maritime Law held at Brussels in October 1922, by which certain unanimous recommendations were made to the various Governments that took part in the conference to adopt as the basis of a convention a draft convention for the unification of certain rules relating to bills of lading and in pursuance to that, as we stated, in England the Carriage of Goods by Sea Act of 1924, 14 and 15 George V, Chapter 22 was passed which is practically 'ad idem' to the Indian Act.

(14) We have rejected the argument of the learned Counsel for the respondents that Art. VI in the schedule to Act XXVI of 1925 will be applicable to deck cargo. But still he argues relying upon certain observations of Sankaran Nair J. at page 126 of — 'Sheik Mahamad Ravuther v. The British India Steam Navigation Co, Ltd, 32 Mad. 95 that the principles of the Contract Act should be applied to a case like this. This argument has not found favour even at a time when the Carriage of Goods by Sea Act was not in existence. See — 'Moothura Kant Shaw v. The Indian General Steam Navigation Co', 10 Cal 166 (F. B.) and — 'British and Foreign Marine Insurance Co Ltd. v. Indian General Navigation and Rly. Co, Ltd', 38 Cal 28. If until the passing of the Carriage of Goods by Sea Act, the law relating to the carriage of goods by sea was governed by the Indian Contract Act, then there would have been some mention made of it at the time of the passing of the Carriage of Goods by Sea Act. The absence of any reference is an indication that there was no such thing.

(15) At page 475 of Carver's Carriage of Goods by Sea, 8th Edn. (1938) specific reference has been made to the fact that the English Carriage of Goods by Sea Act of 1924 does not apply to cargo which by contract of carriage is stated as being carried on deck and is so carried. (Schedule of rules, Art. I (c) such being the case, if in England the Act would not apply to carriage of goods by sea, we fail to see why in India also, after the passing of an identical statute its provisions should apply to carriage of goods by sea. We therefore have no doubt in holding that so far as the goods in question are concerned, the Act of 1925 would not apply. We are also of opinion that if the English Common Law applied then Ss. 151 and 152 of the Indian Contract Act cannot affect the liability of the common carrier.

(16) Now the important question arises as to whether the exemption clause which makes the carrier immune from all liability whatever for the goods or for any loss can be pleaded by the

defendants in the present case where there is nothing to show how the bags of beedi leaves came to be short delivered. In other words the question is whether such a clause is valid or not. Before we discuss that question we may advert to the fact that the bill of lading, though expressly mentioned to be under the Indian Carriage of Goods by Sea Act and the schedule thereto, has this fact that the paramount clause relating to the application of that Act has been cancelled before the same was issued. That the liability for (of?) a common carrier for the loss, injury or delay in respect of the goods carried may be varied by contract is evident from the statement of the law in Halsbury's Laws of England, volume IV, page 27, Art. 37. Carver, even at the very outset at page 2 of his book states the following passage in dealing with such liabilities:

"Therefore it should be borne in mind that the decree of the responsibility which a ship owner impliedly undertakes, as described in this chapter, while remaining the fundamental basis which an express contract may modify is not in most cases the fundamental basis when the express contract is evidenced by a bill of lading".

At page 118 in Art. 77, of the same book it is stated that exceptions in the bill of lading should be construed against the ship owner when they are ambiguous and a passage from the judgment of Lord Loreburn L. C. in — 'Nelson Line v. James Nelson & Sons Ltd', (1908) A. C. 16 at p. 19 is quoted. If there is a general clause in a bill of lading by which the ship owner is exempted from liability for damage to goods whether arising from a defect existing at the time of the shipment or not, or from neglect of the master or crew, or from any other cause whatsoever, and that general clause is qualified by a second clause which exempted the ship owner from liability for damages from defects if reasonable means have been taken to provide against such defects and unseaworthiness, it was held by the House of Lords in — 'Elderslie Steamship Co. v. Borthwick, No. 1' (1905) A. C. 93 at p. 96 that the subsequent clause must prevail over the earlier clause. That is, their Lordships are of opinion that though it is open to a shipowner to exempt himself from liability by contracting that he would not be liable for any loss whatever even arising out of negligence, if another clause restricts exemption from liability only if reasonable means have been taken to provide against defects and unseaworthiness, the subsequent clause would prevail. At page 96, Earl of Halsbury L. C. lays down the law thus:

"It seems to me that if what has been called the large print had stood alone I should not have had the smallest doubt that it would have carried the shipowner the whole way; I can give no other construction to it than that which the words express; but the difficulty in his way is that he has thought proper to execute an instrument which has two different sets of phrases in it, and one rule of construction which must prevail is that you must give effect to every part of a document if you can — you must read as a whole. Mr. Carver has ingeniously spoken of independent contracts and independent paragraphs and so on, but we must remember that this one contract, and each of the parts of this contract must be read so as to give effect to the whole if it can.

My Lords, the only mode of so reading it is to read the first part of it thus: 'I am not to be liable for this', and then what comes after it by way of exception, 'I shall not be liable unless I have failed to take all reasonable means against the injury' that has happened. In that



way you can read the two together, and this seems to me to be the only way in which you can make a reasonable and intelligible contract, and give effect to the words which the parties have agreed to."

Their Lordships are quite positive that if the large print clause, as they call it, which exempts the carriers from liability for all losses including non-delivery had stood alone, such a contract would be valid and binding.

(17) In the case reported in *Chartered Bank of India, Australia and China v. British India Steam Navigation Co. Ltd.*, (1909) A.C. 369, there was a clause in the bill of lading that "the liability of the company shall absolutely cease when the goods are free of the ship's tackle, and thereupon the goods shall be at the risk for all purposes and in every respect of the shipper or consignee". What happened was that the goods were delivered to landing agents appointed by the company itself, but by the fraud of the landing agents, the goods never reached the consignees. Even in such a case it was held by their Lordships that although there had been no delivery under the bills of lading, yet the provision as to cesser of company's (defendants) liability directly the goods were free of the ship's tackle was perfectly clear, and that that was sufficient and effective to protect them.

(18) The rule of exception has been adopted in India almost uniformly as is seen from decisions of other High Courts, such as the one reported in *'B. I. S. No. Co. Ltd. v. Alibhai Mahomed'*, 62 Ind Cas 378 (Low. Bur) (F.B.)

(19) Learned counsel for the appellants referred us to two other cases, viz., — *'Lewis v. Great Western Rly. Co.'*, (1878) 3 Q.B.D. 195 and — *'Price and Co. v. Union Lighterage Co.'*, (1904) 1-K.B.412. On a perusal of these cases it seems to us that the principles enunciated therein cannot with any advantage be applied to the facts of the present case.

(20) In discussing as to the law applicable we had to refer to the decision in — *'Jellicoe v. The British Steam Navigation Co.'*, 10 Cal 489. But that judgment is further instructive in the application of the doctrine of the exemption of liability. That case arose out of a reference by a Judge of the Small Cause Court and the learned Judges of the Calcutta High Court, on the reference held that since the plaintiffs had accepted the terms of the bill of lading which contained a clause,

"carried and delivered subject to the conditions after mentioned ..... loss or damage for any act, neglect or default whatsoever of the pilot, master or mariners or other servants of the company, excepted"

they cannot make the common carrier liable for the loss of the goods. In that case, the goods were destroyed owing to the carelessness of the common carrier's servants and when the plaintiffs sued the company for damages it was held by the Calcutta High Court that the company were protected by their bill of lading the terms of which had been accepted by the plaintiffs. The terms were similar to the one which we have to consider now.

(21) In — *'Hajee Ismail Sait v. The Co. of the Messageries Maritimes of France'*, 28 Mad 400 this court has held that since carriers by sea for hire prior to the passing of the Carriage of Goods by Sea Act, are common law of England, under the English Common law, a common carrier may protect himself from liability for deliberate acts of misfeasance on the part of himself or his servants for losses arising even by acts

of negligence. It is worthwhile to quote a passage from the judgment at page 403.

"By the English law applicable to common carriers, the common carrier may enter into any contract so as to protect himself, but he can only do so by clear, definite, and unambiguous words; If therefore the words used in the exemption clause of the bill of lading are clear, definite and unambiguous, they may suffice to protect the shipowner even from deliberate acts of misfeasance on the part of himself or his servants. On arrival at Madras the defendants delivered the plaintiff's goods, which were oats, in heavy rain and allowed them to get wet in the process. They might, if they had chosen to do so have taken the goods on and not delivered them until later when it was fine; and the plaintiff contends that their act in delivering the goods in rain instead of delaying the delivery until it was fine, was an act of deliberate misfeasance and not mere negligence as the learned Chief Judge has found in the case stated. We think the acts of the defendant's servants amounted only to negligence and that the learned Chief Judge is right in so holding. We further think that the words of the clause above quoted are sufficiently clear and definite to protect the defendants and we answer the question referred to us in the negative."

(22) In — *'Sheik Mahmad Ravuther v. British India Steam Navigation Co. Ltd.'*, 32 Mad 95 & — *Kariandan Kumber v. The British India Steam Navigation Co.* 38 Mad 941 there were similar clauses in the bills of lading and in the latter case this court was of opinion that such a clause relieved the common carrier of any responsibility. Such a clause, according to English law is not opposed to public policy and is valid and S. 23 of the Indian Contract Act has no application. We may say in this connection that the decision in — *'Kariandan Kumber v. The British India Steam Navigation Co.'*, 38 Mad 941 is applicable directly to the facts of the present case.

(23) A further argument was put forward based on the words in the exemption clause in the bill of lading, viz., "however caused and whether due to negligence, unseaworthiness, or otherwise," in this clause should be read as *ejusdem generis* but that argument has been repelled in — *'Baerselman v. Bailey'*, (1895) 2 Q. B. 301 where it has been laid down that these words should have full import and cannot be construed as *ejusdem generis*.

(24) In order to establish that the extinguishment of liability for any reason whatever cannot be had by means of a contract like the one in question, learned advocate for the respondents brought to our notice a decision in the *Stranna*, (1937) P. 130'. In that case Langton J. considered the effect of the expression "at charterer's risk" in the bill of lading and was of opinion that the words did not put on the owner of the goods the risk of loss in every case in which the cause of the loss was unknown and since the defendants the shipowners in that case, had failed to provide an explanation in any sense comparable in probability with the probability of their own negligence, in the loading, the defence failed. A perusal of this case leaves one with the impression that according to the learned Judge it is necessary that the carrier must show that there was no negligence in the case of deck cargo. At page 148, he observes as follows:

"Applying this line of thought to the present case I am at once confronted by the difficulty that the explanation given by the shipowners



is exceedingly meagre. Their theory of cross currents is quite untenable, and their evidence at the best leaves the cause of the heeling completely unexplained. Mr. Willink urges that, although the words deck cargo "At charterer's risk" do not excuse the shipowners for negligence proved and determined, they will avail to put upon the goods owner the risk of loss through unascertained causes. As to this I feel that the statement is too wide. I can quite easily read the words "at charterer's risk" to mean that the goods owner takes the chance of some imperfectly ascertained cause of action. But to say that it confers on the shipowners a right to claim exemption from liability in every case in which the cause of the loss is unknown seems to me to be altogether too benevolent a construction in favour of the party who has inserted the exception. Pushed to its logical conclusion this argument would appear to go to the length of saying that these words excuse a bailee from giving any explanation of the loss of goods entrusted to him. Indeed he might well deem it wiser not to attempt an explanation since without one he must succeed".

He also referred to an earlier decision in — *Svenssons Travaruktiebolag v. Cliffe Steamship Co.*, (1932) 1-K.B. 490 where Wright J. as he then was in considering the question of the carrier's liability in carrying goods under a contract of affreightment which contained a similar exception clause held that although the words in the charterparty "at charterer's risk" standing alone did not excuse the defendants in the case of a loss due to negligence on their part or on the part of their servants, those words must be read with the exception clause, and the effect of reading the two together was to enable the carriers to rely on the exception clause, which protected them against the consequences of such negligence. The exception clause was to effect that the carrier will not be liable even when the loss is occasioned by the negligence, default or error in judgment of the master mariners, or other persons employed by the shipowner or for whose acts he is responsible. All that is required in such cases for the shipowner to prove is that the ship was seaworthy and nothing more. It is argued by the learned counsel that the present case resembles the case in the *Stranna*, (1937) P. 130 where the shipowners did not let in any evidence as to how the loss occurred. It has to be noticed that the observations of Langton J. are somewhat wide and were, as the learned Judge says unnecessary for the decision of the case, because he premises the discussion by stating that since the case might go higher and that he may be proved to be wrong in this determination of the first point, he thought, it desirable to express his view as to this point. It seems to us that if the shipowner on this contract of affreightment is not liable even if the acts of negligence are on the part of the master mariner and other persons employed by the shipowner, it is not obligatory for him to show that there was negligence when a loss has occurred. It might be that the loss was due not because of any negligence at all but due to some unforeseen acts. In such a case, he is no doubt protected. Therefore the reasoning of Langton J. that if the bailee deemed it wiser not to attempt an explanation he is in a better position than if he had attempted an explanation is in our opinion somewhat overstrained. One can conceive of circumstances where a party can rely on strict legal technicality without attempting to put forward any definite case. What prevents a party from saying that if the words of a contract are to be construed

in his favour he can keep silent and need not try to put forward any explanation? In our opinion the bill of lading in this case relieves the shipowner from any liability with regard to showing how the loss had occurred.

(25) Reference was also made to passages in Story on the Law of Bailments, 7th Edn. page 432 as well as Carver's Carriage of Goods by Sea, 8th Edn. pages 167 and 168, Sec. 103 onwards. S. 490 in Story on the Law of Bailments is as follows:

"The reason assigned by Lord Holt for this doctrine is as follows: 'The law', says he 'charges this person (the carrier) thus intrusted to carry goods against all events but acts of God and of the enemies of the king. For, though the forces be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a political establishment contrived by the policy of the law for the safety of all persons, the necessity of persons, that they may be safe in their dealings. For else these carriers might have an opportunity of undoing all persons, that had any dealings with them, by combining with thieves &c. and yet doing it in such a clandestine manner, as would not be possible to be discovered. And this is the reason the law is founded upon in that point.' The ground of the resolution is (As Sir William Jones has justly observed) not the reward of the carrier (upon which Sir Edward Coke lays much stress) but the public employment exercised by the carrier, and the danger of his combining with robbers to the infinite injury of commerce and extreme inconvenience to society. He is treated as an insurer against all but the excepted perils, upon that distrust, which an ancient writer has called the sinew of wisdom. In truth, the reason or policy of the rule is borrowed from the Roman law, where (as we have already seen), the rule is applied equally to carriers by water to innkeepers, and to stable keepers; but it is applied with a stricter severity in the common law, that it was in that law."

It has to be remembered that the American law with respect to the liability of the carrier is different from the English law though subsequently even in America the law has been changed as is seen in note (11) at page 170 of Carver's Carriage of Goods by Sea. The note is to the effect that the Carriage of Goods by Sea Act took effect in the United States on July 15, 1936, its provisions corresponding to those of the English Act of the same name. We may also in this connection refer to Outline of the Law relating to Bills of Lading by C. H. Main Thompson, M. A. at pages 170 and 171 to the following effect;

"The shipowner may escape liability or such loss by an express exception such as 'goods carried on deck are solely at merchant's risk'. He may avail himself of this exception (1) in a contract of carriage to which the rules are not in any case applicable; and (2) in a contract of carriage to which, but for the provisions in the rules as to deck cargoes the rules would be applicable, by complying with those provisions, that is, by stating in the contract of carriage that the cargo is being carried on deck, and so carrying it. The shipowner apparently, cannot escape liability for loss of or damage, to a deck cargo which is being carried under a contract of carriage to which, but for the provisions in the rules as to deck cargoes, the rules would be applicable if he fails to comply with those provisions. He cannot under the rules lessen his liability otherwise than is provided in the rules and any agreement designed to have that effect is null and void and of no effect."



For substantiating the idea underlying the last sentence, the footnote gives reference to the Carriage of Goods by Sea Act, 1924, Art III, rule 8 and therefore we are of opinion that it cannot apply to deck cargoes as was sought to be contended by Mr. T. R. Arunachalam for the respondents.

(26) Learned Counsel for the respondents strenuously urged before us that in none of the cases cited except probably the Stranna (1937)P. 130 in which observations are in his favour, is the total extinguishment of liability provided even where no explanation is given as to how the loss occurred. As we have already remarked if after proving negligence, the carrier can escape liability under the agreement, there is no reason why he should be mulcted with liability when the loss may be due to negligence or for other reasons. The carrier's silence and failing to prove negligence might be construed in favour of the consignor as an implicit admission of negligence. Viewed in that way also the exception clause can be called in aid in support of the carrier's extinguishment of liability. In the case before us the exemption clause is clear that if the loss or non-delivery has occurred as a result of negligence, unseaworthiness or otherwise, they will not be liable and we are of opinion that the case comes within the principles enunciated in the various decisions to which we have already referred. In this view, it seems to us the appellants are not liable for the non-delivery of the 44 bags of beedi leaves. The appeal therefore is allowed, the suit dismissed with costs throughout.

B. R.G.D.

Appeal allowed.

#### A. I. R. 1953 MADRAS 10

SUBBA RAO J.

S. Athimoolam Achari, Petitioner v. The Deputy Commercial Tax Officer, Kovilpatti, Tirunelveli Dt., Respondent.

W. P. No. 127 of 1952, D/- 22-4-1952.

**Constitution of India, Art. 226 — Other effective remedy open — Jurisdiction under Art. 226 cannot be invoked as against Sales-tax authority — (Sales tax — Madras General Sales Tax Act (9 of 1939), Ss. 9, 11, 12, 12A, 12B, 12C and 12D).**

From the provisions of Ss. 9, 11, 12, 12A, 12B, 12C and 12D of the Madras General Sales Tax Act, 1939, it is clear that the Act is a self-contained one and provides for a hierarchy of tribunals to enable the aggrieved person or authority to get a final and authoritative adjudication on the validity or the correctness of the assessments made by the Sales-tax Authorities. Hence, the petitioner cannot seek the aid of the High Court under Art. 226 which, if given, would circumvent the entire statutory procedure prescribed. The fact that the remedy provided by the Act may involve delay or expenditure, or that the decision of the Sales-tax Authority will affect other persons cannot be a ground for invoking the extraordinary jurisdiction of the High Court under Art. 226. (Paras 4, 5)

M. K. Nambiar, for Petitioner, V. P. Sarathi, for the Govt. Pleader, for Respondent.

**ORDER:** This is an application for issuing a writ of prohibition directing the respondent to forbear from assessing the petitioner for sales-tax for 1950-51. The petitioner is a merchant trading in bullion and specie at Ettayapuram Naduveerapatti in Tirunelveli district. When

the Madras General Sales-tax Act was passed in 1939, bullion and specie were exempt from taxation. In 1947, S. 5 of the old Act was substituted by the Madras General Sales-tax Amendment Act, 1947 (Madras Act XXV of 1947). Under that section the sale of bullion and specie shall be liable to tax only at a single point in the series of sales by successive dealers as may be prescribed and only at the rate of one fourth of one per cent of the turnover at that point. In exercise of the powers conferred on the Provincial Government by S. 19 of the Act, rules were made for licensing the persons engaged in the sale of goods and the imposing of conditions in respect of the same for purpose of enforcing the provisions of the Act and the fee for licenses. Rule 5(1) (d) and (f) of the Madras General Sales-tax Rules, 1939, requires that every person who deals in bullion and specie should submit an application in form 1 for a licence in respect of each of his places of businesses, and rule 6(1) says that every licence shall cover one place of business only and rule 6(1-A) provides that in addition to the licensee's place of business, the shandies where he prosecuted his business may also be entered in the same licence. Under rule 7 the benefit of Ss. 5 and 8 can be claimed only for the transactions carried on during the period covered by the licence. The petitioner took out a licence for the place of his business, namely, Ettayapuram Naduveerapatti. In his return for 1949-50 he had shown not only the sales in the town in respect of which he has taken a licence, but also the sales effected by him in other places. The Deputy Commercial Tax Officer at Kovilpatti raised the objection that the sales outside the place of business specified in the licence were liable to be assessed at 3 pies rate on every rupee and accordingly assessed the petitioner for the year 1949-50. The petitioner preferred an appeal to the Commercial Tax Officer, Tirunelveli, but that appeal was dismissed. Against that he preferred an appeal to the Sales-tax Appellate Tribunal. But it is represented to me that the appeal is still pending. Meanwhile the Deputy Commercial Tax Officer issued a notice dated 16th February 1951 proposing to assess the sale turnover of Rs. 29093-1-9 for 1950-51 in Madura, Tirunelveli and Kovilpatti at the enhanced rate of 3 pies on every rupee. The petitioner apprehends that his objections would be overruled. He therefore filed the aforesaid application to prohibit the Deputy Commercial Tax Officer from assessing the petitioner for sales-tax for 1950-51.

(2) The learned counsel for the petitioner raised before me two points:

1. The villages or towns where the petitioner casually sold the bullion are not places of business within the meaning of rules 5(d) and (f) of the Madras General Sales-tax Rules, 1939.
2. The amended rule defining the place of business is not retrospective in operation.

(3) Learned Government Pleader, apart from supporting the view of the sales-tax authorities, contended that the petitioner has an adequate remedy under the Act itself and therefore this writ will not issue. As I am accepting the preliminary objection raised by the respondent, it is not necessary to express my view on the questions raised by the petitioner. The relevant provisions of the Madras General Sales-tax Act (IX of 1939) as amended by later amending



Acts in so far as they are relevant to the preliminary objection raised run as follows:

'S. 9(1).' Every dealer whose turnover is ten thousand rupees or more in a year shall submit such return or returns of his turnover, in such manner, and within such periods as may be specified in the rules made under sub-sec. (2) of S. 3.

'S. 9(2) (a).' If the assessing authority is satisfied that any return submitted under sub-sec. (1) is correct and complete, he shall assess the dealer on the basis thereof.

(b) If no return is submitted by the dealer under sub-sec. (1) before the date prescribed or specified in that behalf or if the return submitted by him appears to the assessing authority to be incorrect or incomplete, the assessing authority shall proceed to determine the turnover in accordance with the rules made under sub-sec. (2) of S. 3:

Provided that before taking action under this clause, the dealer shall be given a reasonable opportunity of proving the correctness and completeness of any return submitted by him.

'S. 11(i).' Any assessee objecting to an assessment made on him may, within thirty days from the date on which he was served with notice of the assessment, appeal to such authority as may be prescribed;

Provided that no appeal shall be entertained under this sub-section unless it is accompanied by satisfactory proof of the payment of the tax admitted by the appellant to be due or of such instalments thereof as might have become payable as the case may be.

(2) \* \* \*

(3) The appellate authority may, after giving the appellant an opportunity of being heard pass such order on the appeal as such authority may think fit.

(4) Every order passed in appeal under this section shall, subject to the provisions of Ss. 12 to 12-C, be final.

S. 12(1): The Commercial Tax Officer may—

(i) 'suo motu', or

(ii) in cases in which an appeal does not lie to him under S. 11, on application,

call for and examine the record of any order passed or proceeding recorded under the provisions of this Act by any officer subordinate to him for the purpose of satisfying himself as to the legality or propriety of such order, or as to the regularity of such proceeding, and may pass such order with respect thereto as he thinks fit.

(2) The Deputy Commissioner may—

(i) 'suo motu', or

(ii) in respect of any order passed or proceeding recorded by the Commercial Tax Officer under sub-sec. (1) or any other provision of this Act and against which no appeal has been preferred to the Appellate Tribunal under S. 12-A on application, call for and examine the record of any order passed or proceeding recorded under the provisions of this Act by any officer subordinate to him, for the purpose of satisfying himself as to the legality or propriety of such order, or as to the regularity of such proceeding, and may pass such order with respect thereto as he thinks fit.

(3) The Board of Revenue may—

(i) 'suo motu', or

(ii) in respect of any order passed or proceeding recorded by the Deputy Commissioner under sub-section (2) or any other provision of this Act and against which no appeal has been preferred to the Appellate Tribunal under Sec. 12-A, on application, call for and examine the record of any order passed or proceeding recorded under the provisions of this Act by any officer subordinate to it, for the purpose of satisfying as to the legality or propriety of such order, or as to the legality of such proceeding, and may pass such order with respect thereto as it thinks fit.

'Sec. 12A (1)':

Any assessee objecting to an order relating to assessment passed—

(i) by the Commercial Tax Officer whether on appeal under Sec. 11 or 'suo motu' under S. 12, sub-sec. (1) or,

(ii) by the Deputy Commissioner 'suo motu' under S. 12, sub-sec. (2),

may, if the assessee has not preferred an application for revision of the order under S. 12, sub-sec. (2), or under sub-sec. (3) of that section, as the case may be, appeal to the appellate Tribunal within thirty days from the date on which the order was communicated to the assessee.

(2) The Appellate Tribunal may admit an appeal preferred after the period of sixty days referred to in sub-sec. (1) if it is satisfied that the assessee had sufficient cause for not preferring the appeal within that period.

(3) \* \* \*

(4) The appellate tribunal shall, after giving both parties to the appeal a reasonable opportunity of being heard, pass such order thereon as it thinks fit.

(5) Notwithstanding that an appeal has been preferred under sub-sec. (1), tax shall be paid in accordance with the assessment made in the case;

Provided that the Appellate Tribunal may, in its discretion, permit the appellant to pay the tax in such number of instalments, or give such other directions in regard to the payment of the tax, as it thinks fit.

(6) (a) The Appellate Tribunal may, on the application either of the assessee or of the Deputy Commissioner, review any order passed by it under sub-sec. (4) on the basis of facts which were not before it when it passed the order;

.....  
'S. 12-B(1)': Within sixty days from the date on which an order under S. 12-A, sub-sec. (4) or (6) was communicated to him, the assessee or the Deputy Commissioner may prefer a petition to the High Court against the order on the ground that the appellate Tribunal has either decided erroneously, or failed to decide, any question of law;

Provided that the High Court may admit a petition preferred after the period of sixty days aforesaid, if it is satisfied that the petitioner had sufficient cause for not preferring the petition within that period.

'S. 12-C(1)': Any assessee objecting to an order relating to assessment passed by the Board of Revenue 'suo motu' under S. 12, sub-sec. (3), may appeal to the High Court within sixty days from the date on which the order was communicated to him;

'S. 12.D': Every petition, application or appeal preferred to the High Court under Ss.



12 B and 12 C shall be heard by a Bench of not less than two Judges; and in respect of such petition, application or appeal, the provisions of S. 98 of the Civil Procedure Code, 1908, shall, so far as may be, apply.

(4) It will be seen from the aforesaid provisions that the Madras General Sales-tax Act is a self-contained one and provides for a hierarchy of tribunals to enable the aggrieved person or authority to get a final and authoritative adjudication on the validity or the correctness of the assessments made by the sales-tax authorities. The petitioner ignores the entire machinery and seeks the aid of this court which, if given, will circumvent the entire statutory procedure prescribed. The petitioner gives the following reasons in his affidavit for filing this writ under S. 226 of the Constitution of India:

"I submit that the Tirunelveli Jilla Jewellers and Bullion Merchants' Association in my district comprises about 100 members. The question is common to all of us and also to other bullion merchants in the State of Madras. In view of the decisions taken by the Sales-tax original and appellate authorities I have every reason to apprehend that the objections before the respondent will be overruled and that the remedy prescribed by the Sales-tax Act, if pursued would be long-delayed, ineffective and of no practical purpose since once a tax is assessed, its non-payment renders the assessee to prosecution and its payment is a condition precedent for the preferring of an appeal. I am not in a position to pay such a large tax and it is virtually impossible therefore for me to resort to the remedies prescribed by the Act."

(5) In my view, the fact that an assessee has got to pay the tax or that the remedy provided by the Act may involve delay or expenditure, is no ground for invoking this court's extraordinary jurisdiction. The question in this case depends upon the construction of the provisions of the Sales-tax Act and the Rules made thereunder. On their correct interpretation depends the rate of the tax. That question is essentially within the jurisdiction of the Tribunals created by the Act. It is also not accurate to say that the Tribunals created under the Act have already expressed an opinion against the petitioner for the appeal against the assessment of the year 1949-50 is still pending before the Appellate Tribunal, and even if the decision of the Appellate Tribunal goes against him, he can file a revision to the High Court. Nor there are merits in the contention that he cannot have an interim relief till the Tribunal or the High Court finally disposes of this matter, though that fact in itself, even if true, cannot be a ground for entertaining a writ of prohibition. Under S. 11 of the Act he can prefer an appeal against the order of the assessing authority and under the proviso to the section the payment of the tax admitted only is the condition precedent for preferring the appeal. Further the Tribunal under S. 12 A can give directions in regard to the payment of the tax. Nor the circumstance that the decision may affect other persons is a ground for ignoring the statutory procedure and remedies. Even assuming there are some difficulties in the way of the petitioner, I do not think I am justified in issuing this extraordinary writ as the petitioner has an effective and satisfactory remedy under the Act itself. I should not be understood to have ex-

pressed any opinion on the merits of the contentions raised. The petition fails & is dismissed with costs. Advocates' fee Rs. 100.

B/G.M.J.

Petition dismissed.

## A. I. R. 1953 MADRAS 12

RAGHAVA RAO J.

Subramanyam Chettiar and others, Petitioners v. Isaki Ammal, Respondent.

Civil Revn. Petns. Nos. 2027 and 2028 of 1951, D/- 24-3-1952.

**Civil P. C. (1908) Ss. 115 and 35 and O. 6, R. 17 — Conditional order for amendment on payment of costs to opposite party — Order of amendment itself susceptible to revision — High Court can interfere with the order for payment of costs and increase the amount.**

(Para 1)

Anno: Civil P. C., S. 35, N. 31; S. 115 N. 20; O. 6 R. 17 N. 15, 21.

G. R. Jagadeesa Iyer, for Petitioners; S. Ramachandra Iyer, for Respondent.

**ORDER:** I am inclined after hearing both sides fully to uphold the order of the court below except to the extent of that part of it which relates to the award of Rs. 5 as costs, payable by the first defendant to the plaintiffs as a condition of the amendment of the written statement. The suit was one which certainly involved a fairly high stake, and having regard to the considerations, which might well operate against the granting of the amendment, the least that the court below ought to have done was to make the provision of costs more decent than the paltry figure of Rs. 5 taxed by it in the exercise of its discretion. The amendment was either one which should have been permitted conditionally or unconditionally. If it is to be treated as a case in which the amendment can only be ordered conditionally, and if the condition as to payment of costs is to be regarded as within the ambit of the conditional character of such an order, and, if the order itself is susceptible of interference by me in revision here, it is difficult for me to understand why I should not interfere with the discretion of the court below in regard to the Rs. 5 of costs which it made conditional in the exercise of its discretion. I do not think that the powers of revision of this court are so far circumscribed by the provisions of the statute or by any considerations laid down by the case law under S. 115, C. P. C. in regard to a matter like this that I should feel that the Rs. 5 of costs must be allowed to remain sacrosanct. It is enough for me to say that, in this case having regard to the nature of the stake and the other considerations that may bear upon the matter, at least a sum of Rs. 100 might have been directed to be paid by the first defendant to the plaintiffs as condition of the amendment.

(2) Mr. Ramchandra Aiyar has rightly insisted that I should not ordinarily interfere with orders which are discretionary, that are made by the court below. But anyhow as I have already said, having listened to counsel of both sides fully and having considered all the aspects of the case, I do feel that not only is my discretion in this case permissible, but it is called for on all the considerations which may legitimately enter into a matter of this description. This sum of Rs. 100 will be paid by the respondent before me to the petitioner's advocate within two months from this date, failing



which the revision petition will stand allowed with costs, even then the pleader's fee payable in the court below being liable to be treated as not less than a sum of Rs. 100 which I have fixed in the foregoing part of my order. The petitioners will pay the respondent her costs in C. R. P. No. 2027 of 1951.

B/R.G.D.

Order accordingly.

### A. I. R. 1953 MADRAS 13

SATYANARAYANA RAO AND BASHEER  
AHMED SAYEED JJ.

Ramakammal, Appellant v. C. G. Subbarathnam Iyer and others, Respondents.

Appeal No. 316 of 1946, D/- 11-11-1949.

**T. P. Act (1882 as amended in 1929) Ss. 58 (g), 67, 68 and 98 — Mortgagee to enjoy property in lieu of interest — Personal covenant to pay — Possession not given to mortgagee — Mortgage held anomalous — Mortgagee held entitled to decree for sale and profits from date of mortgage to date of suit — (Civil P.C. (1908) O. 34 R. 4).**

Under a mortgage deed it was stipulated that the mortgagee should enjoy the property in lieu of interest. There was also a stipulation that the mortgage amount would be paid by the mortgagor. Mortgagor failed to give possession to the mortgagee and made considerable profits from and out of the rents:

Held (i) that under S. 58(g) (as amended in 1929), the mortgage was an anomalous mortgage and the mortgagee was entitled to sue for sale under Ss. 67 and 68. AIR 1919 Mad. 1164 (F.B.) Held no more good law. (Para 7)

(ii) That even otherwise, there being a personal covenant to pay the mortgagee could sue for sale. AIR 1945 All. 202 (FB) Not followed. (Para 8)

(iii) that the mortgagee was also entitled to the profits from the date of the mortgage to the date of the suit. AIR 1938 All. 418 (FB) Not followed. AIR 1932 Mad. 175 Followed. (Para 10)

Anno: T. P. Act, S. 58 N. 40, S. 67 N. 18; S. 68 N. 12; S. 98 N. 2a, 4; Civil P. C., O. 34 R. 4 N. 9.

K. S. Champakesa Aiyangar and K. C. Srinivasan, for Appellant; P. S. Balakrishna Iyer, P. S. Ramachandran, C. A. Vaidyalingam, T. Venkatadri and K. Ramachandra Rao, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

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| ('20) 56 Ind Cas 717: (AIR 1919 PC 121)                        | 8    |
| ('29) 56 Ind App 299: 58 Mad LJ 401: (AIR 1929 PC 139)         | 7    |
| ('38) ILR (1938) All 714: (AIR 1938 All 418 FB)                | 8    |
| ('45) ILR (1945) All 676: (AIR 1945 All 202: 46 Cri LJ 743 FB) | 10   |
| ('10) 6 Ind Cas 153 (Cal)                                      | 8    |
| ('19) 46 Cal 448: (AIR 1919 Cal 46(2))                         | 10   |
| ('46) ILR (1946) Lah 805: (AIR 1947 Lah 40)                    | 8    |
| ('91) 14 Mad 232   | 8    |
| ('94) 17 Mad 131: (4 Mad LJ 50)                                | 8    |
| ('94) 17 Mad 469: (4 Mad LJ 143)                               | 10   |
| ('18) 41 Mad 259: (AIR 1919 Mad 1164 FB)                       | 3, 4 |

('32) AIR 1932 Mad 173: (136 Ind Cas 783) 3, 10

('32) AIR 1932 Mad 175: (136 Ind Cas 785) 3, 10

('22) 1 Pat 350: (AIR 1922 Pat 167) 8

SATYANARAYANA RAO J.: This is an appeal by the first defendant against the decree of the Subordinate Judge of Coimbatore granting to the plaintiff a preliminary mortgage decree.

(2) On the 20th February 1939, the first defendant executed a deed which is described as a usufructuary mortgage deed for a sum of Rs. 4,000. The property comprised in the mortgage is a terraced building in Coimbatore. Under this document, it was stipulated that the mortgagee should in lieu of interest on the amount advanced enjoy the property mentioned, that is, the house as under a usufructuary mortgage. It further provided that: "Within a period of four years from this date, I shall pay you the above usufructuary amount and get return of the deed with endorsement of discharge thereon and along with the title deeds pertaining thereto. I shall also take possession of the undermentioned properties from you. If before the above period of four years I pay the principal sum you shall receive it. If I fail to pay the principal sum on the due date of the above four years you shall continue to be in enjoyment as under a usufructuary mortgage for the very aforesaid mortgage amount till it is paid. Besides, I shall pay the above amount on demand with interest thereon at the rate of four annas per hundred rupees per mensem from the date of default to the date of payment."

The deed also recites that the mortgagee was put in possession of the property immediately, that is, on the date of the execution of the deed. On that very day, the plaintiff leased the property under a rental agreement to one Ramaswami Mudaliar who is examined in the case as P. W. 1 and the lessee agreed to pay a rent of Rs. 30 per mensem for the terraced building and he also stated in the rental agreement Ex. P-2, that he was put in possession of the property. The plaintiff alleged in the plaint that notwithstanding the recitals in the documents above referred to, the first defendant failed to deliver possession of the property to the plaintiff or to his nominee and that she had continued in possession without even paying any sum by way of rent or damages for use and occupation.

On the 3rd April 1943, the first defendant sold the property to defendants 2 to 4 under Ex. D-7 and they are impleaded as parties to the action. The plaintiff, therefore, seeks to recover from the defendants and the property, a sum of Rs. 5949, Rs. 4000 being the principal amount due under the mortgage and Rs. 1949, as compensation for loss of possession from the date of the mortgage to the date of the suit at Rs. 30 per mensem or Rs. 360 per annum. The suit was instituted on the 19th July 1944, and in the plaint, the plaintiff claimed that he was entitled to realise the amount of Rs. 5949 by sale of the hypotheca and he also claimed a personal decree for the balance in case the proceeds of the hypotheca are not sufficient to satisfy the decree. The consideration for the mortgage was not disputed by the defendants in their written statement but they denied the assertion of the plaintiff in the plaint that he had not been given possession of the property



immediately after the deed was executed. They disputed the right of the plaintiff to claim compensation for loss of possession and also denied the right of the plaintiff to a decree for sale of the mortgaged property as claimed in the plaint. It was also alleged in the written statement that by his acquiescence, non-delivery, the plaintiff lost his right to sue by sale of the mortgaged property and that in any event the plaintiff is not entitled to claim more than Rs. 4000 as per the agreement which, it is claimed, was reached between the parties on the 10th September 1942, evidenced by a varthamanam of that date, whereby the claim under the mortgage and also under two other promissory notes was settled at a sum of Rs. 4500 to be paid by the first defendant to the plaintiff.

Immediately after the purchase of the property by defendants 2 to 4 under Ex. D-7 they deposited a sum of Rs. 4050 in Court under S. 83 of the Transfer of Property Act and filed O. P. No. 95 of 1943. The plaintiff, however, refused to receive the amount and give a discharge to the first defendant and therefore the further plea was taken by the defendants that their tender was valid and therefore the plaintiff is not entitled to interest or compensation or to any costs.

(3) The learned Subordinate Judge framed as many as 8 issues in the case covering the contentions of the parties, but on the chief points on which the parties were at variance he found that the mortgage, notwithstanding the covenants (above set forth) contained in Ex. P-1, was a usufructuary mortgage and not an anomalous mortgage. On the question of delivery of possession, he upheld the contention of the plaintiff that the house, in fact, continued to be in the possession of the first defendant. He followed the decision of the Full Bench in — ‘Subbamma v. Narayya’, 41 Mad 259 (FB), which held that if under a usufructuary mortgage possession was not delivered, the mortgage is not a usufructuary mortgage within the meaning of S. 58(d) of the Transfer of Property Act and that the mortgagee is entitled to bring a suit for sale of the mortgaged property. In view of this decision he held that the plaintiff is entitled to a decree for sale. He was also of the opinion that the plaintiff was entitled to claim damages in lieu of interest, in view of two decisions in — ‘Subramania Aiyar v. Panchanada Odayar’, AIR 1932 Mad 175 and — ‘Gurusami Thevan v. Ganapathi Chetti’, AIR 1932 Mad 173. He found also that the varthamanam was not enforceable as it was intended merely to enable the first defendant to effect a private sale of the property and that the concession granted by the plaintiff was subsequently withdrawn by him as it was not accepted immediately and acted upon. In the result the learned Judge passed a preliminary decree for sale of the property.

(4) In this appeal by the first defendant, the claim under the varthamanam was not seriously pressed as it is not an enforceable contract, as the agreement was not supported by consideration and a mere agreement to remit could not under law be enforced. There is also the further objection that it is not admissible in evidence for want of registration and as it purports to modify the essential terms of the mortgage deed. It is, however, unnecessary to pursue this matter as the appellant has not before us relied upon the varthamanam letter as affording a defence to the action. The decision of the

Full Bench in — ‘Subbamma v. Narayya’, 41 Mad 259 (FB) is no longer good law in view of the amended definition of a “usufructuary mortgage” in S. 58 of the Transfer of Property Act. The amendment was introduced to nullify the effect of the Full Bench decision. No attempt was made before us to support the decision.

(5) The other questions that were seriously pressed were: firstly, that the finding of the learned Judge that the plaintiff did not obtain possession of the property at any time and that the first defendant continued to be in possession of the property is wrong; secondly, that the plaintiff is not entitled to a decree for sale; and lastly that he is not entitled to claim profits in lieu of interest.

(6) On the first question we have no doubt on the evidence that the finding of the learned Subordinate Judge is correct. (His Lordship reviewed the evidence and continued.) In view of those circumstances we are clearly of opinion that the plaintiff did not obtain possession of the property and that the first defendant alone continued in possession and made considerable profit from and out of the rents of the house.

(7) The learned Subordinate Judge construed the document as containing no personal covenant to pay and that it is a usufructuary mortgage. The relevant covenants extracted above show that the mortgagor undertook to pay the amount within a period of four years and that if he failed to pay the principal sum within that date, the mortgagee should continue to be in enjoyment until the amount is paid and under the last clause the mortgagor promises to pay the above amount on demand with interest thereon at the rate of four annas for hundred rupees per month from the date of default, that is after the expiry of the four years, to the date of payment. This further rate of four annas for hundred rupees per month is in addition to the profits which the mortgagee is entitled to enjoy until the amount is paid in lieu of interest. There is, therefore, a clear covenant to pay the mortgage amount. The document, therefore, is a simple usufructuary mortgage, and is not a usufructuary mortgage, pure and simple. Under the law as it stood before the amendment of the Transfer of Property Act in 1929, the mortgage would not be an anomalous one. The old S. 98 was as follows:

“In the case of a mortgage, not being a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, or an English mortgage, or a combination of the first and third, or the second and third, of such forms, the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage deed, and, so far as such contract does not extend by local usage.”

When in such a case the mortgagor failed to deliver possession of the property the mortgagee was entitled under S. 68(1) (c), which corresponds to the present clause (d) of that section, to sue for the mortgage money and under S. 67 when there is no contract to the contrary, he would be entitled also to a decree for sale. Clause (a) of old S. 67 did not confer upon a usufructuary mortgagee power to institute a suit for foreclosure or sale but this was confined to cases where he claimed to sue as a usufructuary mortgagee as such. If he was a simple cum usufructuary mortgagee or a person entitled



to enforce the statutory right under the old S. 68(c) to sue for the mortgage money when there was a default in delivering possession by the mortgagor, it could not be said he was then suing or seeking to enforce the rights as a usufructuary mortgagee and would not therefore come within the description of usufructuary mortgage "as such". A suit to enforce payment of the mortgage money under S. 58 and for the sale of property under S. 67 is therefore maintainable, as such a mortgage is not an anomalous mortgage within the meaning of old S. 98. Under the old law, an anomalous mortgage was not included within the definition of "mortgage" under S. 58. A simple cum usufructuary mortgage, not being an anomalous mortgagee was entitled to the benefit of Ss. 67 and 68 of the Transfer of Property Act.

The question was finally decided by the Privy Council in — 'Narasing Partab Bahadur Singh v. Mohammed Yaqub Khan', 56 Ind. App. 299: 58 Mad L J 401 (PC). In that case the mortgage was dated 8th April 1923 and was given to secure an advance of Rs. 30000, which carried interest at the rate of 5 annas and 1 pie per cent per month. The mortgage money was promised to be repaid within a period of 35 years and the mortgagee was to enjoy the rents and profits of an 8 annas share in certain villages in lieu of interest on the mortgage money and the possession of the property was delivered to the mortgagee. If the mortgagor failed to redeem the mortgaged property within the time fixed, power was conferred upon the mortgagee to realise the money due to him by sale of the mortgaged property. There was also a provision for a personal decree if the mortgaged property was found to be insufficient to satisfy the full amount. The mortgagor received the advance but failed to deliver possession of the mortgaged property. An assignee of the mortgagee's interest instituted an action on the 14th May 1924, nearly a year from the date of the deed, claiming to recover the principal and interest by sale of the mortgaged property and in the alternative for a simple money decree for the amount. The subordinate Judge who tried the action held that the plaintiff was entitled to a decree for sale under S. 68 of the Transfer of Property Act and passed a decree in his favour. On appeal the Chief Court held that the mortgage in question was an anomalous mortgage and not a combination of a simple mortgage and a usufructuary mortgage and therefore S. 68 of the Act was inapplicable, as it was excluded by S. 98 and passed a decree for possession only in accordance with the terms of the mortgage deed in substitution of the decree for sale granted by the learned Subordinate Judge. The plaintiff appealed to His Majesty in Council.

The Judicial Committee construed the deed as constituting a combination of a simple mortgage and a usufructuary mortgage. Though under the terms of the deed there was no power of sale, if there is a default in putting the mortgagee in possession of the property and if the suit was instituted within the period of 35 years, the Judicial Committee held that as the plaintiff was deprived of part of his security, he was entitled under S. 68 of the Act to recover the mortgage money as it became payable under S. 68 in consequence of the failure to deliver possession. They further held that as the money became payable under S. 68 a decree for

sale could be made under S. 67. Their Lordships observed:

"It would indeed be a startling result of the legislation if in such a case as this where a default has been made by the mortgagors of a kind which materially affects the mortgagee's security there existed no remedy for the immediate enforcement of the mortgage."

There is however in this decision no express reference to S. 67 (a) which deprived a usufructuary mortgagee, as such, from claiming a right of foreclosure or sale. Their Lordships must have treated the case as an 'a fortiori' one as the mortgage was not a mere usufructuary mortgage but was a combination of simple mortgage and a usufructuary mortgage; and, further, the right that was sought to be enforced was not a right under the usufructuary mortgage, as such, but the statutory right under S. 68 (c) (old) of compelling the mortgagor to pay the mortgage money when he had committed default in putting the mortgagee in possession of the mortgaged property. This statutory right carried with it a right of sale under S. 67 of the Act. But for the fact that there is the complication by an amendment of S. 98 in 1929 by the legislature, this decision of the Judicial Committee would have concluded the case now before us. As the definition of "anomalous mortgage" is now transferred with modifications to S. 58 and is added as clause (g) to that section, which does not expressly exclude the combination of simple mortgage and usufructuary mortgage, it would seem to follow that such a mortgage would be an anomalous mortgage under the present law. Clause (g) to that section says:

"A mortgage which is not a simple mortgage, a mortgage by conditional sale, a usufructuary mortgage, an English mortgage, or a mortgage by deposit of title deeds within the meaning of this section is called an anomalous mortgage."

So that, the mortgages enumerated and defined in the previous clauses were alone excluded from the definition of anomalous mortgage and not their combinations. This omission, it is claimed, is indicative of the view that the legislature intended to treat the combinations as anomalous mortgages. That is also the opinion of Mulla in his commentary. This may be so.

But this alteration in our opinion does not affect the result in the case. As anomalous mortgages are now included in S. 58 of the Act the application of Ss. 68 and 67 of the Act is not excluded as under the old law. This is really the effect of the amendments introduced in 1929. Even under the old law, some courts have taken the view that even in the case of an anomalous mortgage if there is failure to deliver possession, the mortgagee was entitled to take advantage of the provisions in S. 68 (c) (old) now corresponding to clause (d) and also entitled to sue for a decree for sale.

(8) There is also another point of view from which it would follow that the mortgagee in the present case is entitled to a decree for sale. A personal covenant to pay, according to the decisions of this court and of some of the other High Courts implies and carries with it a right of sale. There is the judgment of the Full Bench of this court in — 'Sivakami Ammal v. Gopala Savundaram', 17 Mad. 131. The judgment however is very short and does not give any reasons. But the earlier decision of a Bench in — 'Ramaya v. Guruva', 14 Mad. 232 which



considers the relevant provisions of the Transfer of Property Act holds that a covenant to pay confers a right to sue for sale of the mortgaged property under S. 67 of the Act. This principle was recognised by the Patna High Court in — '*Jag Sahu v. Mt. Ram Sakhi Kuar*', 1 Pat. 350 which quotes with approval the decision in — '*Pitambar Purkait v. Madhu Sudan*', 6 Ind. Cas. 153 (Cal) in which it is said:

"It is well settled that when an instrument of mortgage gives a right to possession and also contains a covenant to pay, thus presenting a combination of a usufructuary and a simple mortgage, the two rights are independent and the mortgagee may sue for sale although he may have given up possession, and the right accrues immediately after the due date is passed."

Even though the Transfer of Property Act is not applicable to Punjab, the Lahore High Court also applied the same principle in—'*Mahomed Saeed v. Abdul Alim*', I. L. R. (1946) Lah. 805 and the decisions in — '*Ramaya v. Guruva*', 14 Mad. 232 and — '*Sivakami Ammal v. Gopala Savundaram*', 17 Mad. 131 were referred to. The Allahabad High Court in — '*Kanhaiya Prasad v. Mt. Hamidan*', I. L. R. (1938) All. 714 (F.B.) no doubt takes a contrary view. Mahajan J. in the Lahore case dissents from that view and follows the view taken by the Madras High Court as sound. Even in the case of an anomalous mortgage, if there are indications in the deed negating a right of sale and showing that the parties never contemplated any such right, the right of sale cannot be given effect to as the parties are bound by the terms of the contract. See — '*Madho Rao v. Ghulam Mohiuddin*', 56 Ind. Cas. 717 (P. C.).

(9) It follows from the foregoing discussion that viewed from any aspect the plaintiff is entitled to a decree for sale.

(10) Lastly, in view of the decisions of this court, no doubt of single Judges in — '*Subramania Aiyar v. Panchanada Odayar*', AIR 1932 Mad. 175 and—'*Gurusami Thevan v. Ganapathi Chetti*', AIR 1932 Mad. 173 and the reasons given by Ramesam J. in the judgment in — '*Subramania Aiyar v. Panchanada Odayar*', AIR 1932 Mad. 175 we think that the plaintiff is entitled to the profits claimed by him. The view of the learned Judges in the two cases also receives support from the decision of a Bench in the earlier case in — '*Linga Reddi v. Sama Rau*', 17 Mad. 469. The decision in — '*Sitanath Ghose v. Thakurdas Chakravarti*', 46 Cal. 448 also takes the same view. The Allahabad High Court differs from the Madras and Calcutta decisions: Vide — '*Nurul Hassan v. Mahabub Bux*', I. L. R. (1945) All. 676 (F. B.). In view of the decisions of our court, we respectfully dissent from the view of the Allahabad Court. The mortgage deed itself in the present case recites that the mortgagee should enjoy the property in lieu of interest on the said amount. If the mortgagor commits a breach of the covenant to deliver possession he should not be allowed to take advantage of it or retain the proceeds of the property and at the same time paying no interest on the mortgage amount, the benefit of which he admittedly enjoyed. We respectfully adopt the reasoning of Ramesam J. in the decision in—'*Subramania Iyer v. Panchanada Odayar*', AIR 1932 Mad. 175 and hold that the view of the learned Subordinate Judge on this point also is correct.

(11) In the result the appeal fails and is dismissed with costs of the first respondent.

B/R G.D.

Appeal dismissed.

### A. I. R. 1953 MADRAS 16

BASHEER AHMED SAYEED J.

Devar and Co. Represented by K. Muthuswami Devar, Appellant v. C. Radhakrishna Naidu, Respondent.

City Civil Court Appeal No. 104 of 1949, D/-11-12-1951.

**Trusts Act (1882), Ss. 5 to 8, 88 and 94 — Employer crediting bonus and dearness allowance in favour of employee — Employer taking benefit in income tax — Employer is trustee for the amount.**

Where the employer had credited to the account of the employee several sums of money as and towards bonus and dearness allowance during the period the employee had served under him, and the employee had during the income tax assessment made statements to the effect that these amounts represented by the credit entries have been amounts not merely set apart for the benefit of the employee but also have been actually paid over to him and on the basis of such setting apart and payment the employee had claimed reduction in the assessment and did actually derive benefit in the matter of reduction of the income tax, but it was established that the amounts were not paid over to the employee:

Held that the credit entries could not but be treated as a declaration by the employer in favour of the employee that the monies were held for and on behalf of the employee by the employer. The action of the employer in having made not merely the entries in the account books but also in having represented to the Income tax Department that these amounts have been set apart for the employee and that they have been paid over to the employee from year to year, would certainly constitute a trust in favour of the employee. Therefore, far from the provisions contained in Ss. 5 to 8 of the Trusts Act not being applicable to the facts of the case, the principles embodied in those sections would certainly come into operation on the facts of the case and they would apply.

Held also that the employee, could be treated as a depositor, as if he had received the money at the end of the year at the time when it was paid and that he redeposited the money with the employer. Even from that view, the relationship of depositor and depositee would certainly entitle the employee to claim the moneys that stood credited in the account books of the employer. (Paras 7, 8, 9)

Anno: Trusts Act, S. 5 N. 2; S. 88 N. 10; S. 94 N. 2.

A. K. Balakrishnan, for Appellant; Subramaniam and Rajagopal, for Respondent.

**REFERENCES:** Courtwar/Chronological/ Paras  
(11) 35 Bom 403; (11 Ind Cas 564) 9  
(24) 47 Mad LJ 791; (AIR 1925 Mad 192) 9  
(44) 1944-2 Mad LJ 29; (AIR 1944 PC 78) 5, 7, 9  
(45) 1945-2 Mad LJ 164; (AIR 1945 Mad 473) 5, 7, 9



**JUDGMENT:** This appeal is against the judgment and decree of the learned Principal City Civil Judge, partially decreeing the suit brought about by the plaintiff claiming arrears of salary, bonus and dearness allowance.

(2) The plaintiff was employed as a driver under the defendants. The defendants are a firm of merchants carrying extensive business in timber in several places in the State of Madras. The allegations of the plaintiff are that, while he was serving the defendants from February 1943 to June 1947 he was discharged from service without cause and without notice on the 10th June 1947. He, therefore, filed the suit claiming arrears of salary from 1st June 1947 to 10th June 1947 and three months' salary for wrongful dismissal. He also claimed dearness allowance and bonus for the period during which he served under the defendants. He alleged that in the accounts maintained by the defendants, the plaintiff was credited with certain sums on account of dearness allowance, and bonus for the years 1943-44, 1944-45 and 1945-46, and though these sums were credited to the account of the plaintiff they were not paid, notwithstanding the fact that there were entries to the effect that those sums were paid to the plaintiffs.

(3) The defendants filed an elaborate written statement. In that written statement they denied that there was any agreement between the defendants and the plaintiff for payment of dearness allowance, but all the same, the defendants admitted that, as a matter of fact, *ex gratia*, they gave the staff, including the plaintiff, dearness allowance calculated at the rate of one third of the month's salary from April 1943 onwards in addition to the monthly salary to which alone they were entitled in law. They also denied that there was any agreement that the dearness allowance formed part of the salary and was a term under the agreement of service, but they, nevertheless, averred that in fact dearness allowance was paid to the plaintiff though not month by month, but in lump sums as per particulars given in the statement of accounts appended to the written statement. With regard to the claim for dearness allowance in respect of the year 1946-47 by the plaintiff, the statement of the defendants was that no dearness allowance was allotted or intended to be paid to the plaintiff for the year 1946-47, and that consequently nothing had been paid to him in that respect, nor was he entitled to the payment. The defendants did not admit the legal position that by reason of the credit entries in the account books of the defendants in regard to the dearness allowance, the said entries had in law the effect of transferring to the plaintiff the right to such amounts, for the reason that they did not form part of the contract of service and that, therefore, such payments were intended to be made only on gratuitous basis.

The defendants further denied the allegations of the plaintiff in regard to the payment of bonuses to the plaintiff or other employees. They nevertheless admit that, as they thought it fit that some bonus should be given, they had voluntarily and gratuitously declared bonuses and paid the same to the staff including the plaintiff, as per particulars mentioned in the statement of accounts appended to the written statement, and that no bonus was allowed to the plaintiff for the year 1946-47 as claimed by him. They also make the further allegation that the plaintiff did not discharge his duties to the satisfaction of the defendants, but nevertheless the payment of bonus was made in favour of the plaintiff also because it was not thought desirable to make any exception in the case of the plaintiff when other mem-

bers of the staff were being paid, and so out of pity and consideration, to the plaintiff, he was also paid bonus, and that the dismissal was not wrongful and that the plaintiff was dismissed for the reason that he did not discharge his duties satisfactorily.

(4) On these pleadings, the learned City Civil Judge framed about six issues. On the first issue as to the amount of salary payable to the plaintiff, it was agreed between the parties that the claim of the plaintiff might be confined to one month's salary alone, as he had secured an employment within a short period after his cessation of service from the defendants. The question of wrongful termination of service was not, therefore, considered. On the question as to whether there was any agreement for payment of dearness allowance for the years 1943 to 1946 the learned City Civil Judge held that there was no agreement between the parties, but on the question as to whether the dearness allowance and bonus had been actually paid to the plaintiff, the learned City Civil Judge held that neither dearness allowance nor bonus was paid actually to the plaintiff. On the claim for bonus and dearness allowance for the year 1946-47, the learned City Civil Judge held that, that claim could not be maintained. An issue was also framed as to whether the claim of the plaintiff was barred by limitation. On that issue, the learned City Civil Judge held that, in as much as there was a trust created in favour of the plaintiff in respect of the dearness allowance and bonuses claimed by the plaintiff, there was no bar of limitation and that the plaintiff was entitled to recover them from the defendants and he gave a decree in a sum of Rs. 1,333-5-4, being the amount that was credited to the account of the plaintiff in the accounts of the defendant's firm for the years 1943-44, 1944-45 and 1945-46. He did not award costs to the plaintiff and directed that each party should bear his or their own costs. Against this decree and judgment, the defendants have now preferred this appeal.

(5) Mr. O. T. G. Nambiar, appearing for the defendants-appellants, has contended that under the Trusts Act, Ss. 5 to 8, on the facts of the present case, no trust created in respect of the movable property is valid, unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or of the trustee. S. 6 of the Trusts Act provides that subject to the provisions of S. 5, a trust is created when the author of the trust indicates with reasonable certainty by any words or acts (a) an intention on his part to create thereby a trust, (b) the purpose of the trust, (c) the beneficiary, and (d) the trust property, and (unless the trust is declared by will or the author of the trust is himself to be the trustee) transfers the trust property to the trustee. S. 8 of the said Act provides that the subject matter of the trust must be property transferable to the beneficiary and it must not be merely beneficial interest under a subsisting trust. Construing these sections, the learned counsel for the appellants contends that if there was no separation of the trust property from the general property of the person who is supposed to be creating the trust, there cannot be a trust created. In this case, on the facts as have emerged from the plaint and written statement and the evidence that is on record, it is urged by the learned counsel for the appellants, that there has been no separation of the trust property from the general property of the defendants, and, therefore, there has been no setting apart or transfer of the property to the beneficiary that there has been no ownership created in



the property that could be said to have been transferred in favour of the beneficiary and, therefore, the conclusions of the City Civil Judge are not warranted.

Learned counsel for the appellants has also invited my attention to a decision in — '*Chambers v. Chambers*', 1944-2-Mad. L. J. 29 (P. C.). In that case, the Judicial Committee held that the subject matter was not clearly ascertained, that there was no setting aside the appropriation of the amounts as a fund transferable by the husband to the wife, that there was nothing in the case tantamount to a declaration of trust at all and that there was never any absolute parting by the husband with the alleged subject matter of the trust and it, therefore, finally held that there was no valid trust constituted.

Mr. O. T. G. Nambiar also referred to a decision in — '*Ramanathan Chettiar v. Palaniappa Chettiar*', 1945-2-Mad. L. J. 164 which has followed the decision in — '*Chambers v. Chambers*', 1944-2-Mad. L. J. 29 (P. C.) and has held that an allocation of specific property or fund to charity is essential both for effecting an endowment under the Hindu law and for creating a valid trust. The mere credit entry in the donor's account books without setting aside and appropriating the sum credited is not sufficient to create a valid trust. The modes in which a voluntary transfer of property in favour of a temple can be validly and effectually made have also been discussed in the course of the judgment delivered by Patanjali Sastri J. in that case. The principles laid down in these decisions relied upon by the learned counsel for the appellants cannot be taken exception to. But the fact remains as to whether the facts disclosed in this case come within the purview of the rulings of these two decisions. Whether the subject matter was not clearly ascertained, whether there was any setting aside and apportionment of the amounts said to have been due to the plaintiff, whether there was an absolute parting with the alleged subject matter of the trust and whether the credit entries, without satisfying the conditions required for creating a valid trust in favour of the plaintiff, are the questions that arise for consideration in this appeal, on the facts as disclosed in the plaint, the written statement and the documentary and oral evidence that has been recorded.

(6) The learned counsel for the respondents has taken me through the relevant paragraphs of the plaint as well as the written statement and he has read out the evidence on behalf of the defendants. The claim of the plaintiff has been, in the alternative, on the basis of a contract, a completed gift, relationship of depositor and deposit, creditor and debtor and beneficiary and trustee. The defendants no doubt deny all these relationships as between the plaintiff and themselves, but notwithstanding all these denials, the solid fact remains that the plaintiff served under the defendants as an employee on a particular salary, that his services were dispensed with and that before the services were dispensed with in June 1947, the defendants had credited to the account of the plaintiff several sums of money as and towards bonus and dearness allowance during the period of three years during which the plaintiff served under the defendants. The defendants admit that they not merely made these credit entries in favour of the plaintiff, but they go also to the extent of saying that all the amounts that have been shown as credit entries in favour of the plaintiff have actually been paid and the dates for the payment are also given in the course of the evidence let in on behalf of the defendants. The first payment is said to have been made on the 31st July 1944, the second payment on the 31st

July 1945 and the third payment on the 18th February 1947, so that the stand taken by the defendants is that bonus and dearness allowance were not merely declared to be paid in favour of the plaintiff, but that they were also actually paid to the plaintiff on the respective dates mentioned above.

On the question as to whether actually payments had been or had not been made, of these various sums that were shown as due to the plaintiff, the learned City Civil Judge has come to the conclusion that the payments of bonus and dearness allowance were never made by the defendants to the plaintiff. There is also no cogent or convincing proof that the payments of dearness allowance and bonuses had actually been made to the plaintiff. No receipts appear to have been taken from the plaintiff for vouching the payments of these sums of dearness allowance and bonuses. The defendants' witnesses would say that no muster roll was kept, that there was no salary acquittance register at all kept by the defendants and that the signatures of the employees were not taken when salaries were disbursed. These things reveal a very strange state of business efficiency in the defendants' firm, which is said to be transacting a very large business in timber throughout the state; so that, I do not think that there is any justification for me to differ from the finding of the learned City Civil Judge that the amounts shown in the account books of the defendants firm have not been paid to the plaintiff. That this was so is also corroborated by the fact that the second witness for the plaintiff, who was another employee and whose services were dispensed with by the defendants and against whom also similar entries for payment of bonus and dearness allowance were shown, was paid off a sum of Rs. 400 or thereabouts, in settlement of his claim of bonus and dearness allowance, when he filed a suit against the defendants.

(7) The question then is, what is the effect of the credit entries that have been found in the account books of the defendants in favour of the plaintiff. The contention of the appellants is that those are mere credit entries and they cannot have the effect of creating a trust in favour of the plaintiff. One has to consider whether these credit entries are merely as credit entries not sufficient to create a valid trust or, taking the circumstances which obtain in relation to the fund, the credit entries have to be considered as being part and parcel of a trust created by the employer in favour of the employee. The important background that has been furnished in the evidence is that the defendants, who are income-tax assesseees, when they filed their accounts in the course of the assessment to income-tax have made statements to the effect that these amounts represented by the credit entries, have been amounts not merely set apart for the benefit of the employees, but also have been actually paid over to them, and on the basis of such setting apart and payment to the plaintiff and other employees, the defendants have claimed benefit, namely, reduction in the assessment of income-tax & other taxes to that extent. In view of this fact, viz., that the Income-tax Department were made to believe & act upon the representation of the defendants that these amounts, standing to the credit of the plaintiff in the account books of the defendants have been set apart as funds belonging to the plaintiff and as funds paid over to the plaintiff and that thereby the defendants derived benefit in the matter of reduction of income-tax, the question arises as to whether, in such circumstances, it will not be



just and proper that the defendants should be fixed up to their representation to the Income-tax Department to the above effect and whether such a state of things could not be taken advantage of by the plaintiff. I should think that the defendants have not conducted themselves properly judging from the manner in which they have done in relation to the plaintiff and the Income-tax Department. They could not be allowed to blow hot and cold in the same breath. They cannot approbate and reprobate at the same time. But for the fact that they represented to the Income-tax department that these amounts standing to the credit of the plaintiff in their accounts had actually been paid and that they had become the property of the plaintiff, they would not have been entitled to the benefit and consideration in the matter of reduction of the Income-tax from the Income-tax Department. What is the effect of such a representation is the question. Undoubtedly, the effect of such a representation, in my opinion, would be that the amounts, which have been credited to the account of the plaintiff in the account books of the defendants have not only been separated from the general funds belonging to the defendants, but have also been set apart for the benefit of the plaintiff, as an employee entitled to bonus and dearness allowance.

I think, applying the principles laid down in the Privy Council decision in — *Chambers v. Chambers*, 1944-2-Mad.L.J. 29(P.C.) and also the ruling in — *Ramanathan Chettiar v. Palaniappa Chettiar*, 1945-2-Mad. L. J. 164, I am inclined to hold that the action of the defendants in having made not merely the entries in the account books but also in having represented to the Income-tax Department that these amounts have been set apart for the plaintiff and other employees and that they have been paid over to the employees from year to year, would certainly constitute a trust in favour of the plaintiff.

(8) Apart from this, there is the further fact which has to be taken into account, viz, the credit entries do not stand by themselves as mere credit entries in favour of the plaintiff. A reading of the exhibits containing the credit entries would show that this is something like a running account wherein there are also debit entries against the plaintiff. Loans that the plaintiff had borrowed on more than one occasion have been debited to this account of the plaintiff and the balance has been struck, after deducting these loans made to the plaintiff. The payments also made by the plaintiff on occasions have been credited towards this account. Not merely this. On occasions, even the salary has been credited towards this account of the plaintiff. This would mean that these amounts which have been found in the accounts to the credit of the plaintiff have been treated as amounts set apart for his benefit and as belonging to him and that they were separated from the general funds belonging to the defendants and that these amounts had been transferred for the benefit of the plaintiff having been separated from the general funds, as will be clear from the state of accounts and the way in which those accounts have been adjusted from time to time by the defendants themselves. Therefore, it cannot be denied, on one hand, that there is admission by the defendants that these amounts have been allocated and set apart, though they say that this was done *ex gratia* and not under any contract or agreement between the plaintiff and themselves; and, on the other hand, there is the conduct of the defendants which goes to show that they had treated these amounts as amounts belonging to the plaintiff and payable to him, so that if these amounts, which belong to the plaintiff

and which are payable to him have been retained by the defendants in their hands, the result would be nothing other than that they were holding those amounts on behalf of the plaintiff as trustees, in order that they may be paid over to him whenever there was a demand by the plaintiff for the same. Therefore, far from the provisions contained in Ss. 5 to 8 of the Trusts Act not being applicable to the facts of the present case, I think the principles embodied in those sections would certainly come into operation on the facts of the present case and they will apply.

(9) It is not necessary for me to characterise the evidence of the first witness of the defendants. Nevertheless, it furnishes a clear proof that the defendants intended and agreed not merely to declare dearness allowance and bonuses to the plaintiff and other employees of theirs, but that they also set apart deliberately those amounts calculated on the basis on which the defendants wanted to pay dearness allowance and bonuses to the plaintiff and other employees. I do not think that the learned City Civil Judge has appreciated the evidence of D. W. 1 in the correct perspective. Apart from what is to be gathered from the general tenor of the written statement, it must be considered that there has been an intention and agreement to pay dearness allowance and bonus to the plaintiff, as revealed by the averments in the plaint, and also in the written statement, as also the deposition of the first witness for the defence. The credit entries in favour of the plaintiff cannot but be treated as a declaration by the defendants in favour of the plaintiff that the monies are held for and on behalf of the plaintiff by the defendants. The decision in — *Kanakasabhapathi Mudaliar v. Hajee Oosman Sahib*, 47 Mad L. J. 791 furnishes the nearest approach to the facts of the present case. That decision is based on an earlier decision in — *Bai Mahakore v. Bai Mangla*, 35 Bom 403, where, one of the judges constituting the Bench held, relying upon a declaration by the donor, that there was a trust created, whereas Heaton J. held that the relationship between the employer and the employee was that of a depositor and depositee and that the relationship of depositor and depositee was established in the circumstances of the case. I do not think that any violence will be done, if a similar inference is drawn from the facts of the present case. The plaintiff having been the employee and who had been allocated and awarded dearness allowance and bonuses, can be treated as a depositor, as if he had received the money at the end of the year at the time when it was paid and that he redeposited the money with the defendants. Even from that view, the relationship of depositor and depositee will certainly entitle the plaintiff to claim the money that stand credited in the account books of the defendants. If it were certain immovable properties which were actually not separated from the general properties belonging to the owner, as it was the case in — *Chambers v. Chambers*, 1944-2-Mad L. J. 29(P. C.) certainly there would have been some difficulty in coming to the conclusion that there was no declaration of the trust in favour of the plaintiff by the defendants in having made the credit entries and having adjusted the accounts of the plaintiff from time to time in the manner in which they have done. But in this case, the subject matter was involved in cash and that cash has been allocated and separated from the general funds and shown to have been so separated and allocated to the plaintiff when the defendants dealt with the Income-tax Department in connection with their assessment. Therefore, the difficulty that arose in — *Chambers v. Chambers*, 1944-2-Mad L. J. 29(P. C.) is not to be seen in the present case. Similarly, the difficul-



ties that have been pointed out in the credit entries that were the subject matter of discussion in — 'Ramanathan Chettiar v. Palaniappa Chettiar', 1945-2-Mad L. J. 164 do not obtain in this case, for in this case, the credit entries, far from remaining as mere credit entries, have the effect and character of having been amounts separately allotted and allocated for the benefit of the plaintiff and have been treated as such, as revealed from the course of conduct adopted by the defendants in relation to those credit entries in their books of accounts.

(10) In these circumstances, I should think the decree of the learned City Civil Judge will have to be upheld and this appeal will have to be dismissed with costs.

B/R.G.D.

Appeal dismissed.

### A. I. R. 1953 MADRAS 20

SATYANARAYANA RAO AND  
RAJAGOPALAN JJ.

Asher Textiles Ltd., Tiruppur, Applicant v.  
Commr. of Incometax and Excess Profits Tax,  
Madras, Respondent.

Case Referred No. 53 of 1950, D/- 14-4-1952.

**Income-tax Act (1922), S. 13 — Commercial  
accountancy — Valuation of opening stock and  
closing stock in a year — Method of.**

It is a long established principle of commercial accountancy that in order to arrive at true profits of a business the closing stock during that period should be valued either at the market value or at cost price whichever is lower, at the option of the trader. The cost is always taken and understood to be the original cost and not the notional cost. (Para 1)

The value of the closing stock is adopted as the value of the opening stock for the succeeding year. (Para 1)

Where at the end of the accounting year, the assessee, who had purchased goods at Rs. 500 cost price, adopts the market value, say Rs. 300, of the goods on that date as it is lower of the two values and adopts that value of Rs. 300 as the value of the opening stock for the succeeding year but at the end of the succeeding year instead of applying the same principle (namely, valuing the closing stock either at the market value or the cost price whichever is lower) adopts the same value of Rs. 300 as the value of the closing stock when the market value is say Rs. 400, the method adopted is improper. AIR 1949 Mad 580; (1949) 2 All ER 889 and AIR 1925 Mad. 1242 Ref. (Para 1)

Anno: Income-tax Act, S. 13 N. 2.

S. Swaminathan, for Applicant; C. S. Rama Rao Sahib, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

(25) 2 ITC 14: 48 Mad 836: (AIR 1925 Mad 1242)

(49) 1949-17 ITR 1: (AIR 1949 Mad 580)

(1949) 2 All ER 889: (65 TLR 725)

SATYANARAYANA RAO J.: The question referred to this court for decision is a simple one, namely,

"whether the valuation of the closing stock is to be made on the basis adopted by the assessee company."

To bring out the method adopted by the assessee for valuating the closing stock a simple

illustration may be given. Suppose he had purchased goods at Rs. 500 cost price and if such goods remained unsold at the end of the accounting year, applying the well known principle of commercial accountancy, the assessee adopted the market value (say for example Rs. 300) of the goods on that date as it was lower of the two values, namely, the market value and the cost price. Having done that in valuing of the closing stock he correctly adopted that value of Rs. 300 as the value of the opening stock for the succeeding year. But at the end of the succeeding accounting year instead of again applying the principle, that he should have valued the closing stock either at the market value or the cost price whichever is lower, adopted the same value of Rs. 300 at which the opening stock was valued, when the market price was say Rs. 400. Here it must be mentioned that the market value means

"market value at the commencement of the year when the opening stock has to be valued and at the close of the year when the closing stock has to be valued and not any intermediate valuation."

The method of valuation of the closing stock adopted by the assessee was objected to by the Incometax authorities and their decision was upheld by the Appellate tribunal. The assessee adopted the mercantile system in maintaining his accounts, and the only question is whether he followed correctly the well-established principles of accountancy in making up his accounts. It is a long established principle of accountancy that in order to arrive at true profits of a business the closing stock during that period should be valued either at the market value or at cost price whichever is lower, at the option of the trader. The principle underlying this, is to provide a reserve for the loss which he is likely to incur during the period. By giving the option to adopt the lower of the two valuations the trader is protected from being taxed in respect of profits which he did not actually earn. Profits always represent the surplus of the receipts over the cost price including expenditure. The cost is always taken and understood to be the original cost. Applying this principle in different years at each stage the market value or the cost of the stock must be considered and the trader has to choose between the two valuations to make out and adopt whichever is to his advantage.

What is now urged in support of the contention that the opening stock and the closing stock in the accounting year could be valued at the same figure, is that the value of the opening stock represents really the replacement value of the goods at that time and therefore, it represents the cost price of the stock. In valuing the closing stock as under the rule already stated he has got the option to adopt either the cost price or the market rate whichever is lower; it is claimed that he is entitled to adopt this notional cost price because it is lower than the market rate. In the illustration given, the sum of Rs. 300 the value of the opening stock during the accounting year is undoubtedly lower than the market value which was Rs. 400. In support of this contention no authority has been cited except the opinion of a text book writer, Mr. Montgomery, whose opinion was based upon certain trading regulations having statutory force and obtaining in America. There are no such rules in India and in Great Britain. The learned advocate is not able to cite any



opinion of any text book writer of England on the subject in support of his contention. When the assessee was allowed to set off in the previous accounting year the loss of Rs. 200 incurred against the profits earned he was allowed to create a reserve from the profits to cover the loss of Rs. 200. In the succeeding year when the market price was Rs. 400 and the cost of the goods was Rs. 500 the reserve of Rs. 200 already allowed was not justified as the loss in the succeeding year was reduced to Rs. 100. In reality in respect of this Rs. 100, he was not being called upon to pay tax as profits arising by the sale of the goods but is called upon to bring back from out of the reserve a sum of Rs. 100 in respect of which he did not pay tax in the previous year. At no stage when this principle is applied would he be called upon to pay tax on profits which he did not actually earn for if the value of the goods appreciated to Rs. 600 the difference of Rs. 100 cannot be treated as profits and would not be treated because the assessee has the option of choosing between the cost price and the market price whichever is lower. In the illustration if the market price goes to Rs. 600 he could value the closing stock at Rs. 500 the cost price, and no question of profits being taxed before they are earned would arise.

The rule of accountancy adopted all over England and as also adopted in India is to construe the cost price as "original cost price" and not a notional cost price and liberty should be given to the assessee to adopt either the original cost price or the market value. There is no authority in support of the position that the cost price means notional cost price. On the contrary decisions in which the application of the rule was considered are against this contention. In the decision in — 'Commr. of Income-tax and Excess Profits tax, Madras v. Messrs. Chari and Ram, Madura, 1949-17 I. T. R. 1, the question that arose for consideration was whether the assessee was bound to value different kinds of goods at the average cost and also value them at the average market price and then adopt the lower of the two or whether he was entitled when the prices of the goods varied to adopt in respect of such of the goods whose cost price was higher than the average market value and in respect of others the average of the cost price where the cost price was lower than the average market value. The answer given by this court was that the latter view is correct and that the department was not entitled to insist that the assessee should adopt the former method. This court examined the decisions in England in which the scope of this principle of accountancy was fully considered. The same view was taken in England in the case — 'Inland Revenue Commissioners v. Cock Russell & Co. Ltd.', 1949-2-All E. R. 889 and in — 'Commr. of Income-tax v. Chengalvaraya Chetti', 2 I. T. C. 14: 48 Mad 836, the assessee adopted some novel method of valuing the opening stock. With a view to set off loss against profits in the first year, the assessee adopted the cost price as the price of the opening stock and the market value as the price of the closing stock of that year. In the succeeding year, however, instead of taking the value of the closing stock as the value of the opening stock he again adopted the cost price as the value of the opening stock for the succeeding year. This, it was pointed out, was not warranted and was opposed to principles

of commercial accountancy and the rule that in arriving at trading profits the trader has the option of choosing either the market value or the cost price whichever is lower cannot be applied in the manner in which it was done by the assessee in that case. These decisions, in our opinion, clearly point to the conclusion that the method which the assessee has adopted in valuing the closing stock in the present case is not supported either on principle or authority. In these circumstances the question referred to us must be answered in the negative and against the assessee. As the assessee has failed he must pay the costs of the respondent which we fix at Rs. 250.

B/G.M.J.

Answer in the negative.

## A. I. R. 1953 MADRAS 21

RAJAMANNAR C. J. AND VENKATARAMA AYYAR J.

In re M. Thomas by father and natural guardian S. Masilamani, Petitioner.

Writ Petn. No. 149 of 1952, D/- 21-4-1952.

(a) **Constitution of India, Arts. 14, 15(1) and 16 — Concession in school fees to converts can be restricted to converts from one generation only — (Madras Education Rules, Rule 92, Appendix 17 (A) ).**

A person is not entitled as of right to any concession in school fees. In making the exception the State is certainly entitled to fix limits to its operation. After all, when the State is granting an indulgence it is for the State entirely to decide how far the indulgence would go. Where policy of the State evidently was to allow the concession to pupils or students who themselves had been converted to christianity or whose parent or guardian had been converted but the State apparently was not willing to extend the concession where the conversion was more than one generation old, it cannot be said that the State has made any discrimination in making this provision. (Para 5)

(b) **Constitution of India, Arts. 46, 37 — Directive principles are not enforceable by Courts of law. (Para 3)**

A. R. C. Albuquerque, for Petitioner.

RAJAMANNAR C. J.: The petitioner in this application is a minor aged about 13 years and the affidavit filed in support of the petition has been filed on his behalf by his father and natural guardian. The petitioner is an Indian Christian, but claims to be a Harijan. The petitioner is studying in Form I in the Hindu High School, Madurantakam which is a State-aided school. His father applied on his behalf to the Manager of the school for a grant of a full school-fee concession; but his request was not complied with and the manager of the school drew the attention of the petitioner's father to a note under appendix 17 (A) of rule 92 of the Madras Educational rules. The effect of this note can be understood only by a reference to the substantive provision in the Madras Educational Rules, in particular rule 73 and rule 92. Under rule 73 of these rules, it is inter alia provided that boys belonging to the classes and castes specified in Appendix 17 (A) may be admitted without the payment of fees. Rule 92 also makes a similar provision. Appendix 17 gives a list of backward classes under 2 categories (1) Harijans and (2) Castes other than



**Harijans.** Note (1) to this appendix runs as follows:

"Converts to Christianity or to any other religion from the castes included in Group I above shall be eligible for all fee concessions including fee concessions in colleges, for which the scheduled castes are eligible under the Madras Educational Rules provided however, that the conversion was of either the pupil or the student or of his parent or guardian".

The petitioner will not under this rule be entitled to the fee concession because it was his grand-father who was converted to Christianity.

(2) The ground on which interference by this court is sought under Art. 226 of the Constitution is that the above said note is repugnant to Arts. 14, 15 (1), 15 and 46 of the Constitution because it makes a discrimination between persons on the ground of their religion.

(3) The contention of the petitioner appears to us to be entirely untenable. The basis of the argument appears to be that the petitioner has some sort of right and he has been deprived of it by the discriminatory treatment of the State. In the first place, it must be remarked that the petitioner is not entitled as of right to any concession. It is true that Art. 46 of the Constitution enunciates one of the directive principles of State policy, viz., that the State shall promote with special care the educational and economic interest of the weaker sections of the people, and, in particular, of the scheduled castes and scheduled tribes. But this provision is not enforceable by any court — Vide Art. 37.

(4) The petitioner's claim is entirely based on the fact that he belongs to the Harijan community. That assumption itself is wrong. It may be that his grand-father before his conversion, belonged to one of the Harijan castes, enumerated in appendix 17 A. But the moment he was converted to Christianity, he ceased to belong to any caste because the Christian religion does not recognise the system of castes. It follows therefore that the petitioner cannot claim today to be a member of the Harijan community, since he is a Christian.

(5) Though in law any member of the castes enumerated in Appendix 17-A would cease to belong to that caste on his conversion to Christianity or to any other religion, and therefore, will not be entitled to any of the concessions given to members of that caste, nevertheless the State made an exception in the case of recent converts from the castes enumerated therein. It is not for us to speculate on the reasons for the policy underlying this exception. Note 1 which embodies the exception confers the concession on persons who would ordinarily be otherwise not entitled to the concession because they had ceased to be members of the enumerated castes. In making the exception the State is certainly entitled to fix limits to its operation. After all, the State was granting an indulgence and it was for the State entirely to decide how far the indulgence would go. The policy of the State evidently was to allow the concession to pupils or students who themselves had been converted or whose parent or guardian had been converted. But the State apparently was not willing to extend the concession where the conversion was more than one generation old. We fail to see how the State has made any discrimination in making this provision. It is not as if the petitioner's religion has been the reason for not coming within the scope of the note. But for the note the petitioner would not have had any right at all and would not have any reason to complain. In our opinion, the petitioner has entirely misconceived

his remedy. It is certainly open to him to impress upon the State the desirability of extending the concession even to persons in his position. But as a court of law we are unable to see how we can give any relief to the petitioner under Art. 226.

(6) The petition is therefore dismissed.

A/R.G.D.

Petition dismissed.

## A. I. R. 1953 MADRAS 22

KRISHNASWAMI NAYUDU J.

A. N. Subramanian, late a minor by G. S. Lakshmi Ammal, as next friend but now having attained majority, Appellant v. A. S. Kalyanarama Iyer and others, Respondents.

Appeal No. 484 of 1949, D/- 30-7-1952.

(a) **Hindu Women's Right to Property Act (1937) S. 3 — Separate property — Property acquired by father at partition between him and his sons is his separate property and on his death it passes to his widow.** AIR 1945 FC 25 Distinguished; AIR 1949 Nag. 108 dissented from; AIR 1945 Pat. 87 held not impliedly overruled by AIR 1945 FC 25. (Paras 3 and 4)

Anno: Hindu Women's Right to Property Act S. 3 N. 1.

(b) **Family arrangement — Binding on son of party.**

A bona fide family arrangement entered into between the parties as to the disposal of a particular item belonging to the family whereby a coparcener gave up the property even when he had a right to it is binding on his son. (Para 8)

N. Sundara Iyer, for Appellant; C. S. Swaminathan, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras  
(45) 1945-1 Mad LJ 108: (AIR 1945  
FC 25: ILR 1945 Kar F C 39) 3, 4  
(48) ILR (1948) Nag 465: (AIR 1949  
Nag 108) 3  
(44) 23 Pat 508: (AIR 1945 Pat 87) 3

**JUDGMENT:** The appellant is the plaintiff in a suit for partition and separate possession in respect of the properties of his grand father one Subramania Iyer. Subramania Iyer had two sons, the first defendant and Narayana Iyer, father of the plaintiff. Subramania Iyer died in 1945 leaving his widow the 2nd defendant. The plaintiff's claim is in respect of the properties left by Subramania Iyer which consists of properties which were allotted to the share of Subramania Iyer in a partition between Subramania Iyer, Kalyanarama Iyer and Narayana Iyer entered into under Ex. B-1 dated 4-2-1935. The second defendant is the widow of Subramania Iyer and the lower court conceded to her a share under the Hindu Women's Rights to Property Act. The present appeal is confined to the finding as to the widow being entitled to a share in the partition under the Hindu Women's Rights to Property Act and as to the rejection of the plaintiff's claim to items 29 and 30 of the A schedule to the plaint. The preliminary decree was passed on 17-9-1948. The second defendant died on 28-11-1948. The question as to her being entitled to a right to a share need not really be decided in appeal. But it is pointed out by Mr. Sundara Iyer appearing for the appellant that even though by reason of her death no share need be set apart for her and the property may be divided as



between the surviving parties, in any event as a question of mesne profits arises, it should be necessary to consider whether she would be entitled to any share after the lifetime of her husband until her death on 28-11-1948.

(2) The properties in respect of which the 2nd defendant was allotted share comprised of properties allotted to her husband Subramania Iyer at the family partition evidenced by Ex. B-1. That was a partition between the father and his two sons and each had separate possession of their respective shares. But in respect of one of the items, i.e., item 29 which is one of the properties referred to in the schedule D to the partition deed it was provided that the exact half of the properties in D schedule had been separately allotted to Subramania Iyer and similarly the remaining half of the properties mentioned in the said D schedule are allotted separately to the first defendant. Paragraph 11 of that document proceeds as follows:

"It has been settled and agreed that even though executants Nos. 1 and 2 have equal rights in respect of the Madam Kudiyruppu (item 29) mentioned in the D schedule, as described in paragraph 6 supra, executant No. 1 and his wife Lakshmiammal, the mother of executants Nos. 2 and 3 shall have full authority and liberty to reside therein, that subsequent to the death of the aforesaid two persons the said Madam Kudiyruppu shall devolve upon executant No. 2 exclusively and that executant No. 3 shall have no right in respect of the same."

This item of property continued to be in the possession of Subramania Iyer and the first defendant and during the period it was in their possession improvements were made by putting up a building which is described as item 30 in schedule A to the plaint. The contention of the learned counsel for the appellant is that this item 29 is also the property of Subramania Iyer in which the plaintiff would be entitled to a share and that in any event item 30, being a building put up by Subramania Iyer on the house site in item 29, whatever rights the first defendant may have to item 29 by virtue of the recitals in clause (11) of Ex. B-1, item 30 should be treated as a property in which the plaintiff would be entitled to a share.

(3) As regards the first of these contentions, viz., the widow's right to a share, reliance is placed on the decision of the Federal Court reported in — *'Umayal Achi v. Lakshmi Achi'*, 1945-1-Mad L J 108 (FC) and it is urged that property obtained by a coparcener at a partition would not be "separate property" as contemplated in S. 3(1) of the Hindu Women's Rights to Property Act of 1937. The contention is that the decision has laid down this proposition. The question before the Federal Court was as to whether the property of a sole surviving coparcener who left his widow could be treated as separate property within the meaning of the Act and the learned Judges of the Federal Court were not considering a case of the present nature, viz., of property obtained by coparcener at a family partition where there were no sons, in the sense undivided sons, as by the partition the sons had become divided. The decision of the Federal Court is binding on this High Court, but it is binding only to the extent it purports to decide and nothing more.

I consider that decision is a statement of the proposition of law applicable to the facts arising in that case, viz., that the property of a sole

surviving coparcener who leaves a widow cannot be treated as "separate property" for the purpose of Hindu Women's Rights to Property Act. But there are certain observations in the judgment which are relied upon to support the contentions of the appellant. The learned Judge refers to Mulla's Hindu Law, 9th Edn., paragraph 230 and to the classification of what "separate property" is and observes that the expression "separate property" has been used in a limited sense and sometimes in a general sense. Mulla in paragraph 230 classifies the various properties which he considers to be separate properties and among them, 6 and 7 relate to properties obtained as a share at a partition, and property held by sole surviving coparcener. With reference to 6 and 7, it is not merely the share at a partition of property held by sole surviving coparcener that is treated as "separate property", but property subject to certain qualifications, the qualifications being that in the case of property obtained as a share at a partition the property so obtained must be by a coparcener who has no male issue, whereas in the other case of property held by sole surviving coparcener, where there is no widow in existence. The obvious reason for this qualification is that in the case of a person who obtains a share at a partition and who has a son or a grandson, the son or the grandson acquires right by birth and once the son or grandson comes into existence, it could not be treated as separate property, since it becomes coparcenary property on such birth. As regards the other category of the property held by sole surviving coparcener, the widow's existence who has a power to adopt a boy so long as she lives which power she may exercise at any time, would be a bar to treating it as "separate property", since such power could be exercised by her and the adopted son may come into existence when on such adoption the property could not be considered to be a separate property but the coparcenary property of the adopted son.

Mulla in his Treatise, carefully prescribed the qualifications and it is only when such qualifications are present, a property could be said "separate property" and these qualifications are prescribed in respect of only classes 6 and 7 out of the 7 classes enumerated by the author in the categories of separate property.

The reasoning in the judgment of the Federal Court is based on the qualifications referred to by Mulla in his Treatise and if in a case where a property is obtained at a partition by a coparcener, who thereafter becomes divided and that coparcener had no son, there is no question of any one acquiring a right by birth in the property so divided and allotted to the dividing coparcener and there is nothing to prevent to call it "separate property" as undoubtedly the dividing coparcener who acquires title to it under the partition would be entitled to deal with it absolutely, since there is no other to question his actions regarding the property. In the present case it may be pointed out that Subramania Iyer, at the time of the partition had sons. But that is immaterial because the sons had become divided and ceased to have any interest in the property and it was always open to Subramania Iyer to have disposed of the property in the manner he liked subject however to whatever rights the widow or the wife had in the property which however does not arise in the present case. This decision of



the Federal Court is referred to in Mayne's Hindu Law and Usage, 11th Edn. at p. 705 as follows:

"The Federal Court has held in — 'Umayal Achi v. Lakshmi Achi', 1945-1-Mad L J 108 (FC) that the expression 'separate property' may be the antithesis of three other expressions, viz., 'ancestral property', 'coparcenary property' and 'joint family property' that having regard to the contingency requiring legislative interference, the property held by a person as the last surviving coparcener of a joint family cannot be regarded as 'separate property' within the meaning of S. 3(1), wherein the term refers to property in respect of which the son of the surviving coparcener would not be entitled to coparcenary rights but only to a right of inheritance on the father's death if he survived him."

What was really laid down by the Federal Court in the decision is expressed in the passage extracted above and that does not cover a case where the property is not the property held by a sole surviving coparcener, but property allotted in a family partition.

In — 'Bhaorao v. Chandra Bhagabai', ILR (1948) Nag 465 the question arose as to whether the share received by the father at a partition between him and his son is "separate property" and on his death it passes to his son in preference to his widow and it was held, following the decision of the Federal Court in — 'Umayal Achi v. Lakshmi Achi', 1945-1-Mad L J 108 (FC) that it is not "separate property" since "separate property" means only self-acquired property in the narrow sense. The learned Judges of the Nagpur High Court considered that they were bound by the decision of the Federal Court and followed it and held that the widows are entitled to a share under the Hindu Women's Rights to Property Act in the self-acquired property in the narrow sense.

With reference to a contention that the decision of the Patna High Court in — 'Nandhkumari Devi v. Bulkan Devi', 23 Pat 508, which came to a different conclusion, the learned Judges of the Nagpur High Court observed that that decision must now be taken to be impliedly overruled by their Lordships of the Federal Court and that the view expressed in the Patna case is no longer good law. The Patna case was decided earlier to the Federal Court decision and it does not appear that that decision came in for consideration at the hands of the learned Judges of the Federal Court.

(4) In the view I have taken that the decision of the Federal Court was with reference to a case which arose before them, viz., the case of the nature of the property held by a sole surviving coparcener, it does not prevent me from holding the opinion which I have expressed that in the case of a property obtained as a share at a partition, it is separate property and I would prefer to follow the classification made by Mulla in his valuable Treatise and find that the 2nd defendant will be entitled to a share. It must be observed that if the contention of the learned counsel for the appellant has to be given full effect to, the Act which obviously was intended to give better rights to women in respect of property, as the preamble makes it clear, would not place the Hindu women in any better position excepting to ask for a partition in respect of property acquired out of the self-acquisitions of her husband, and that in regard to any property which is in any

way tainted in the sense that it comprises ancestral or coparcenary property the Hindu widow would be in the same position as she was prior to the enactment of Act XI of 1938. I do not consider that was the object or intention of the framers of the Act nor was it understood like that at any rate until the decision of the Federal Court in — 'Umayal Achi v. Lakshmi Achi', 1945-1-Mad L J 108 (FC) though with respect to one kind of property I agree with the lower court's view as to the widow's rights to a share in the property.

(5) The other question as to whether the plaintiff would be entitled to a share in item 29 would depend upon the construction of Ex. B-1. The learned counsel argued that the recitals in clause 11 of Ex. B-1 would show that in so far as the half share of Subramania Iyer in item 29 was concerned after Subramania Iyer's death, the first defendant did not become entitled to it until after the lifetime of this Subramania Iyer's wife and mother of the first defendant who was second defendant in the suit. In short, his contention is that after Subramania Iyer's death the estate was kept in abeyance and the direction is, to vest it in the first defendant after the lifetime of the second defendant. Such a devise is invalid and soon after the death of Subramania Iyer, the heirs of Subramania Iyer including the plaintiff had become entitled to a share.

(6) In considering this argument, it must be stated that one is not examining the recitals in either a will or a deed of settlement or gift but the terms of a partition deed to which the plaintiff's father was a party. In paragraph 6 of the partition there is an allotment of an exact half of the properties in the D schedule which comprises item 29 to each of the first defendant and father Subramania Iyer. Though there is an allotment there is no division. There are other properties separately allotted to each and the valuations of the properties are fixed. Properties are also separately allotted to the father of the plaintiff. There is no division of item 29, paragraph 6 declaring the rights of the first defendant and his father to a moiety in that item of property. In respect of this item the parties to the document, viz., Subramania Iyer, the first defendant and the plaintiff's father agreed that the rights of the respective parties to it should be governed by what is contained in paragraph 11 and that is the reason why it is stated that even though Subramania Iyer and the first defendant have equal rights in respect of the Madham Kudiyruppu i.e., item 29 still the property is to be enjoyed in a certain manner and it provided that Subramania Iyer and his wife, the second defendant, will have full authority and liberty to reside therein and that subsequent to their death the property would go to or devolve upon the first defendant exclusively and that the plaintiff's father shall have no right in respect of the same.

(7) Taking the language of the document and intent of the parties, it appears to me that item 29 being a family residential house and site, it was intended that neither the father's nor the mother's occupation of the property should in any way be disturbed. But the property having been declared to belong equally to Subramania Iyer, and the first defendant and to the extent first defendant's rights to it are subject to the right of residence of the second defendant even after the lifetime of Subramania Iyer, it was



provided that the first defendant would be solely entitled to it to the exclusion of the plaintiff's father. The plaintiff's father was a party to it and must have agreed to that arrangement for the simple reason that he wanted to provide, out of regard and affection, for his mother right to reside in the family house and not to be disturbed in any manner by the second defendant even after the lifetime of Subramania Iyer. There is no question of any estate being kept in abeyance, but what was intended to be held separately in the earlier part of the document was conveyed in the latter part to the first defendant subject to the right of residence of Subramania Iyer and his wife the second defendant. Whatever rights were provided for in paragraph 6 as to their respective shares that must be deemed to have been varied and modified by the subsequent clause in paragraph 11 whereby the property became vested in the first defendant subject to the rights of residence referred to. It is, therefore, a case where it could not be said that after the death of Subramania Iyer the estate was in abeyance.

(8) Further fact that the plaintiff's father agreed not to claim any rights to it shows that in so far as this item is concerned, the members of the family entered into a kind of arrangement as to the best manner of disposing of this item. Nothing could be said against the bona fide nature of this arrangement and the plaintiff's father must have been imbued with feelings of affection and love to the mother and also the fact that in case Subramania Iyer died, to the extent that her residence is provided for, the third defendant is absolved from liability, moral or legal, from making any provision for the residence of his mother. I also consider that this portion of the document which is far from being a partition as such, is a bona fide family arrangement entered into between the parties as to the disposal of a particular item belonging to the family. In that view also giving up of the property even if he had any right by the plaintiff's father was certainly binding on the plaintiff.

(9) The only other contention is as to whether the building put up in item 29 could be separated and be treated as the property of Subramania Iyer in which the plaintiff would be entitled to a share. Though a contention was raised on behalf of the first respondent that the building was constructed at the cost of both himself and his father, it is pointed out by the lower court that no evidence has been let in on the point and for the purpose of this case it may be assumed that the property has been improved by putting up a house item 30 solely at the expense of Subramania Iyer. It was never intended by Subramania Iyer that he should have any separate rights to that property, he himself having reserved a right of residence there for himself as well as his wife. He only improved the property to afford suitable accommodation for himself and his wife. The building naturally will go with the property. It is not separable nor is it intended to be severed from that item and it will acquire the character of the property to which it was attached, i.e., item 29. In this item as well, the plaintiff will not be entitled to a share.

(10) In the result, the appeal is dismissed with costs.

A/R.G.D.

Appeal dismissed.

# A. I. R. 1953 MADRAS 25

SUBBA RAO J.

Munusami Naidu, Appellant v. Swaminatha Naidu and others, Respondents.

Second Appeal No. 1958 of 1948, D/- 2-4-1952.

†Limitation Act (1908), Art. 144 — Adverse Possession — Possession of illegitimate son of Sudra — (Hindu Law — Joint family).

The illegitimate son of Sudra is a member of his family but he is not a member of the coparcenary. He does not also acquire a right by birth. He is not in joint possession with the father. He cannot claim partition. It follows that the possession of an illegitimate son cannot be deemed to be possession on behalf of the family consisting of himself and his father, and is adverse to the coparcenary of which his father is a member.

(Para 2)

Anno. Limitation Act, Arts. 142 and 144 N. 35.

M. S. Venkatarama Iyer, for Appellant; T. R. Srinivasan and S. Gopalaratnam, for Respondents.

REFERENCE ..... Para ('32) 55 Mad 1: (AIR 1931 PC 294) 2

JUDGMENT: This second appeal arises out of O. S. No. 285 of 1944, a suit filed by the appellant for partition of the joint family properties. The plaintiff, first, third and sixth defendants are brothers. The third defendant's sons are defendants 4 and 5. The sixth defendant's sons are defendants 7 and 8. The 2nd defendant Soundararajulu Naidu is the son of the first defendant's concubine one Dhanammal. Defendants 7 and 8 filed O. S. No. 318 of 1935 against the other members of the family for partition of the family properties and obtained a decree. To that suit defendants 1, 3 and 6 and the plaintiff were made parties. The plaintiff schedule properties in the present suit were the properties covered by Exs. II, XI and B in the earlier suit. Defendants 7 and 8 filed an application for appointment of a commissioner for dividing the properties. The plaintiff filed a counter claiming to be in possession of his share. But the court refused to accede to his request at that stage.

The present suit is therefore filed for partition and separate possession of the plaintiff's share. Though the plaintiff schedule consisted of 5 items, in this appeal we are concerned only with items 1 to 4 of the plaintiff schedule. Items 1 and 2 have been in the possession of the 2nd defendant for over the statutory period. Item 3 likewise has been in the possession of the 2nd defendant's mother Dhanammal for over the statutory period. The learned District Munsif found that Dhanammal and Soundararajulu Naidu acquired rights to the said items by adverse possession. But in regard to item 4 the learned District Munsif gave a decree to the plaintiff for an 4th share in the said item. But in the appeal the learned Subordinate Judge held that the plaintiff would not be entitled to a share even in respect of that item as his claim for a share was negated by the court in the final decree proceedings in the former suit. The plaintiff has therefore preferred the above second appeal.

(2) The learned counsel for the appellant fairly conceded that he has no case in respect of item 3 and so too the learned counsel for respondents in respect of item 4. The dispute therefore centres round items 1 and 2 of the plaintiff schedule. As aforesaid, Soundararajulu Naidu is the illegitimate son of the first defendant by his concubine Dhanammal. There is no finding in this case whether Soundararajulu Naidu is the illegitimate son by a continuously kept concubine, though the indications



are that Dhanammal was the continuously kept concubine of the first defendant. The learned counsel for the appellant argued that among Sudras an illegitimate son is a member of his father's family and therefore his possession must be deemed to be the possession of his father and if that is the legal position no question of adverse possession would arise.

To put in other words his contention is that Soundararajulu Naidu being a member of the first defendant's family, if the first defendant's possession cannot be adverse, the 2nd defendant's possession also cannot be adverse to the coparcenary of which the 1st defendant is a member. I have already pointed out that the foundation for this argument has not been laid in the courts below. Even on the assumption that the 2nd defendant is the illegitimate son of the 1st defendant by his continuously kept concubine, I find it very difficult to equate his possession with that of his putative father. Learned counsel relied upon the decision of the Judicial Committee in — '*Vellaiappa Chetti v. Nataraja*', 55 Mad 1 (P. C.) where their Lordships of the Judicial Committee held that the illegitimate son of a Sudra by a continuous concubine has the status of a son, and, if his father had died leaving no legitimate son and no separate property, the illegitimate son, though not entitled to a partition, is entitled as a member of the family to maintenance out of joint family property in the hands of the collaterals with whom the father was joint.

It is true that the illegitimate son of Sudra is a member of his family but it is equally settled law that he is not a member of the coparcenary. He does not also acquire a right by birth. He is not in joint possession with the father. He cannot claim partition. From the aforesaid principles it follows that the possession of an illegitimate son cannot be deemed to be possession on behalf of the family consisting of himself and his father. The learned Subordinate Judge on a consideration of the entire evidence held that the illegitimate son was in actual possession of the suit items 1 and 2 for over the statutory period in his own right and had thereby acquired a right by adverse possession. The finding is really one of fact.

(3) In the result, the second appeal is allowed in respect of item 4. The parties will bear their own costs in this appeal. In other respects the second appeal is dismissed. No leave.

A/V.R.B.

Appeal partly allowed.

## A. I. R. 1953 MADRAS 26

RAMASWAMI J.

In re Gangiredla Mathayya, Petitioner.

Criminal Revn. Case No. 688 and Cri. Revn. Petn. No. 633 of 1950, D/- 22-11-1951.

Criminal P.C. (1898), Ss. 209(1) and 437 — Implied discharge — Committal under S. 437.

Where after a particular stage in committal proceedings the Magistrate comes to the conclusion that the graver charge has not been made out, that he should proceed with the case on the less serious charge and that he is competent to dispose of the matter himself and thereupon he proceeds to frame charges, there is a discharge of the graver charge and the District Magistrate is competent to set aside the discharge and direct that the accused be committed to the Sessions. ILR (1951) All. 604, Dissent. from. AIR 1920 Mad. 94; AIR 1945 Mad. 459 and AIR 1949 Mad. 430 Foll.

(Paras 3, 5 and 9)

Anno: Cr. P. C., S. 437 N. 4 Pt. 3.

S. Suryaprakasam and A. S. Prakasam, for Petitioner; Public Prosecutor, for the State.

REFERENCES: Courtwar/Chronological/ Paras ('50) 1950 All LJ 647: (ILR (1951)

All 604)

3

('01) 24 Mad 136: (2 Weir 544)

8

('20) 43 Mad 330: (AIR 1920 Mad 94: 21 Cri LJ 91)

8

('45) 1945 Mad WN Cr 85: (AIR 1945 Mad 459)

8

('49) 1949 Mad WN Cr 5: (AIR 1949 Mad 430: 50 Cri LJ 558)

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ORDER: This is a criminal revision case filed against the order made by the Additional District Magistrate of Visakhapatnam in C. R. P. No. 2 of 1950 which raises an interesting point.

(2) The facts are: Gangiredla Mathayya and six others were charge-sheeted by the police for offences under Ss. 147 and 302 read with S. 149, I. P. C. This case was enquired into in the Court of the Taluk Magistrate of Bimlipatam as preliminary register case No. 3 of 1949. The Magistrate after hearing witnesses came to the conclusion that only offences under Ss. 325 and 323, I. P. C. were made out and framed charges and wanted to proceed with the trial. Thereupon the Additional District Magistrate has been moved on the ground that the Taluk Magistrate Bimlipatam had improperly discharged these accused for offences triable exclusively by the Sessions Court and the Additional District Magistrate in what can legitimately be described as an elaborate and considered order has directed the committal.

(3) The only interesting point that has been taken by Mr. Suryaprakasam is that in this case there was no discharge of the accused persons and that in fact charges have been framed that there has been no termination of these proceedings and that, in these circumstances there can be no interference by way of revision by the Additional District Magistrate of Visakhapatnam. In this contention he is fortified by a Bench decision of the Allahabad High Court by Dayal and Bhargava JJ. in — '*Abdul Waheed v. Rex*', 1950 All L J 647. The substance of that decision is that it was not necessary for a Magistrate who decides to try a case himself and does not commit the accused to the Court of Session, to record reasons for his not charging the accused with the offence exclusively triable by the Court of Session; and when the Magistrate decides that the accused be tried by him or any other Magistrate, the accused is not discharged, and, therefore, no question of recording of reasons arises; and that the mere non-framing of a charge cannot amount to an order of discharge so long as the accused is on trial with respect to the offences which are charged against him; that the Magistrate is free to frame a charge which he did not consider necessary to frame, at an earlier stage of the proceedings at a later stage, and that so long as the Magistrate retains the option of framing a charge against the accused, with respect to the allegations made against him it cannot be said that the Magistrate had by his non-framing of the charge discharged the accused of the offence which might have been made out against him on the basis of those allegations and that therefore there can be no interference in revision.

(4) The arguments in this Bench decision, if I may venture to say so are interesting, but with very great respect, it seems to me that they overlook the scheme of the Criminal P. C., wherein cases are classified into four categories.



viz., preliminary register cases, summons cases, warrant cases and summary trials. The Criminal Procedure Code then proceeds to prescribe the mode of procedure in regard to each of these four categories. In the case of offences which are 'prima facie' wholly triable by a Sessions Court at their inception, the procedure is to try the case as a preliminary register case. If it is found by the Magistrate after enquiry, that the graver charge making it exclusively triable by the Sessions Court, has not been made out (sic) to drop that accusation or discharge or not proceed with the accused on that graver charge, whatever phrase we might use, and then proceed to frame a charge himself if he considers that he is competent to dispose of the matter himself or adopt other modes of procedure in the Criminal Procedure Code.

(5) Then this is precisely what has happened in this case, namely, after a particular stage, the Magistrate has come to the conclusion that the graver charge has not been made out and that he should proceed with the case on the less serious charge, that he was competent to dispose of the matter himself and that thereupon he has proceeded to frame charges. If this is not a discharge of the graver charge what else can be a discharge? The argument that it will be still open to the Magistrate to commit at a later stage and therefore there is no termination of the proceedings on the graver charge is a mere talking point because after practically the entire prosecution is before Court and the accused has to enter upon his defence what aggravating factor would come before Court to make the Magistrate convert the C. C. case into P. R. case? Such a likelihood is not beyond the bounds of possibility but hardly ever likely to arise in practice.

The conclusion of the Bench decision, with very great respect, that the non-framing of charge will not amount to a discharge does not commend itself to me. In this conclusion we are fortified by two considerations, namely, first of all, if really we adopt the reasoning in this decision, then S. 437, Cri. P. C. would be rendered practically nugatory. Suppose an accusation against a person is for an offence under S. 302, I. P. C. and it is started as a preliminary register case and enquired into by the second class Magistrate as happens in this province, and the second class Magistrate after enquiring into the matter comes to the improper conclusion that the offence of murder has not been made out and frames a charge for the offence of hurt under S. 324, I. P. C.; and then he proceeds to dispose of the matter as in a warrant case and acquits the accused. Wherein in this picture does the Sessions Judge and the Additional District Magistrate come by way of revision? How can the order of this Magistrate clutching at jurisdiction, assuming that it is such a case, be corrected?

(6) It is unnecessary to proceed further to discuss this matter elaborately, because really if this interpretation is placed, then S. 437, Cri. P. C. would become a mere dead letter so far as the Sessions Judge and the Additional District Magistrate are concerned because they can only interfere in cases of discharge and only the High Court can interfere in cases of acquittal.

(7) In expressing this opinion which I do so with great diffidence having regard to the fact that the learned advocate is relying upon a

Bench decision of the Allahabad High Court, I am fortified by the fact that the Bench decision itself says that its views are opposed to that of the Madras High Court and that it has held the contrary opinion.

(8) I shall now briefly set out the decisions of the Madras High Court in regard to this matter. The earliest decision we have is a Bench decision of this High Court in — 'Gondi Appa Razu v. King Emperor', 43 Mad 330. In this case, it was held that though the complaint alleged facts against the accused constituting an offence under S. 302, I. P. C., the Sub-Magistrate disbelieving the evidence on this point did not frame any charge under S. 302 or S. 304, I. P. C. his action amounted in law to an order of discharge on those counts, even though no express order of discharge was recorded by him, and that being so, it was open to the Sessions Judge under S. 436, Cri. P. C. to act 'suo motu' & set aside the implied discharge & direct the committal of the accused to the Sessions on being satisfied that he had been improperly discharged as the offence under S. 304, I. P. C. is one exclusively triable by the Sessions Court.

This decision relies upon and refers to an earlier decision of this Court — 'Krishnareddi v. Subbamma', 24 Mad 136. Subsequently on the same lines, this Court has been interpreting this matter as it can be seen from the two following decisions, viz., — 'Lakshmayya v. Emperor', 1945 Mad W N Cr. 85. There Happell J. held that in a case where the Sub-Magistrate after hearing the prosecution evidence and the arguments (sic) that no case had been made out against the accused for an offence under S. 307, I. P. C. and framed charges under Ss. 147, 323 and 325 of the I. P. C., it must be deemed to have been decided, in effect, that the accused had been discharged by the Sub-Magistrate in respect of the offence under S. 307, I. P. C. and that the Additional District Magistrate was therefore competent to set aside this order of discharge and direct that the accused be committed to the Sessions.

In — 'King v. Parameswarayya', 1949 Mad W N Cr. 5, it has been held by Govinda Menon J. that when a charge-sheet was filed against the accused for an offence under S. 307, I. P. C. and the Magistrate was of opinion that the offence on the evidence placed before him was one under S. 337 converted the preliminary register case into a calendar case and convicted the accused under S. 337, I. P. C. the action of the Magistrate amounted to a discharge of the accused of an offence under S. 307, I. P. C. and that it was open to the District Magistrate either to order a further inquiry under S. 436, Cri. P. C. or to order commitment to the Court of Session and that S. 403, Cri. P. C. was bar to the trial of the offence under S. 307, I. P. C.

(9) Therefore the point of law taken fails and in regard to the Additional District Magistrate himself, it is an exhaustive one and he has set out elaborately the reasons for coming to the conclusion that a case had been made out to commit the accused to Sessions. It would be improper to discuss the pros and cons of these arguments at this stage, because this is a matter which ought to be gone into in the trial Court itself untrammelled by the observations of the Additional District Magistrate.

(10) Therefore subject to these remarks, I decline to interfere, and dismiss the petition.



(11) The petitioners will continue to remain on bail until the disposal of the Sessions case and on the same terms as before.

A/V.R.B.

Petition dismissed.

**A. I. R. 1953 MADRAS 28**  
**KRISHNASWAMI NAYUDU J.**

Aparanji Chetti, Appellant v. Arunachalam Chettiar and others, Respondents.

Appeal No. 481 of 1948, D/- 29-7-1952.

(a) Land Acquisition Act (1894), Ss. 30, 31 and 32 — Dispute as to right to payment of compensation — Necessity to refer parties to suit — Power of Court to decide dispute.

Where there is any dispute as to the right to the payment of compensation and if the matter is before the Land Acquisition Court, which is the principal Court of civil jurisdiction, there is nothing in either S. 30 or S. 31 which requires the court to refer the parties to a suit even though the compensation money is in the custody of the court. On the contrary, S. 32 enjoins the court by implication to entertain an application for payment out and enquire into the merits of the application and decide as to the respective claims of the parties who will become entitled to the money. (Para 4)

Anno: Land Acquisition Act S. 30 N. 4, S. 31, N. 1, S. 32 N. 1.

(b) Land Acquisition Act (1894) S. 32 — Applicability — Case of Hindu widow.

S. 32 directly applies to a case where there is a limited estate-holder as a Hindu widow, and the amount of compensation is directed to be kept invested until the same was applied in the purchase of such other lands or payment to any person or persons becoming absolutely entitled thereto. (Para 4)

Anno: Land Acquisition Act, S. 32 N. 1.

† (c) Succession Act (1925) S. 214 (1) — Reversioner claiming compensation money — Necessity to produce succession certificate — Land Acquisition Act (1894) S. 32.

It is not necessary for a reversioner who claims that he is entitled to compensation moneys in respect of lands acquired after the death of the last male holder to produce a succession certificate to enable him to receive the amount. 15 C. W. N. 1018 dissent. from. (Para 7)

Anno: Succession Act S. 214 N. 1, Land Acquisition Act S. 32 N. 1.

V. C. Veeraraghavan, for Appellant; N. R. Raghavachariar and Govt. Pleader, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras  
(10) 11 Cal LJ 533: (6 Ind Cas 508) 4  
(11) 15 Cal WN 1018: (10 Ind Cas 357) 6, 7  
(11) 13 Cal LJ 597: (39 Cal 33) 4  
(17) 26 Cal LJ 123: (AIR 1918 Cal 868) 4  
(29) 33 Cal WN 1177: (AIR 1929 Cal 661 FB) 6, 7

JUDGMENT: This appeal arises out of an application for payment of monies remaining in court-deposit under the Land Acquisition Act (1894). The lands acquired belonged to one Kanniya Chetti and the acquisition was after his demise. Kanniya Chetti had no issue but left a widow, Bangaru Ammal, and during her life-

time, the properties were acquired and the monies deposited into Court under the provisions of S. 31 of the Land Acquisition Act as she was a limited owner. During her lifetime she was paid the interest accruing from the deposit. She died on the 17th February 1945, and one Arunachalam Chettiar, claiming to be the sister's grandson of Kanniya Chetti filed a petition, M. P. No. 307 of 1946 in O. P. No. 236 of 1925 for payment of the monies. The next of kin of Kanniya Chetti were made party respondents to the petition. The petitioner claimed this amount by virtue of being the son of Kanniya Chetti's sister, Ammayi Ammal's son, Veeraraghava Chetti, and relied on a surrender deed executed by Bangaru in favour of Veeraraghava who was then the nearest reversioner to the estate of Kanniya Chetti.

Apart from being the son of Veeraraghava in whose favour the surrender was executed, the petitioner also claimed as entitled to Veeraraghava's rights under a transfer executed by Veeraraghava in favour of the petitioner on the 27th December 1944. This application for payment was opposed by the respondents on the ground that the petitioner was not the nearest reversioner that his father was not the nearest heir and that the alleged surrender deed, if true, was invalid, and if at all it was a mere fraudulent and collusive transaction and was not 'bona fide'. The learned District Judge held in favour of the petitioner and the fourth respondent has now filed this appeal.

(2) The other contentions that were found against which were also raised and argued besides the right of the petitioner to the properties, were that the Land Acquisition Court had no power to decide disputes 'inter se' between the parties as to who is entitled to the compensation money and that it could only in such circumstances refer the disputes to court, and further that a succession certificate was necessary before the amount can be paid.

(3) Evidence was adduced as to the relationship and it is observed by the learned Judge that at the hearing of the petition none of the contentions was strenuously pressed, the contentions obviously relating to that of the petitioner not being the nearest heir and also about another question that was raised, namely, that even Kanniya Chetti was not adopted to Narayana Chetti. It is urged on behalf of the appellant that the lower court has not given any finding as to the validity and binding nature of the surrender in favour of the petitioner's father and the settlement deed in his favour and that this is a case which should be remanded to the lower court for a finding on that issue. Issues were not settled on the pleadings, but there does not appear to have been any request on either side for framing issues.

I have no reason to disregard the statement made by the learned Judge that none of the contentions was strenuously pressed. It is not open, therefore, to the appellant to contend that there is no finding on the question of the surrender and the settlement deed. By virtue of the attitude taken by the respondents, it must be deemed to have been given up as a contention not worthwhile agitating before the lower court. It is further pointed out that the learned Judge has not properly approached the question that arises for determination as by his finding in paragraph 9 of his judgment that the petitioner is the nearest reversioner entitled to the money in court deposit, the learned Judge



has not applied his mind to the question of the surrender and the settlement deed.

'Prima facie' the language of the finding of the lower court lends support to the argument, but I consider that in view of the statement of the case given in the earlier part of the judgment, it is not as if the learned Judge was unaware of the real point that arose for decision and in view of the failure on the part of the respondents to pursue the contentions and being quiet except raising them in the counter affidavit, the learned Judge held that the petitioner was the person entitled to the amount, though it is not correct to say that he is the nearest reversioner. He was certainly not the nearest reversioner but for the surrender and settlement deed, he is the nearest heir of the surrenderer Veeraraghava Chetti. What the learned Judge meant was that he was the nearest heir entitled to the amount.

(4) The other question related to the jurisdiction of the court in whose charge the moneys were. It is contended, relying on the provisions of Ss. 30 and 31 of the Land Acquisition Act that in cases where there is any dispute as to the right to the payment of compensation, the Act intended that the court should refer the parties to a suit. This argument is sought to be supported by referring to Ss. 30 and 31 which have no bearing whatsoever on the question at issue. It is provided under S. 30 that with reference to compensation which was settled under S. 11 if any dispute arises as to the apportionment of the same and as to the persons who may be entitled to it, the Collector may refer such dispute to the decision of the court, and under S. 31, on the making of an award under S. 11, the Collector shall tender payment of the compensation awarded by him to the persons interested entitled thereto, and if there be any dispute as to title to receive the compensation, the Collector has to deposit the amount of the compensation in the court to which a reference under S. 18 would be submitted.

Court here is the principal Civil Court of original jurisdiction — in this case, the court of the District Judge. There is nothing either in S. 30 or 31 to support the contention referred to by the learned counsel that even when the matter is before the court, as in the present case, the parties should be referred to a court, and even though the compensation money is in the custody of the court. By virtue of Bangaru Ammal being a limited owner and there being no person then absolutely entitled to receive it under S. 31(2) the duty of the Collector was to deposit the monies and the monies having been deposited the court had to give certain directions for investment of this money and payment of the income therefrom to the limited estate-holder.

What all S. 30 contemplates is that the Collector is not competent to decide these disputes but should refer them to the court and, in my view, the court referred to is the court defined under the Act, which is the principal Court of civil jurisdiction—in this case the District Court of South Arcot. Far from supporting this argument, it appears to me that these sections only lay down that no authority other than a court could deal with matters where disputes arise as to the right to the compensation money, the manner in which it has to be shared and the persons who would be held entitled to claim the amount. The court, therefore, has ample

jurisdiction to deal with any application, just as the present one, for payment out.

The monies having come into court, under S. 32 of the Act, the court shall order the money to be invested suitably as per the provisions of S. 32(i) (a) and (b) and direct the payment of interest to the person who would be entitled to it as the need for such investment arises where the person who will be entitled to interest or income had no power to alienate the principal. Section 32 directly applies to the present case where there is a limited estateholder as a Hindu widow, and these amounts were directed to be kept invested until the same were applied in the purchase of such other lands or payment to any person or persons becoming absolutely entitled thereto. The petitioner in this case has come to court as being a person absolutely entitled to the amount and it is therefore for the court to consider whether it could continue to hold the amount in deposit or continue to have it invested under S. 32 (b) (ii).

It, therefore, becomes necessary for the court when such an application is made to find out whether the person who comes to court asking for payment out is a person who is absolutely entitled to the money, and such an application would put upon the court the duty to enquire into the respective claims of the petitioner and any other persons who claim the amount—in this case the respective claims of the petitioner and the respondents—and adjudicate as to who is the person or persons that are absolutely entitled to the same. Far from the Act not contemplating this kind of enquiry in a court, in my view, S. 32 enjoins the court by implication to entertain such an application for payment out and enquire into the merits of the application and decide as to the respective claims of the parties who will become entitled to the money. This view has found support in the decisions in — '*Kamini Debi v. Promothonath Mookherjee*', 13 Cal L J 597 at p. 609; — '*Mrinalini Dasi v. Abinash Chander Dutt*', 11 Cal L J 533 and — '*Debendranath De v. Tulsimoni Dasi*', 26 Cal L J 123 at p. 125. Passages from the judgments of these cases are extracted at p. 399 of Aggarwal's Commentary on Compulsory Acquisition of Land in India and Pakistan, 3rd edition.

"As the fund is placed in the custody of the court, jurisdiction is by implication conferred upon the court to deal with all questions that may arise as to the application of the fund in its custody. When, therefore, there is an application for such payment, the court will have to investigate and satisfy itself that the applicant has become so entitled to the money. 'The Land Acquisition Judge has obviously jurisdiction to make an enquiry when a claim to the fund is put forward by a person who asserts that he has become absolutely entitled thereto, or when it is suggested that suitable land is available for the purchase of which the fund may be applied'. This view is also followed in — '*Debendranath De v. Tulsimoni Dasi*', 26 Cal L J 123 at p. 125, where it is observed "As the fund is in the custody of the Special Judge, he is competent to deal with the question of its application. There is no controversy that the Special Judge is competent to apply the fund in purchase of other lands or in payment to a person who has become absolutely entitled thereto. Such



authority, however, implies a power to make enquiry."

(5) Therefore the point as to want of jurisdiction in the court cannot stand.

(6) The other contention which appears to be of some importance is whether the amount could be paid without the production of a succession certificate. The answer to this question would depend upon in what cases succession certificate is necessary to enable a person to recover monies due to a deceased person. Section 214 of the Indian Succession Act provides that no court shall pass a decree against a debtor of a deceased person for payment of his debt to a person claiming on succession to be entitled to the effects of the deceased person or to any part thereof except on production, by the person so claiming, of a succession certificate granted under Part X and having the debt specified therein. The word "debt" is defined in clause (2) as including any debt except rent, revenue or profits payable in respect of land used for agricultural purposes.

Whether the compensation money that was paid into court after the death of Kanniya and during the lifetime of his widow Bangaru Ammal is a debt due to the deceased Kanniya within the meaning of S. 214 is what is required to be considered now. Mr. Viraraghavan, learned counsel for the appellant, referred me to a decision in — '*Abinash Chandra v. Probodh Chandra*', 15 Cal WN 1018, where Mookerjee and Caspersz JJ. held that right of the reversionary heirs of a deceased Hindu to take out succession certificate in respect of debts due to the estate of the deceased is not affected by the interposition of the estate of the widow and the court cannot reject an application for succession certificate by such heirs merely on the ground of the deceased having died long ago.

In that case there was a sum of money awarded under the Land Acquisition Act after the death of the owner and kept in deposit under S. 32 of the Act along with other amounts. It was found necessary that a succession certificate should be taken for all debts including the sum of money awarded under the Land Acquisition Act. The correctness of the decision was doubted by Suhrawardy and Jack JJ. and the question whether the Land Acquisition Judge was entitled to refuse payment unless a succession certificate was produced by the applicant was referred to a Full Bench. The Full Bench consisting of five Judges in — '*Brojendra Sundar Banerjee v. Niladrinath Mookerjee*', 33 Cal W N 1177 did not however decide this question as in their view it did not arise for decision on the facts of that case. In that case succession certificate was granted and the learned Judges restricted their opinion to the question whether the learned Judge had jurisdiction to grant the certificate but did not propose to answer the other question.

If, as has been found the court under S. 32 has a duty to entertain an application for payment of the deposit moneys and for the discharge of that duty it was necessary on the court's part to enquire into the claims of the contending parties, it goes without saying that the court is competent to give a finding as to who are the persons entitled to the money irrespective of the fact whether a succession certificate is necessary or not, and even if one is produced it does not preclude the court from going into the question whether the person in whose favour the succession certificate is issued

is the only person that is entitled to the moneys. The production of succession certificate, therefore, is not conclusive as to the right of the parties claiming the amount who might not have been parties to the proceedings where the succession certificate had been obtained. It is, therefore, unnecessary for the court to consider whether the person in whose favour the court might ultimately decide should in any event produce a succession certificate.

(7) It may however be examined whether a succession certificate is necessary for a claim of the nature as in the present case. The compensation money is in respect of an acquisition made by Government after the lifetime of the owner of the land, Kanniya Chetti, and during the lifetime of his widow, the limited owner. The petitioner who claims through a reversioner would be entitled to it as he would be entitled to the other properties of Kanniya Chetti after the lifetime of Bangaru. If he could inherit the other properties of Kanniya without the necessity of the production of any succession certificate, is it any reason that he should be asked to produce a succession certificate only in respect of this money since it happened to be converted into money, not during the lifetime of Kanniya but after his lifetime, and kept in court deposit by reason of a person who is the next heir having had only a limited interest.

It is not justifiable to insist on the reversioners to produce succession certificates in respect of amounts which have come into the hands of the limited owner after the lifetime of the last maleholder. Further, from a reading of S. 214 of the Succession Act, a succession certificate is necessary only in respect of the debt due to a deceased person. It cannot be said that this debt was due and owing to Kanniya Chetti whose properties only the petitioner is claiming, not the properties of Bangaru. It is obviously a case where it could not be said to be the recovery of a debt to the deceased person, Kanniya. That is sufficient to dispose of the contention that S. 214 would not be applicable to this case.

I am therefore unable to agree with the conclusions arrived at by the learned Judges in — '*Abinash Chandra v. Probodh Chandra*', 15 Cal W N 1018, the correctness of which has been doubted and also to a great extent shaken by the judgment of Rankin C. J. in the Full Bench decision in — '*Brojendra Sunder Banerjee v. Niladrinath Mookerji*', 33 Cal W N 1177. I am therefore of the view that it is not necessary for a reversioner who claims he is entitled to compensation moneys in respect of lands acquired after the death of the last male holder to produce a succession certificate to entitle him to receive the amount.

(8) The appeal is dismissed. The appellant will pay the costs of the Government. Advocate's fee Rs. 50. No order for costs in favour of the other respondents.

A/V.R.B.

Appeal dismissed.

**A. I. R. 1953 MADRAS 30**  
**SUBBA RAO J.**

Jaya Bharat Tile Works, Samalkot, Madras State, represented by its Partner and Manager Madanpati Satti Reddi, Petitioner v. The State of Madras, represented by the Secretary, Development Department, Government of Madras and others, Respondents.

Writ Petn. No. 630 of 1951, D/- 7-8-1952.



**Industrial Disputes — Illegal lock-out or unfair labour practice — Jurisdiction of Tribunal to determine — Decision that closure of industry amounted to unfair labour practice — Writ of certiorari cannot be issued — (Constitution of India, Art. 226).**

Whenever, a question arises whether a closure is in fact illegal lockout or a subterfuge adopted by employers to bring the employees to their knees the Industrial Tribunal has to decide that question. For, if it is a lockout or an illegal labour practice the Tribunal certainly will have jurisdiction to go into the question. (Para 3)

Where the Industrial Tribunal on the particular facts of a case holds that the closure of an industry is not bona fide and amounted to an unfair labour practice and the decision is affirmed by the Appellate Tribunal, the High Court would not issue a writ of certiorari to quash the order when there is no error apparent on the face of the record. (Para 4)

D. Narasaraju and K. B. Krishnamurthi, for Petitioner; Vepa P. Sarathi for Govt. Pleader and P. Venkataraman, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras  
(49) C S No 448 of 1949 (Mad) 3

(52) 1952-1 Mad LJ 481: (65 Mad LW 269) 3

ORDER:— This is an application for issuing a writ of certiorari to quash the order of the Labour Appellate Tribunal of India made in App. No. 176 of 1951.

(2) The petitioner is the Jaya Bharat Tile Works, Samalkot. It is a partnership business of which Madapati Satti Reddi is a partner. The business was started in the year 1949. On 6th December 1948, the Government of Madras referred the disputes between the workers and the management of four other factories to the Industrial Tribunal. The Tribunal gave its award on 13th August 1949 and it was accepted by the Government. The award was to be in force for one year. The term expired on 23rd Aug. 1950. On 24th Aug. 1950, that is the next year after the expiry of the period of one year from the date of the award the petitioner closed the business. The other four factories also closed their business on 25th September 1950. The petitioner reopened the factory on 13th December 1950. The Government in their order dated 27th October 1950 referred the dispute between the petitioner and other tile factories and their workers to the Industrial Tribunal, Vijayawada. It may be mentioned that the other four factories did not reopen their factories. The Industrial Tribunal by its award dated 31st March 1951 held that the closure of the tile factory was not bona fide and amounted to unfair labour practice. It gave the findings on the following terms:

"I hold that the closure of the five mills was not bona fide, and that it was with a view to victimise the labour and find the issue against the Mills."

The petitioner along with the others preferred appeals to the Labour Appellate Tribunal of India being App. No. 176 of 1951. The Labour Appellate Tribunal set aside the order of the Industrial Tribunal so far as the other four factories are concerned but in regard to the petitioner's factory they confirmed the order of the Industrial Tribunal. The Appellate Tribunal found,

"They closed on the 24th August 1950 and reopened on the 13th December 1950. We are doubtful if the closure from 24th August which was effected in order to avoid the payment of

wages at a higher rate was a closure at all, when subsequently under the same circumstances the Mill has been reopened. We are of opinion that it amounted to an unfair labour practice and effected in order to bring pressure to bear on the worker to accept lower rates."

They further directed that the labourers should be reinstated and they would be paid compensation during the period of closure at the rates indicated therein until the mills reopened in respect of workmen who came back within 15 days of the award.

(3) Mr. Narasaraju, the learned counsel for the petitioner, contended that the Industrial Tribunal had no jurisdiction to decide the disputes in respect of closure of the factory. In support of that contention he strongly relied upon a judgment of a Division Bench of this court in the —'Indian Metal & Metallurgical Corporation v. Industrial Tribunal', Madras, 1952 Mad. L. J. 481. There the petitioner was a firm carrying on business of manufacture of brass, copper and aluminium sheets at Mettur. It had also a factory at Tondiarpet, Madras, where brass and stainless steel utensils were manufactured. On 3rd February 1951 the management issued a notice to the employees to the effect that they would suspend the work for an indefinite period till they are able to complete the erection and try to get the sheets from their own plant. The work was suspended from Saturday, the 17th inst. The dispute was referred by the Government to the Industrial Tribunal. One of the questions raised was whether the closure of the factory from 17th February was justified. The learned Judges after considering the provisions of the Act and the case law on the subject came to the following conclusion:

"We hold therefore that the award in so far as it directs the petitioner to continue to carry on the business is void as it is inconsistent with the Constitution."

They proceeded to observe:

"There cannot be dispute strictly so called between an employer and an employee, as regards the continuance of the business itself. This question was completely outside the Industrial Disputes Act, and we hold that the reference by the Government was without jurisdiction and consequently the award was bad."

The learned Judges in that case were not called upon to consider or decide the question namely that if a closure was in fact an illegal lock out or unfair labour practice whether the Tribunal had jurisdiction to consider that question. That question was specifically raised and considered by Balakrishna Aiyar J. in C. S. No. 448 of 1949 (Mad) though on the facts the learned Judge held that in that case there was not a lock out. The pertinent observations of the learned Judge are rather instructive and may usefully be extracted. The learned Judge says:

"The lock out is the corresponding weapon in the armoury of the employer. If an employer shuts down his place of business as a means of reprisal or as an instrument of coercion or as a mode of exercising pressure on the employees or generally speaking when his act is what may be called an act of belligerency than would be a lock-out. If on the other hand, he shuts down his work because he cannot for instance get the new materials or the fuel or the power necessary to carry out his undertaking or because he is unable to sell the goods he has made or because his credit is exhausted or because he is losing money, that



would not be a lock out ..... A factory or an industry can be "sick" though not of course in the same manner as a labourer, if it is unable to pave its way ..... Where an employer suspends work and the question is whether that suspension is a lockout or not, we will have to enquire, why did he shut down."

I respectfully agree with the observations. Whenever, therefore, a question arises whether a closure is in fact illegal lock-out or a subterfuge adopted by employers to bring the employees to their knees, the Industrial Tribunal has to decide that question. For, if it is a lock-out or an illegal labour practice the Tribunal certainly will have jurisdiction to go into the question.

(4) The Labour Tribunal and the Appellate Tribunal in the appeal in the instant case held that the closure was not bona fide & that amounted to an unfair labour practice. If the matter had come up before me as an appeal whether I would have agreed with that conclusion I do not know. But the Tribunals, entrusted with the jurisdiction, came to the conclusion that the petitioner was guilty of illegal and unfair labour practice and closure was not bona fide. Nor can I say that the judgment is vitiated by an error apparent on the face of the record.

(5) The petition therefore fails and is dismissed with costs.

A./K. S.

Petition dismissed.

**\*A. I. R. 1953 MADRAS 32**

RAJAMANNAR, C. J. AND  
VENKATARAMA AIYAR J.

**Ammenumma, Appellant v. Chelampiriyarath Beeviamma and others, Respondents.**

Appeal No. 491 of 1948 D/-18-1-1952.

†\*Civil P. C. (1908) S. 11 — Decree for sale to enforce charge passed in prior suit — Second suit for sale to enforce charge — Bar of — (Transfer of Property Act (1882) Ss. 67 and 100)

A mortgagee has a right under S. 67 of the T. P. Act to file a suit for sale subject only to the conditions prescribed therein and of course subject to the law of limitation and such a suit is not barred under S. 11 C. P. C. by reason of a decree for sale passed on the same mortgage in a prior suit, and under S. 100 of the T. P. Act the same principle applies to a second suit for sale to enforce a charge. Case law discussed. (Para 22)

Anno: C. P. C., S. 11 N. 40; T. P. Act, S. 67 N. 9, S. 100 N. 25.

K. Kuttikrishna Menon and T. C. Raghavan, for Appellant, N. Sivaramakrishna Aiyar Amicus Curiae for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('96) 19 Mad 249: (23 Ind App 32 PC) 9

('34) 56 All 561: (AIR 1934 PC 205) 4, 6, 9, 12, 20, 21

('50) 1950-1 Mad LJ 752: (AIR 1950 FC 1) 4, 9, 12

('89) 13 Bom 567 17

('20) 44 Bom 939: (AIR 1920 Bom 29) 9

('28) 52 Bom 111: (AIR 1928 Bom 67) 9

('48) AIR 1948 Bom 226: (ILR (1948) Bom 139 (FB) ) 9

('83) 6 Mad 119 5

('84) 7 Mad 423 5

('85) 8 Mad 478 5

('92) 15 Mad 366

('02) 25 Mad 300: (12 Mad LJ 128 FB) 5

5, 15, 16, 17, 18

('08) 31 Mad 354: (18 Mad LJ 259) 17

('16) 39 Mad 896: (AIR 1916 Mad 887 (3)) 17, 18

('26) 49 Mad 691: (AIR 1926 Mad 816) 18

('45) ILR (1945) Mad 803: (AIR 1945 Mad 225) 9

('46) ILR (1946) Kar 110: AIR 1947 Sind 12 21

VENKATARAMA AIYAR J.: This is an appeal by the plaintiff against the judgment and decree of the Subordinate Judge of Palghat dismissing O. S. No. 49 of 1945 which was an action by her to enforce a charge. The facts are not in dispute. One Bava Kutti died leaving behind a son Koyathan and two daughters, Bee Pathumma and Sayeed Mal Umma. After the death of Koyathan on 18-10-1929 his sister Bee Pathumma filed O. S. No. 36 of 1930 on the file of the Sub Court, Ottapalam for partition of her share in the estate. This suit was transferred to the Sub Court, Palghat and was there numbered as O. S. No. 75 of 1932. The appellant Ammenumma is one of the daughters of Koyathan and was the 3rd defendant in that suit. On 23-8-1933 all the parties entered into a 'razinama', Ex. P. 1, and a compromise decree was passed in terms thereof on 4-9-1933, Ex. P. 6.

This decree provides that Bee Pathumma was to take over the share of Ammenumma & pay her in lieu thereof a sum of Rs. 7333-5-4 within one month and the payment of this amount was charged on the suit properties. The amount not having been paid, Ammenumma filed O. S. No. 45 of 1938 on the file of the Sub Court, Palghat for the recovery of a sum of Rs. 10100 as due to her for principal and interest under the decree by enforcement of the charge. The suit was decreed after contest and a preliminary decree was passed on 12-12-1939, Ex. P. 2(a). Under this decree the amount due to the plaintiff as on 12-12-1939 was declared to be Rs. 11804-4-0. Clause 2 provided that the 1st defendant Bee Pathumma was to pay this amount with subsequent interest into Court on or before 12-2-1940 and clause 3 directed that in default of payment the plaintiff was to apply for a final decree for sale of the property.

Clause 4 provided that the sale proceeds should be applied in payment of expenses, cost and amounts due to the plaintiff; the balance if any, being payable to the 1st defendant. The other clauses are not material for the purpose of this case. It may be mentioned that the decree does not contain the usual clause for redemption that on payment of the mortgage amount the mortgagee shall deliver the title deeds and if necessary retransfer the property to the mortgagor and put him in possession of the same. No amount was paid by the 1st defendant and the plaintiff filed I. A. No. 100 of 1941 for the passing of a final decree. That application was dismissed as fresh notice to the defendants was not taken.

I. A. No. 843 of 1943 was filed for reviewing the order in I. A. No. 100 of 1941. That was also dismissed on 25-8-1945; vide Ex. P. 5. It is after this that the plaintiff has instituted the present suit on 3-10-1945 for recovery of the balance amount due under the 'razinama' decree in O. S. No. 75 of 1932, by enforcing the charge created under that decree by sale of the suit property. The plaintiff has given credit for a sum of Rs. 2516-6-0 received by her under the decree, Ex. P. 2(a) and also for



certain other amounts and the balance claimed as due on the date of the suit is Rs. 10733-2-8. Giving up Rs. 233-2-8 out of this, the claim is made for Rs. 10500 with subsequent interest and costs.

(2) The 1st defendant Bee Pathumma contested the suit on the ground that it was barred by the rule of 'res judicata' by reason of the proceedings in O. S. No. 45 of 1938 and that it was barred by limitation. Sayeed Mal Umma, the sister of the 1st defendant having died prior to the suit, defendants 4 to 7 were impleaded as her legal representatives. They contended that items 36 to 46 in the plaint schedule were allotted to Sayeed Mal Umma free of charge and that the plaintiff had no right to proceed against them. They also put forward various other claims. The 1st defendant having died pending the suit, defendants 8 to 13 were brought on record as her legal representatives. The suit was heard by the Subordinate Judge of Palghat who held that the present suit was barred by reason of the decree in O. S. No. 45 of 1938 which was for enforcement of the same charge and between the same parties, that the only right of the plaintiff was to pursue her remedies under that decree and that a second suit was not maintainable under S. 11 C. P. C.

He also held that as the amount was payable under the compromise decree, Ex. P. 6, on 4-10-1933, the suit which was instituted on 3-10-1945 was within time and that there was no bar of limitation. With reference to the pleas put forward by defendants 4 to 7 he held that items 36 to 46 were not liable for the suit claim and that the defendants were not entitled to any other relief. In the result in view of his finding that the suit was barred by the rule of res judicata, he dismissed it with costs. It is against this decree that the plaintiff has preferred this appeal.

(3) On behalf of the appellant it was argued by Mr. K. Kuttikrishna Menon that as the law is now well settled that a second suit for redemption by a mortgagor is maintainable subject only to the conditions mentioned in S. 60 of the Transfer of Property Act, it should likewise be held that a second suit for sale by a mortgagee is maintainable subject only to the conditions mentioned in S. 67 of the Transfer of Property Act and that as there has been neither a decree for redemption nor any payment or deposit of the mortgage amount as provided in that section, the mortgagee has a right to bring the present action for sale. No authority directly dealing with this question has been cited to us, and as the respondents were not represented by counsel, in view of the importance of the question, we requested Mr. N. Sivaramakrishna Iyer a senior advocate of this court to assist as 'amicus curiae' and we are indebted to him for his learned arguments.

(4) The starting point for the argument on behalf of the appellant is the rule now well established that successive suits for redemption are maintainable so long as there is no decree of Court foreclosing that right and that the bar of 'res judicata' is inapplicable to such suits. Vide — 'Raghunath Singh v. Mt. Hansraj Kunwar', 56 All 561 (PC) and — 'Subba Rao v. Matapalli Raju', 1950-1 Mad L J 752 (FC). Before discussing how far these decisions

could be used as authority for the maintainability of successive suits for sale by a mortgagee, it is necessary to examine the principles underlying those decisions. It will be convenient to set out the relevant statutory provisions relating to the right of redemption and then refer to the authorities bearing on them.

Section 60 of the Transfer of Property Act in so far as it is material for the present purpose provides that at any time after the principal money has become due, the mortgagor has a right on payment or tender of the mortgage amount to redeem the mortgage; "provided that the right conferred by this section has not been extinguished by the act of the parties or decree of a Court." Section 92 of the Transfer of Property Act dealing with this right enacted that in a suit for redemption a decree be passed for taking of accounts or declaring the amounts due as on the date of the decree, that on the plaintiff paying the amount on or before a date to be fixed he should have redemption and that if no such payment was made he should be debarred from redeeming the property when the mortgage was by conditional sale or usufructuary mortgage or the property be sold, when it was a simple mortgage.

Section 93 provided for the defendant applying for an order for foreclosure or sale as the case might be in case the mortgagor did not pay the amount and it was further enacted that the Court should in the former case pass an order that the plaintiff shall be foreclosed of his right to redeem the property and in the latter case pass an order for sale and that on the passing of such an order the plaintiff's right to redeem and the security should both be extinguished.

(5) On these provisions the question frequently arose for decision whether a second suit for redemption would lie when a previous suit for the same relief had been decreed but the decree was allowed to become barred by limitation. There was considerable authority in this Court for holding that a second suit was maintainable so long as the relationship of mortgagor and mortgagee subsisted. Vide — 'Sami Achari v. Somasundaram', 6 Mad 119, — 'Periandi v. Angappa', 7 Mad 423, — 'Karuthasami v. Jaganatha', 8 Mad 478 and — 'Ramunni v. Brahma Dattan', 15 Mad 366. The question came up for consideration before a Full Bench of this Court in — 'Vedapuratti v. Vallabha Valiyaraja', 25 Mad 300. It will be useful to examine the reasoning on which the decision in this case rests. Sir Arnold White C. J. stated the point for consideration in the following terms:

"The answer to the question appears to me to depend not upon whether or not at the time of the bringing of the second suit the relation of mortgagor and mortgagee subsists between the parties but upon whether the mortgagor is precluded, by the operation of the doctrine of 'res judicata' by reason of the adjudication which he has already obtained, from bringing a second suit."

After holding that the right to redeem had not been extinguished by the prior suit, the learned Chief Justice goes to observe that:

"Though the right subsists, the remedy is barred by operation of the rule of law which is embodied in S. 13 (corresponding to S. 11 of the present Code) of the Civil Procedure



Code..... and that it is immaterial whether or not the decree in the first suit directs that if the mortgagor does not pay as ordered by the Court the equity of redemption should be foreclosed or the property should be sold."

Bhashyam Aiyangar J. dealing with the argument that a suit for redemption was maintainable so long as the relationship of mortgagor and mortgagee subsisted, observed as follows:

"With all deference to the learned Judge I find it impossible to adopt the reasoning on which the decisions of this Court in — 'Sami Achari v. Somasundaram', 6 Mad 119, — 'Periandi v. Angappa', 7 Mad 423, — 'Karuthasami v. Jaganatha', 8 Mad 478 and — 'Ramunni v. Brahmaddattan', 15 Mad 366 proceed and the conclusions arrived at therein. If those decisions are sound, there can be no limit to the number of successive suits for redemption of the same mortgage and the fundamental principle on which the doctrine of 'res judicata' is founded will have to be wholly ignored. If the principle of these decisions be — as it must — that so long as the relation of mortgagor and mortgagee is not extinguished by act of parties or by order of Court under Ss. 87, 89 or 93 of the Transfer of Property Act or by S. 28 of the Limitation Act, the right of redemption is inseparable from such relation and that, therefore, there can be no impediment to the mortgagor's bringing a suit for redemption although he had already obtained a decree for redemption, it will necessarily follow that he can institute in succession as many suits as he chooses for foreclosure or sale; for the right of redemption and the mortgage security are not extinguished until the passing of an order for foreclosure absolute or for sale," and again,

"In considering whether the plea of 'res judicata' operates as a bar to the suit, the question is not whether the alleged relation of mortgagor and mortgagee or any other legal relation between the parties to the suit subsists, but whether assuming the same to subsist, the plaintiff is not precluded from seeking to enforce his right by reason of his having already sued upon the same cause of action and obtained an adjudication which it was competent for him to enforce and execute."

Dealing with the language of S. 60 of the Transfer of Property Act the learned Judge held that by virtue of Sec. 2 (a) of the Transfer of Property Act the provisions of other enactments remained unaffected and that therefore the rights conferred by S. 60 were controlled by the rule of 'res judicata' enacted in the Civil Procedure Code: Vide page 319, and he referred to the well-established principle that a remedy might be barred even though the right might not be extinguished and expressed the view that for the same reason a second suit for redemption might be barred if a prior suit had been dismissed under S. 102 now Order IX, Rule 8 C. P. C. or withdrawn without leave of the Court under S. 373 now Order XXIII, R. 1 C. P. C. The other learned Judges concurred in this view. The ratio of this decision is that though the relationship of mortgagor and mortgagee might subsist by reason of the provisions of the Transfer of Property Act the rights conferred by that Act are subject to other provi-

sions of law and that, therefore, the right to redeem conferred by S. 60 of the Act is controlled by such provisions as S. 11, Order IX, Rule 9 and Order XXIII rule 1 C. P. C.

(6) Then we come to the decision of the Privy Council in — 'Raghunath Singh v. Hansraj Kunwar', 56 All 561 (PC). In that case a decree for redemption had been made in 1896 declaring the amount payable by the mortgagor as on 15-11-1896, providing for redemption on payment of the amount and further providing that "in case of default his case will stand dismissed." The amount was not paid. On 5-3-1924 a second suit for redemption was filed by the legal representatives of the mortgagor and the plea put forward was that it was not maintainable. The Courts in India overruled this plea and granted a decree for redemption. The mortgagee appealed to the Privy Council and on his behalf three contentions were put forward: (1) that the remedy of the mortgagor was in execution of the decree of 1896; (2) that the second action was barred under S. 11, C. P. C.; and (3) that in substance the decree in the prior suit was one of foreclosure. Dealing with the second contention that the action was barred by the doctrine of 'res judicata' the Privy Council observed as follows:

"In regard to the second point their Lordships are of opinion that no relevant question of 'res judicata' here arises. The issues decided in the former suit were (1) whether the mortgagors were then entitled to redeem; (2) the amount then to be paid if redemption then took place. The issues in the present suit are (1) whether the right to redeem now exists, and (2) the amount now to be paid if redemption now takes place."

and

"It is sufficient to say in regard to the second point, that if the appellants fail to establish under their third point that the old decree extinguished the right to redeem, there is in their Lordships' opinion no ground for saying that the old decree operated by way of 'res judicata' so as to prevent the Courts, under S. 11 C. P. C. from trying the present suit."

Dealing with the third point the Judicial Committee examined Sections 60, 92 and 93 of the Transfer of Property Act and held that the decree passed in 1896 was not one which foreclosed the right of redemption and in the result the second suit for redemption was held maintainable.

(7) According to the decision of the Judicial Committee, therefore, S. 60 of the Transfer of Property Act is the paramount provision; under that section the question is whether the right to redeem has been extinguished by act of parties or decree of Court and where there has been no such extinguishment, an action for redemption will be available to the mortgagor notwithstanding that there was a prior action.

(8) Dealing particularly with the question of 'res judicata' the Privy Council observed that the issues involved in the two suits were different because the right of redemption and the amount to be paid for redemption would be different at the two dates. That is to say the cause of action is not the same and the principle of 'res judicata' would be inapplicable.

(9) We may now consider the decision of this Court reported in — 'Mattapalli Raju v. Venkata Raghavayya', ILR (1945) Mad 803. The



facts of that case were that the mortgagor executed a simple mortgage on 2-1-1914 and a usufructuary mortgage on 27-11-1915. The mortgagor filed a suit for redemption, O.S. No. 53 of 1929, but withdrew it without obtaining the permission of the Court for instituting a fresh suit. The question arose whether he was precluded by the terms of Order XXIII Rule 1 C. P. C. from filing a fresh suit for redemption. Dealing with the contention that the suit was maintainable under S. 60 of the Transfer of Property Act notwithstanding the bar under Order XXIII, Rule 1 C. P. C. the Court observed as follows:

"It is however urged for the mortgagor that redemption actions stand on a special footing as mortgagors have a statutory right to redeem under S. 60 of the Transfer of Property Act at any time after the mortgage money has become due and they can be deprived of such right only in the manner contemplated in that section, and that, therefore, Or. XXIII rule 1 cannot bar the exercise of such right until it is extinguished 'by act of the parties or by a decree of a Court'. Reliance is placed in support of this argument on the decisions of the Judicial Committee in — 'Raghunath Singh v. Hansraj Kunwar', 56 All 561 (PC) and — 'Papamma Rao v. Virapratapa H. V. Ramachandra Raju', 19 Mad 249 (PC). It is true that S. 60 confers upon a mortgagor a right to redeem on certain conditions 'provided that the right conferred by this section has not been extinguished by act of the parties or by decree of a Court'. But this enactment cannot have the effect of overriding other statutory provisions which may limit or bar the exercise of such right in certain circumstances. Order XXIII rule 1 contains no saving provision in favour of suits for redemption and there is nothing in S. 60 of the Transfer of Property Act to qualify the operation of that rule in such suits."

In the result it was held that the second suit was not maintainable. In — 'Rajaram v. Ramchandra', AIR 1948 Bom 226: ILR (1948) Bom 189 (FB) the facts were that while a suit for redemption was pending the plaintiff died; no legal representatives were brought on record and the suit was dismissed under Order XXII, rule 9 C. P. C. as having abated. The question arose whether a later suit for redemption by the legal representatives was barred under that provision. In holding that it was not, Chagla J. delivering the judgment of the Full Bench observed:

"Now the Civil Procedure Code deals with procedure relating to all suits. There is a special law, which deals with rights of mortgagors and mortgagees, and that law is to be found in the Transfer of Property Act."

After setting out the provisions of S. 60 of the Transfer of Property Act, the learned Judge went on to observe:

"Therefore in our opinion, the general provisions of the Civil Procedure Code as contained in Order XXII, Rule 9 are to that extent overridden by the specific provisions of S. 60 of the Transfer of Property Act. So long as the relationship of mortgagor and mortgagee continues, and so long as the right to redeem has not been extinguished by a decree of the Court, or by the act of the

parties, the mortgagor is entitled to go to a Court of law to enforce his right. Of course, the position with regard to limitation is different, because the Limitation Act expressly provides that the period of limitation for redemption suits is sixty years."

Reference was then made to — 'Sridhar Sadba v. Ganu Mahadu', 52 Bom 111, where it was held that the dismissal of a redemption suit for default did not bar the second suit for redemption under Order IX, Rule 9; and to — 'Ramchandra Kolaji v. Hanmanta Laxman', 44 Bom 939 where the withdrawal of a redemption suit without permission was held not to bar the second suit for redemption under Order XXIII, Rule 1. It was held that the causes of action for the two suits were different. The decision in — 'Mattapalli Raju v. Venkata Raghavayya', ILR (1945) Mad 803 was taken in appeal and the same was heard by the Federal Court. Vide — 'Subbarao v. Mattapalli Raju', 1950-1 Mad L J 752 (FC). Kania C. J. delivering the judgment of the Court referred to the divergent views held by this Court and the Bombay High Court and observed:

"In our opinion the view of the Madras High Court is incorrect. We prefer the view taken by the Bombay High Court on this point. The right of redemption is an incident of a subsisting mortgage and it subsists so long as the mortgage itself subsists. As held by the Privy Council in — 'Raghunath Singh v. Hansraj Kunwar', 56 All 561 (PC) the right of redemption can be extinguished as provided in S. 60 of the Transfer of Property Act and when it is alleged to have been extinguished by a decree, the decree should run strictly in accordance with the form prescribed for the purpose. Unless the equity of redemption is so extinguished, a second suit for redemption by the mortgagor, if filed within the period of limitation, is not therefore barred. The Board expressly held that if the appellants failed to establish that the old decree extinguished the right to redeem, there was no ground for saying that the old decree operated as 'res judicata' and the Courts were prevented from trying the second suit under S. 11 C. P. C. They, therefore, held that the right to redeem was not extinguished by the procedural provisions contained in the Civil Procedure Code."

Dealing with the objection based on Or. XXIII, rule 1 C. P. C. the Court referred to the observations in — 'Raghunath Singh v. Hansraj Kunwar', 56 All 561 (P.C.) that the causes of action in the two suits were different and observed as follows:

"The Board held in that case that the trial of these issues was not barred under Section 11 C. P. C. It follows therefore that if the right of redemption is not extinguished, provisions like Order IX rule 9, Order XXIII rule 1 will not debar the mortgagor from filing a second suit, because, as in a partition suit, the cause of action in a redemption suit is a recurring one. The cause of action in each successive action, until the right of redemption is extinguished or a suit for redemption is time barred, is a different one."

(10) In this view it was held that the second suit was maintainable.

(11) The result of the above authorities may thus be summed up: (1) The provisions of the



Transfer of Property Act relating to mortgages form a special law and the rights and liabilities of mortgagors and mortgagees have to be worked out in accordance with those provisions; (2) the right to redeem is an incident of the relationship of mortgagor and mortgagee. It subsists so long as the relationship subsists and it is enforceable under S. 60 of the Transfer of Property Act so long as it subsists; (3) a second suit for redemption which is not barred by S. 60 of the Transfer of Property Act will not be barred under S. 11 C. P. C., because the special provisions of S. 60 of the Transfer of Property Act will override the general provisions of the C. P. C.; *Generalia specialibus non derogant*; and because the cause of action for the later suit is not the same as in the earlier suit inasmuch as the right to redeem is a continuing and recurring right. For the same reasons a second suit for redemption will not be barred by the provisions of Order IX rule 9, O. XXII, rule 9 and Order XXIII, rule 1 C. P. C.

(12) Applying these principles to a second suit for sale by a mortgagee, it has first to be seen whether such a suit could be maintained under the provisions of the Transfer of Property Act. The right to obtain a decree for sale of the mortgaged property is conferred by S. 67 of the Transfer of Property Act. That section, so far as it is material for the present purpose, runs as follows:

"The mortgagee has at any time after the mortgage money has become due to him and before a decree has been made for the redemption of the mortgaged property, or the mortgage money has been paid or deposited, a right to obtain from the Court a decree that the mortgagor shall be absolutely debarred of his right to redeem the property, or a decree that the property be sold."

The section deals with suits both for foreclosure and for sale and the provisions contained therein must be read distributively in relation to the two subjects. So read, the section enacts that (1) a suit for foreclosure can be filed after the mortgage amount has become due and before a decree for redemption has been made and (2) a suit for sale can be filed after the amount has become due and before it has been paid or deposited in the manner provided. It has been suggested that there is nothing in S. 67 corresponding to the proviso in S. 60 on which the decisions in — *Raghunath Singh v. Hansraj Kunwar*, 56 All 561 (PC) and — *Subba Rao v. Mattapali Raju*, 1950-1 Mad L J 752 (FC) were based and that, therefore, the considerations applicable to a second suit for redemption would not be applicable to a second suit for sale.

But what is enacted in the form of a proviso to S. 60 is enacted as part of the section itself in S. 67 and in substance the position is not different. Even the differences in the form in the draftsmanship of the two sections might be due to the fact that while S. 60 deals only with the right to redeem, S. 67 deals with both the right to foreclosure and the right to sale and the language had to be adopted to cover both the rights. Thus on the language of S. 67 this action is clearly maintainable as the mortgage money had not been paid. As already mentioned there is not even the usual clause for redemption in the decree, Ex. P. 2 (a).

(13) We may now turn to the provisions of Order XXXIV, C. P. C. and see what light

they throw on the point now under consideration. Rules 2 and 3 deal with suits for foreclosure; rules 4 and 5 with suits for sale and rules 7 and 8 with suits for redemption. Rule 2 enacts that the preliminary decree in a suit for foreclosure shall order an account of the amount due or declare it as on the date of the decree; direct that on payment of such amount by defendants there shall be redemption; that in default of such payment the mortgagee shall be entitled to apply for foreclosure. The Court has the power to extend the time for payment. Rule 3 provides for a final decree being passed in terms of rule 2. Dealing with suits for sale rule 4 enacts that a preliminary decree has to be passed in the same terms as the decree in rule 2; that is to say the amount payable should be ascertained as on the date of the decree; time for payment should be fixed and provision should be made for redemption on payment within time.

The only difference in the form of the decree is that in case of default in payment by the mortgagor, the mortgagee is to apply for a decree for sale and not for foreclosure. The preliminary decree in a suit for redemption under rule 7 is to contain the same directions as a preliminary decree for foreclosure suit under rule 2 and is to provide for the taking of accounts, declare the amount payable fixing a date for payment and provide for redemption on payment. In default of payment by the plaintiff, the defendant, mortgagee, is entitled to apply for a final decree for sale or for foreclosure according to the character of the mortgage which is the subject-matter of the suit. Rule 8 provides for the passing of an appropriate final decree.

(14) It will thus be seen that whatsoever be the nature of the suits the preliminary decrees to be passed therein are in substance the same; the amount due to the mortgagee is to be ascertained, a time is to be fixed for payment of the amount, with a power in the court to extend the same and redemption is to be decreed on payment by the mortgagor. Thus all the three decrees run on the same lines. It is only in the case of default in payment that there is a difference in the form of the final decree to be passed; it will be a foreclosure decree in some cases and a decree for sale in others. This difference in the character of the final decree arises out of the difference in the nature of the mortgages and has no relation to the difference in the nature of suits filed thereon, whether it is for foreclosure, for sale or for redemption.

(15) From the foregoing review of the statutory provisions it will be abundantly clear that whatever the nature of the suit that is filed on a mortgage, the rights and liabilities of the mortgagor and the mortgagee are the same. On principle it cannot be otherwise. In law the right to redeem and the right to foreclose are co-extensive; and the right to sell is, under the Indian law, a substitute for the right to foreclose, in the case of certain mortgages. In view of the fact that a mortgage transaction creates one jural relationship involving reciprocal rights and obligations between mortgagor and mortgagee, it will be illogical to hold that principles applicable to one of them are not applicable to the other.

Differentiation in the mutual rights and obligations of the mortgagor and mortgagee



must inevitably result in anomalies in the administration of the law of mortgages. By way of illustration we can take the case of a usufructuary mortgage with a personal covenant. The mortgagee files a suit for sale on the basis of the covenant to pay; the suit is decreed but the execution of the decree becomes time barred. The law as now settled is that this decree does not preclude the mortgagor from filing a suit for redemption. In that suit it is open to the defendant mortgagee, to apply for a decree for sale under Or. XXXIV rules 7 and 8. How is this to be reconciled with the view that a suit for sale by him is barred under S. 11 C. P. C.?

If the decree in the prior suit operates to extinguish the right of the mortgagee to sell the hypotheca which right thereafter becomes merged in the decree and could be exercised only thereunder, on what principle can a fresh decree for sale be passed in his favour in the mortgagor's suit for redemption? The theory that the original cause of action is gone — 'transit in rem judicatum' — which is the foundation of the doctrine of 'res judicata' will be a bar to the grant of that relief in the mortgagor's action as well. It will be contrary to the provisions of the statute to hold in such a case that the mortgagor can get a decree for redemption under rules 7 and 8 but that no decree for sale could be passed in favour of the mortgagee under those provisions.

(16) The view that, on principle, suits for sale stand on the same footing as suits for redemption derives considerable support from the judgment of Bhashyam Aiyangar J. in — 'Vedapuratti v. Vallabha Valia Raja', 25 Mad. 300. He no doubt held that a second suit for redemption was barred, a view which has now been rejected but in discussing the legal position he examined both Ss. 60 and 67 of the Transfer of Property Act and proceeds on the view that the rights under both the sections are correlative. Vide pages 310 and 320. He also examines the provisions of the Act relating to the form of decree to be passed in suits for redemption, sale and foreclosure and observes.

"that whether the decree be in a suit for foreclosure or in a suit for sale or in a suit for redemption there is in each a conditional decree for redemption in favour of the mortgagor, the condition being the payment by the mortgagor of the amount decreed on or before the day fixed."

(17) Dealing particularly with the plea of 'res judicata' the learned Judge referred to the decision in — 'Maloji v. Sagaji', 13 Bom 567 where a prior suit for redemption by a mortgagor was held to bar a subsequent suit for sale by a mortgagee, notwithstanding that the prior decree did not provide for sale in default of payment and observed as follows:

"Whether or not the decision that the subsequent suit for sale which was brought by the defendants in the former suit was barred by the decree in the first suit is strictly warranted by S. 13 (Explan. II) C. P. C., it is certainly in conformity with S. 67 of the Transfer of Property Act which provides that a mortgagee can bring a suit for foreclosure or sale only before a decree has been made for redemption of the mortgaged property. It is, therefore, of the highest importance that de-

crees in mortgage suits should be complete not only so far as the rights of the plaintiff are concerned, but also in so far as the rights of the defendant are concerned; and the fact that the decree is imperfect will not enable the defendant to enforce his rights under the mortgage as plaintiff in a suit, subsequently to be brought by him, if such rights could have been enforced by him in the former suit and provided for in the decree passed therein."

A converse case to that decided in — 'Maloji v. Sagaji', 13 Bom 567 came up for consideration in — 'Ranga Aiyangar v. Narayana Charar', 39 Mad 896. There a usufructuary mortgagee obtained a decree for sale but it was not executed. He, however, continued in possession of the properties. The mortgagor then filed a suit for redemption. It was held following the observations of Bhashyam Aiyangar J. in — 'Vedapuratti v. Vallabha Valiaya Raja', 25 Mad 300 (FB) that the second suit was barred. The following observations of Sadasiva Aiyar J. may be quoted:

"A decree for redemption is almost invariably a conditional decree whether it is passed in a mortgagee's suit for sale or a mortgagor's suit for redemption. No doubt where it is passed in a mortgagee's suit for sale it is not usually passed on the invitation of the mortgagor (defendant) and in the language used in — 'Adipuram Pillai v. Gopalaswami Mudali', 31 Mad 354 'the defendant is a decreeholder in spite of himself, an involuntary decreeholder'. But I do not see how this could on principle make any difference in the decision of the question whether the mortgagor defendant who has been given such a decree is entitled only to execute that decree or whether he is entitled to bring a fresh suit for redemption despite the doctrine of res judicata".

(18) The facts in — 'Ellaravan v. Nagaswami Aiyar', 49 Mad 691 were similar to those in — 'Ranga Iyengar v. Narayana Charar', 39 Mad 896. There was a prior decree for sale in a usufructuary mortgagee's suit based on the personal covenant; it remained unexecuted and became barred and a suit for redemption was instituted by the mortgagor. In holding that this suit was not maintainable, Wallace J. observed:

"It follows then, that, after a decree in a mortgage suit, whatever the form of that decree, whether for foreclosure, sale or redemption, the parties to the mortgage and to the suit and their legal representatives or assignees cannot maintain in future any separate suit or any claim arising out of the mortgage."

Madhavan Nair J. observed at p. 711:

"It is no doubt true that in the present case the decree in the prior suit was one for the sale of the properties and not for redemption; but if we have regard to the real nature of the decree for sale passed under Ss. 88 and 89 of the Transfer of Property Act, it will be found that this difference does not really make the decision inapplicable."

All these authorities proceed on the view that on the provisions of the Transfer of Property Act and Order XXXIV C. P. C., the nature of the suit that is laid on the mortgage makes no difference in the rights of the mortgagor and



the mortgagee and that, therefore, a second suit for redemption would be barred under S. 11 whether the prior suit was one for redemption as in — '*Vedapuratti v. Vallabha Valiaraja*', 25 Mad 300 (F.B) or was for sale as in — '*Ranga Aiyangar v. Narayana Chariar*', 39 Mad 896 and — '*Ellarayan v. Nagaswami Iyer*', 49 Mad 691.

(19) When once it is held, as now it has been, that a second suit for redemption is maintainable so long as it is not barred under S. 60 of the Transfer of Property Act, it should logically follow that a second suit for sale should likewise be maintainable so long as it is not barred by S. 67 of the Transfer of Property Act. If S. 11 C. P. C. cannot operate to curtail or abridge the rights conferred by Sec. 60 of the Transfer of Property Act, on principle, it cannot operate to cut down the rights under S. 67 of the Transfer of Property Act either and the second suit for sale must accordingly be held to be not barred as '*res judicata*'.

(20) In — '*Raghunath Singh v. Hansraj Kunwar*', 56 All 561 (PC) the Privy Council observed that a second suit for redemption was not barred on the ground of *res judicata* because in the first suit the issue was what amount had to be paid then by the mortgagor for redemption whereas in the second suit the issue was what amount had to be paid at the time of that suit for redemption. This reasoning is obviously based on the form of the decree to be passed in redemption suits, which has to declare the amount due as on the date of the decree in that suit, and provide for redemption on payment of that amount. The issue in 1896 suit was what amount was payable on the date of the decree in that suit whereas the amount payable in 1924 suit was the amount payable on the date of the decree in that suit. According to the Privy Council as the ascertainment of the amount payable by the mortgagor was an essential issue in a suit for redemption and as that issue must be necessarily different in the two suits there could be no bar of '*res judicata*'.

The same reasoning must apply to suits for sale and foreclosure as well, as the amount payable by the mortgagor has to be ascertained and declared in the preliminary decree which is to be passed under rules 2 and 4 in suits for foreclosure and sale. Dealing particularly with the facts of this case, the decree in the prior suit Ex. P-2 (a) declared that Rs. 11804-4-0 was due to the appellant on 12-12-1939. In the present suit the plaintiff claims that a sum of Rs. 10500 was due to her. The defendants dispute it. Issue No. 3 in the suit runs as follows: "What, if any, is the correct amount due to the plaintiff?" The finding on that issue is that the amount claimed is correct. This issue could obviously not have been the subject-matter of decision in the prior suit and on the principle laid down in — '*Raghunath Singh v. Hansraj Kunwar*', 56 All 561 (PC), it must be held that the decree Ex. P-2(a) cannot operate as *res judicata* in this suit.

(21) Mr. N. Sivaramakrishna Aiyar brought to our notice the decision in — '*Bhajanmal Tapondas v. Tikamdas*', ILR (1946) Kar 110: AIR 1947 Sind 12, as authority for the position that a second suit for sale by a mortgagee is not maintainable. The facts of that case were, that one Tapondas executed a simple mortgage

on 7-2-1920. In 1924, a suit O. S. No. 147 of 1924 was filed to enforce this mortgage and a preliminary decree for sale was passed. An application for final decree was filed on 29-2-1934 and was dismissed as barred by limitation. Then a second suit was filed in 1939 basing itself on the preliminary decree in O. S. No. 147 of 1924 and the question was whether such a suit was maintainable.

It was held that both under English and Indian law the right of a party is only to execute a decree and not to file a further action on it. The suit in that case was not one to enforce the mortgage dated 7-2-1920 and it would seem that such a suit would have been barred by limitation. The question whether a second suit on the mortgage itself was maintainable did not arise for determination and it is for this reason that the decision in — '*Raghunath Singh v. Hansraj Kunwar*', 56 All 561 (PC) is not even referred to in the judgment. This decision, therefore, is no authority for the position contended for on behalf of the respondents.

(22) In conclusion we are of opinion that a mortgagee has a right under S. 67 of the Transfer of Property Act to file a suit for sale subject only to the conditions prescribed therein and of course subject to the law of limitation and that such a suit is not barred under S. 11, C. P. C. by reason of a decree for sale passed on the same mortgage in a prior suit and that under S. 100 of the Transfer of Property Act the same principle applies to a second suit for sale to enforce a charge.

(23) In the result the suit will be decreed as prayed for with costs, both here and in the Court below as against defendants 8 to 13, who are the legal representatives of the 1st defendant. Time for payment, three months. In view of the finding on Issue No. 5 Items 36 to 46 of plaint schedule will be excluded from the decree.

A/V.R.B.

Suit decreed.

#### A. I. R. 1953 MADRAS 38

RAJAMANNAR C. J. AND

SOMASUNDARAM J.

M. A. Janaki, Petitioner v. M. A. Srirangammal, Respondent.

Civil Misc. Petn. No. 14691 of 1951, D/- 15-2-1952.

**Constitution of India, Art. 133 — Suit under Madras High Court Original Side Rules, Or. 45 Rule 4 dismissed — Appeal dismissed for default of appearance — Application to restore also dismissed — Dismissal order is neither judgment, decree nor final order.**

Where an appeal from an order dismissing a suit by an originating summons under O. 45 Rule 4 of the Original Side Rules of the High Court is dismissed for default of appearance in person or by advocate and an application filed under O. 41, Rule 19, Civil P.C., for restoration of the appeal and for re-hearing is also dismissed, the order dismissing the application is neither a judgment nor a decree nor a final order within the meaning of Art. 133. It is not a judgment or decree because it was not passed in a suit or appeal. It is not a final order as it does not deal with the rights of parties. It is a



matter of procedure and not an order passed on the merits. (Paras 1, 2)

Anno: C.P.C., S. 109 N. 4.

Petitioner in person; K. Sankara Sastri, for Respondent.

#### REFERENCE .....

/Para

(37) AIR 1937 All 566: (171 Ind Cas 29) 2

RAJAMANNAR, C. J.: The petitioner filed a suit by an originating summons under Or. XLV, Rule 4 of the Original Side Rules of this Court for the determination of certain questions relating to deeds of settlement executed by her father. The suit came on before Krishnaswami Nayudu J. who dismissed it on the ground that the matters in controversy could not be gone into on an originating summons in a summary manner. The learned Judge therefore referred the plaintiff to a suit, if she was so advised. The petitioner filed an appeal against this order of the learned Judge (O. S. A. No. 112 of 1950). That appeal was dismissed on 24-1-1951 for default of appearance in person or by advocate. The petitioner then filed an application (C. M. P. No. 2733 of 1951) under Or. XLI, Rule 19, Civil P. C., for restoration of the appeal and for re-hearing. This application was dismissed by this Court on 23-4-1951. The petitioner now seeks leave to appeal to the Supreme Court against this last order of this Court in C. M. P. No. 2733 of 1951. The application is opposed.

(2) The relevant provision of law is Art. 133 of the Constitution under which an appeal lies to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies that one or other of the conditions mentioned in clauses (a), (b) and (c) is satisfied and where the decision of this Court affirms the decision of the Court below the appeal involves some substantial question of law. We are of opinion that the order in question is neither a judgment nor a decree nor a final order. It is not a judgment or decree because it was not passed in a suit or appeal. Is it then a final order? In our opinion it is not. It does not deal with the rights of parties. It is a matter of procedure and not an order passed on the merits. The result of the order in question was only to leave undisturbed our decree and judgment dismissing the petitioner's appeal. Vide — 'Krishnakant v. Lala Amarnath', AIR 1937 All 566. It is clear that we could not have certified that the petitioner was entitled to appeal to the Supreme Court against the judgment and decree in the main appeal, because that was an affirming judgment and obviously the appeal did not involve any substantial question of law. The grounds which are now sought to be urged against our later order are all grounds which could have been urged in the appeal against the judgment in the main appeal. If the petitioner, as we have just held, was not entitled to leave to appeal to the Supreme Court against the judgment in the appeal, we fail to see how she can be allowed to get the same relief by this indirect method. The application is, therefore, dismissed with costs.

A/V.S.B.

Application dismissed.

#### A. I. R. 1953 MADRAS 39

GOVINDA MENON AND CHANDRA REDDI JJ.

C. Chenchanna Naidu, Petitioner v. Praja Seva Transports Ltd., Cuddappah and another, Respondents.

Civil Misc. Petns. Nos. 1097 and 1098 of 1951, D/- 26-10-1951.

† (a) Civil P. C. (1908), O. 47 R. 1 — Application under Art. 226 of the Constitution — Review — Constitution of India, Art. 226.

If the application for the issue of a writ under Art. 226 is made on the civil side, in dealing with such an application the High Court is governed by the provisions of the Civil Procedure Code, and the High Court has jurisdiction to review its order under Art. 226. AIR 1938 Mad 722, Rel. on. (Para 11)

Anno: C.P.C. O. 47 R. 1 N. 2.

(b) Civil P. C. (1908), O. 47 R. 1 — "Error apparent on the face of the record."

The order 'ex facie' should show that the Government applied its mind to a consideration of the question whether the order under revision was under one or the other of the three categories mentioned in S. 64-A of the Motor Vehicles Act. Where at the time when the High Court passed its order on a petition under Art. 226, the question whether the Government acted without jurisdiction in exercising its powers under S. 64-A or whether the order of the Central Road Traffic Board, was one which could be called either illegal or irregular or improper, to enable the State Government to interfere with that order was not considered by it, such an omission would constitute "an error apparent on the face of the record." Case law discussed. (Para 19)

Anno: C.P.C., O. 47 R. 1 N. 15.

K. Rajah Aiyar and A. Bhujanga Rao, for Petitioner; Vepa P. Sarathi, for the State Counsel; and C. A. Vaidhalingam and C. Kondiah, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras  
(22) 26 Cal WN 697: (AIR 1922 PC 112) 18  
(51) AIR 1951 Bom 25: (52 Cri LJ 305 FB) 9  
(25) 29 Cal WN 148: (AIR 1925 Cal 304) 14  
(27) AIR 1927 Cal 534: (54 Cal 405) 16  
(29) AIR 1929 Cal 17: (115 Ind Cas 357) 15  
(23) 46 Mad 955: (AIR 1924 Mad 98) 17, 18  
(25) 49 Mad LJ 671: (AIR 1925 Mad 1031) 16  
(38) ILR (1938) Mad 816: (AIR 1938 Mad 722) 11

(39) 1939-2 Mad LJ 809: (AIR 1940 Mad 17) 16  
(41) 1941-2 Mad LJ 390: (AIR 1941 Mad 918) 17  
(25) 3 Rang 261: (AIR 1925 Rang 314) 16

CHANDRA REDDI, J.: This is a petition for review of our order in C. M. P. No. 605 of 1951 dated 9th January 1951 declining to issue a writ of certiorari calling for records in G. O. Ms. 5424 M. Home department, Government of Madras, dated 27th December 1950 and to quash the said Government Order. The circumstances that necessitated the filing of that petition are the following:

(2) The petitioner along with the first respondent herein and some others applied to the Regional Transport Authority, Cuddappah for pucca permits for running three stage carriages on Cuddappah Madanapalle route via Kurubola Kota. The Regional Transport Authority rejected the application of the petitioner while that of first respondent was allowed.



(3) Against this order an appeal was filed to the Central Road Traffic Board, Madras, by the petitioner. The Appellate Tribunal cancelled the permit granted to the first respondent and directed the issue of one to the petitioner herein.

(4) Thereupon the first respondent preferred a revision to the Government of Madras against the order of the Central Road Traffic Board. The Government in its G. O. Ms. 5424 M. Home department referred to above allowed the revision petition filed by the first respondent and set aside the order of the Central Road Traffic Board in so far as it related to the granting of a permit to the petitioner.

(5) This led the petitioner to invoke the jurisdiction of this Court under Art. 226 of the Constitution of India in the manner and for the relief mentioned above. The main ground upon which that petition was based was that the order of the Government disclosed no reason for interfering with that of the Appellate authority and therefore was one passed arbitrarily.

(6) When this petition came before us on 9th January we rejected it observing that we saw no reason to hold that the State Government has exercised jurisdiction vested in it under S. 64-A of the Madras Motor Vehicles Act illegally or with material irregularity and that there were no grounds for interference.

(6a) A day or two after the disposal of that petition the jurisdiction of the State Government to exercise its revisional powers under S. 64-A. of the Motor Vehicles Act without finding whether the order sought to be revised was illegal, irregular or improper as required by the provisions of the section was questioned in another application for the issue of writ of certiorari to quash the order of the State Government in similar circumstances filed by an aggrieved party. We issued notice on that petition which ultimately resulted in pronouncement inter alia that the order, ex-facie should show that the Government applied its mind to a consideration of the question whether the order under revision was one under one or the other of the three categories mentioned in S. 64-A.

(7) As a result of the issue of notice in that application the petitioner has come forward with C. M. P. No. 1098 of 1951 for a review of our order dated 9th January 1951.

(8) The first point that arises for consideration in this petition is whether we have jurisdiction to review the order in C. M. P. No. 605 of 1951 and whether this petition is competent.

(9) This petition is resisted on behalf of the first respondent that we have no inherent powers to review the order passed upon Art. 226 of the Constitution. In support of this contention Mr. Vaidhalingam, the learned counsel for the first respondent relied on a ruling of a Full Bench of the Bombay High Court in—'In re Prahlada Krishna' AIR 1951 Bom 25. But we do not think that that case carries the contention of the respondents very far. What was observed by the Chief Justice Chagla with whom the other two learned Judges agreed was that the Court has no inherent power of review and that the power of review like that of an appeal should be conferred by a statute and that the Criminal Procedure Code did not vest any powers of review in the High Court. It was also remarked that Art. 226 of the Constitution did not confer upon the High Court a power of review. It must be remembered that in that case the first application that was rejected by the Division Bench of that Court was under S. 491 Criminal Procedure Code. The applications were

filed subsequently one for a review of that order and the order for a Writ of Habeas Corpus under Art. 226 of the Constitution. Both the applications were rejected when they were ultimately heard by the Full Bench.

(10) It is while dealing with these applications that the statement of law referred to above was made by the learned Judges.

(11) Here we have to deal with a case not under the Criminal Procedure Code. The petitioner invoked the civil jurisdiction of this court to issue a writ under Art. 226 of the Constitution. If the application for the issue of a writ, is made on the civil side, in dealing with such an application we are governed by the provisions of the Civil Procedure Code. It is indisputable that the procedure applicable to all courts of civil judicature is that contained in the Civil Procedure Code. In — 'Ryots of Garabandho and etc. Villages v. Zamindar of Parlakimedi', I. L. R. (1938) Mad 816, the view taken by a Bench of this court consisting of Sir Lionel Leach C. J. and Madhavan Nair J. was that an order refusing the issue of a writ of certiorari to quash the orders of the Board of Revenue was one passed in the exercise of its original civil jurisdiction within the meaning of S. 109 (b) Civil Procedure Code and was subject to the right of appeal to the Privy Council from the same. Once it is conceded that the procedure applicable to cases of this kind is that enacted in the Civil Procedure Code, the question of jurisdiction of this court to review its orders under Art. 226 does not present much difficulty. Order 47, R. 1 Civil Procedure Code has invested civil courts with power to review their own decrees or orders under certain conditions, namely, discovery of new and important matter, or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him seeking review at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason. The first two conditions are not relevant for the purpose of the present enquiry. Here we are only concerned with the latter conditions.

(12) The question for consideration in this case is whether the grounds alleged are sufficient to bring them within the expressions "error apparent on the face of the record, or for any other sufficient reason".

(13) In support of his contention that the present case falls under the category of error apparent on the face of the record or for any other sufficient reason within the meaning of O. 47, R. 1 C. P. C., Mr. Rajah Aiyar, the learned counsel for the petitioner placed before us some decided cases of this court and other courts.

(14) In — *Brindhaban Chandra v. Damodar Prasad*, 29 Cal. W. N. 148, a Bench of the Calcutta court allowed an appeal relying on a decision of the Judicial Committee. An application for review of a judgment was presented by the aggrieved party within time allowed by the statute and before it could be disposed of there was a pronouncement by the Privy Council construing the earlier judgment in a manner which rendered the judgment of the High Court wrong. A Bench of that court held that the circumstances of that case attracted the provisions of Order 47, Rule 1 Civil Procedure Code and that the expression "error apparent on the face of the record" was wide enough to cover a case like that.

(15) — *Sourendranath v. Jatindranath*, A. I. R. 1929 Cal 17 is also a case where the applicability of the expression "error apparent on the



face of the record" in O. 47 R. 1 Civil Procedure Code was considered. The learned Judges Mukherji and Jack JJ. before whom the matter came up for consideration took the view that the failure of the lower court to deal with the merits of an application to restore a petition dismissed for default which was in itself an application for the restoration of the suit dismissed for default on an erroneous view of S. 151, Civil Procedure Code amounted to an error apparent on the face of the record.

(16) What was decided in — *Sarat Krishna Bose v. Bisweshwar Mitra*, A. I. R. 1927 Cal 534 was where an application under O. 9 R. 9 Civil Procedure Code was dismissed for default, the second application for restoring that application is not competent under O. 9 R. 9, but that the second application could be treated as an application for the restoration of the suit itself dismissed for default if the second application was made within time to restore the suit and if such an application was not within time the inherent jurisdiction of the Court under S. 151 Civil Procedure Code could be invoked in proper cases to restore the suit. The reason of the rule is stated by the learned Judges thus,

"To meet cases such as this, S. 151 of the Code was enacted and where there is no provision in the Code expressly providing for a remedy and none which prohibits a remedy being administered and such remedy is called for in order to do that real and substantial justice for the administration of which it exists, the provision of S. 151 may and should be restored to."

Coming to our own High Court in — '*Govinda Chettiar v. Varadappa Chettiar* 1939-2-Mad. L. J. 809', Patanjali Sastri J. laid down that the misapprehension owing to which respondent's counsel did not urge all his argument in support of the finding recorded in favour of his clients by the first court and the consequent erroneous decision on the part of the Subordinate Judge that the Counsel had no arguments to urge to meet the points raised by the appellant's counsel are analogous to errors apparent on the face of the record so as to be sufficient reason for review under Or. 47 rule 1 Civil Procedure Code. Reference was made to two decisions in support of the learned Judge's finding reported in — '*Kyone Hoe v. Kyon Soon Sun*', 3 Rang 261 at p. 267 and — '*Nagabhushanam v. Jagannaikalu*', 49 Mad. L. J. 671.

(17) In — '*Natesa Naicker v. Sambanda Chettiar*', 1941-2-Mad. L. J. 390 another Judge of this Court took the view that where the legal position is clearly established by a well-known authority and by some unfortunate oversight the Judge has gone wrong by the omission of those concerned to draw his attention to the authority, it may in a proper case be a ground for review in the light of the decision in — '*Murari Rao v. Balavant*', 46 Mad 955 as coming within the category of an error apparent on the face of the record.

(18) It was the opinion of the learned Judge that — '*Murari Rao v. Balvant*', 46 Mad 955 which recognised the power of the court to review its order when it overlooked the leading authority on a clear matter of law was still good law evidently meaning that its authority has not in any way been shaken by the pronouncement of the Judicial Committee in — '*Chhajjaram v. Neki*', 26 Cal. W. N. 697 (P. C.).

(19) In the light of the observations contained in the decided cases cited to us we are inclined to hold that the instant case is governed by the clause "an error apparent on the face of the

record" contained in O. 47, r. 1 Civil Procedure Code. At the time when, we passed the order, the question whether the Government acted without jurisdiction in exercising its powers under Sec. 64-A or whether the order of the Central Road Traffic Board, was one which could be called either illegal or irregular or improper, to enable the State Government to interfere with that order was not considered by us. A plain reading of S. 64-A shows that it is only when the Government reaches a conclusion that the order sought to be revised was one falling under either of the three categories mentioned in Sec. 64-A that it can exercise its revisional powers under that section.

We have held in C. M. P. No. 625 of 1951 that the Government order should 'ex facie' show that it applied its mind to the question of the legality, irregularity or propriety of the order of the Appellate Tribunal and that in the absence thereof the Government's order was liable to be quashed. No doubt our omission to consider that point was due to the Counsel not putting forward before us that aspect of the case, (that application have not (sic) been grounded on the arbitrary exercise by the Government of the power conferred on it under S. 64-A of the Act). But whoever might be responsible for it, if the most important point arising in the petition was not considered by us we think such an omission would constitute "an error apparent on the face of the record", within the meaning of the expression occurring in Or. 47 rule 1 Civil Procedure Code so as to warrant a review of our order dated 9th January 1951.

(20) It follows that our order dismissing the application for the issue of a writ of certiorari is discharged. A writ Nisi will issue in this case and the records in G. O. Ms. 5424 M. Home Department dated 27th December 1950 will be called for within two weeks. The petitioner will pay the respondent's costs (first respondent), Advocate's fee of Rs. 100 (one hundred only).

A/D.H.

Order accordingly.

#### A. I. R. 1953 MADRAS 41 SATYANARAYANA RAO AND RAGHAVA RAO JJ.

In re A. K. Gopalan, Petitioner.

Criminal Misc. Petn. No. 354 of 1951, D/- 19-3-1951.

(a) Public Safety — Preventive Detention Act (1950), Ss. 3 and 12 — Right of detenu to challenge order on ground of mala fide — Burden of proof — Duty of government — Malice and 'mala fide' explained — Validity of prior order in question — Fresh order for detention passed before pronouncement of judgment — Omission by Government to inform court of order reflects on their bona fide — (Criminal P. C. (1898), S. 491) — (Constitution of India (1950), Art. 226).

Satyanarayana Rao J.: An order of detention passed under the law of preventive detention can be challenged on the ground that there is lack of bona fide on the part of the authority exercising the power: AIR 1949 Mad 307 (SB), Rel. on. (Para 7)

A statutory authority must always be exercised honestly and without malice. There should be no fraudulent exercise of the power conferred or colourable exercise of it to gain an ulterior object. The question when that power has been exercised mala fide will depend upon the circum-



stances of the case. (1942) AC 284, (1917) AC 260; AIR 1945 PC 156 and AIR 1950 Mad 162, Ref. to. (Para 7)

When the question of the validity of an order of detention is being decided by the Court in an application for a writ of Habeas Corpus, the Government passes a fresh order to arrest the detenu if he is set at liberty, and alleges as its reason for passing the order, the difficulty of arresting the detenu, a dangerous communist whose subversive activities would be a threat to the security of the state, as he would go underground immediately, the reason is unconvincing. Further the government which apprehending an adverse judgment acts with alacrity and passes the fresh order after full consultations with all its legal advisers and even communicates it, before the judgment is delivered, to the police officer present in court for execution if the detenu is set at liberty but fails to inform the court of the fresh order and the reasons for passing it, the omission to do so is a serious circumstance reflecting upon the bona fide of the government in passing the order. (Para 9)

Raghava Rao J.: It is open to a detenu to show that the order of detention was a fraudulent exercise of the power vested in the Government. The burden of showing that is on him and he can sustain the burden only if he successfully rebuts the presumption of bona fide on the part of Government: AIR 1945 FC 18, Rel. on. (Para 14)

'Malice' and 'mala fide' in connection with an order of detention are cognate terms expressive of the same legal idea. 'Malice' in law can mean nothing more than intention to injure another by doing an act in disregard of the latter's right, wilfully and wrongfully, without reasonable and probable cause. It does not mean personal ill-feeling or spite. These terms in relation to an order of detention express the legal idea of an intention on the part of the Government to misuse or abuse the power vested in it and are not necessarily connotative of moral turpitude on the part of the Government or anybody connected with it. (Para 14)

A detention order issued for the purpose of flouting the decision of Court, holding the previous order of detention invalid on merits, would be a mala fide order. But if the decision had proceeded on the ground that the law under which the prior order was made was invalid or that the order itself was in an irregular form a fresh order passed under a fresh legislation or in a valid form would not be necessarily mala fide. Where however the Government, passes an order even before the judgment is delivered and allege that they passed the order because they anticipated the judgment to declare the prior order invalid on the technical ground that it did not mention the period of detention, when they had no justification for such belief, and even the fresh order omits to rectify the defect the circumstances leave no doubt that the intention of the government was to flout the decision of the court. AIR 1949 Mad 307 (SB), Ref. to. (Para 17)

Further when having passed such an order they refrain from mentioning it to

the court, so as to enable the court to take the reasons therefor into consideration before it pronounces judgment, it again is a circumstance which goes to show the indirect motive and improper conduct of the Government. (Para 18)

Anno: Cr. P. C., S. 491 N. 7; Civil P. C., App. III; Constitution of India, Art. 226 N. 7.

(b) **Constitution of India (1950), Arts. 53, 73, 154 and 162 — Executive and judiciary — Conflict — Duty of executive.**

Satyanarayana Rao J.: The Court is not concerned with person or personalities and has to administer justice according to law without consideration of the character of the person who invokes its jurisdiction. The executive is as much bound to obey the law as an ordinary citizen and show respect to the law. The judiciary being only another limb of the Government it is as much the duty of the executive as that of anybody else to maintain the dignity of the court and see that its prestige is not lowered in the eyes of the public by flouting the judgment of the Courts: AIR 1948 Bom 417; AIR 1949 Pat 247 and AIR 1915 PC 106 (2), Rel. on. (Paras 9, 10)

Raghava Rao J.: While this constitution does not in so many words provide for a separation of powers in the strict sense of the term between the legislature, the judiciary and the executive, there are specific provisions in regard to the three heads of powers embodied in different portions of the Constitution which have to be read together. Whatever the relative degrees of importance enjoyed by the three organs of State the powers of each one of them have to be exercised as fundamentally subject to the provisions of the Constitution relating to the organ individually as well as to the provisions relating to the other organs. (Para 22)

Whatever the limits within which the judiciary in this land can function in relation to the Union Parliament and State Legislatures and whatever the residual powers of the executive under the Constitution over and above what is defined in the specific articles thereof there is no doubt that the executive must needs respect the decisions of the judiciary & can only avoid as in England, their due operation by appropriate legislation. In India as in England it is the business of the Courts to apply the Constitution and the laws and in cases properly brought before them the judiciary exercises control over the executive action in so far as to refuse to uphold as valid any act of government which is not supported by the Constitution or by some law. The authority of the Courts as regards the executive action arises when the executive exceeds its authority in which case the agents and instruments through which the action is carried out are personally responsible to law and the Courts. AIR 1915 PC 106 (2), applied. (Para 23)

While on the one hand it is not the business of the courts to pass judgments on the policy of executive action, the executive on the other hand has no authority to pass verdict upon the validity of a judgment but must assist in enforcing the judgment even though the executive may believe it to be erroneous. (1916) 1 KB



595; AIR 1931 PC 248 and 22 Mad 270 (PC),  
Ref. to. (Para 23)

It is the respect that is accorded by one organ of the State to the others that ensures that healthy working of the Constitution which is the acid test of its merits whatever the paper value of its provisions. (Para 22a)

(c) **Constitution of India (1950), Art. 226 — Habeas Corpus — Nature of proceedings — Jurisdiction of Court to consider validity of orders passed subsequent to institution of proceedings — (Criminal P. C. (1898), S. 491).**

The analogy of civil proceedings in which the rights of parties have ordinarily to be ascertained as on the date of the proceedings cannot be invoked in habeas corpus proceedings. It is open to the court in such proceeding to consider if there was a valid order which came into existence later directing the detention and decline to release the person even if the earlier order was invalid: AIR 1949 Pat 247 and AIR 1945 FC 18, Rel. on.

(Paras 11 and 19)

Anno: Civil P. C., App. III, Constitution of India, Art. 226 N. 10; Cr. P. C., S. 491 N. 7, Pt. 29.

(d) **Constitution of India (1950), Art. 226 — Habeas corpus — Order of court declaring detention invalid — Effect on valid order of detention passed before pronouncement of judgment but not brought to notice of court — (Criminal P. C. (1898), S. 491).**

Satyanarayana Rao J. (Raghava Rao J. dubitante): A writ of habeas corpus is concerned with the justification for detention. The justification may be based upon an order originally passed or an order which was subsequently made and brought to the notice of the Court. But the essence of the matter is that if an order came into existence before the judgment is pronounced, it is the duty of the Government to bring it to the notice of the Court. The effect of the omission to do so would be that the order of the court directing the release of the detenu would automatically discharge the fresh order passed before the pronouncement of the judgment and the Government thereafter would be precluded from putting forward the fresh order of detention in justification of the arrest and detention of the detenu. AIR 1949 Pat 247, Rel. on.

(Paras 11 and 26)

(e) **Public Safety — Preventive Detention Act (1950), S. 3 A — Arrest and service of order not simultaneous — Effect.**

Raghava Rao J.—Non-service of detention order simultaneously with the arrest does not necessarily render the arrest illegal. It is all a question of substance whether subsequent service is or is not a sufficient compliance with law. (Para 14)

(f) **Public Safety — Preventive Detention Act (1950) S. 3 — Successive orders passed on same grounds — Legality.**

Raghava Rao J.—An order of detention can be passed against a person who is already under detention and there is nothing inherently illegal about successive orders passed on the same grounds where the sufficiency of the grounds is not examinable by Courts: AIR 1945 FC 18 Rel. on.

(Para 17)

(g) **Public Safety — Preventive Detention Act (1950), S. 3 — Judgment declaring deten-**

**tion order invalid — Government's failure to appeal — Bona fide of fresh order of detention.**

Raghava Rao J.—The failure of the Government to take steps to appeal against the order of the High Court declaring the detention order under which the detenu is detained invalid is not proof of the mala fides of the fresh order passed by it. If the Government felt satisfied about the emergency of the situation so far as to resort to the speedier course of a fresh order instead of the normal remedy of an appeal which might involve delay in making sure of the detenu if he once gets off, they may do so provided their action is well founded otherwise. Their failure to appeal cannot render the order invalid or illegal. (Para 20)

M. K. Nambiar, for Messrs. Row and Reddy, for Petitioner; the Advocate General with Public Prosecutor, for the State.

REFERENCES: Courtwar/Chronological/, Paras

('99) 22 Mad 270: (26 Ind App 16 PC)	23
('15) 1915 AC 750: (AIR 1915 PC 106(2) )	9, 23
('31) 1931 AC 662: (AIR 1931 PC 248)	23
('45) 1945-2 Mad LJ 325: (AIR 1945 PC 156)	7
('45) AIR 1945 FC 18: (46 Cri LJ 559)	11, 14, 17, 19
('48) AIR 1948 Bom 417: (49 Cri LJ 579)	10
('49) AIR 1949 Cal 633: (51 Cri LJ 169 FB)	17
('48) Appeal No 13 of 1948 (Mad)	15
('49) ILR (1949) Mad 377: (AIR 1949 Mad 307: 50 Cri LJ 405 SB)	7, 17
('49) 1949-2 Mad LJ 310: (AIR 1950 Mad 162: 51 Cri LJ 525)	7
('51) Cri MP No 153 of 1951, D/- 22-2-1951 (Mad)	1, 3, 9, 14, 17, 24
('50) AIR 1950 Orissa 107: (51 Cri LJ 891 FB)	17
('49) AIR 1949 Pat 247: (50 Cri LJ 518)	10, 11, 19, 26
(1917) AC 260: (86 LJ KB 1119)	7
(1942) AC 284: (111 LJ KB 24)	7
(1942) AC 206: (110 LJ KB 724)	7
(1912) 1 Ch 173: (81 LJ Ch 105)	9
(1911) 1 KB 410: (80 LJ KB 531)	9
(1916) 1 KB 595: (85 LJ KB 630)	23
(1674) 3 Keb 279: (84 ER 720)	21
(1627) 3 State Tr 1	21

SATYANARAYANA RAO J.: On the 22nd February 1951, this Court directed that the petitioner should be set at liberty forthwith and at that time the petitioner was present in court. We reserved judgment in Crl. M. P. No. 153 of 1951 in which that order was made on 19th February 1951. According to a note made by the Bench Clerk, the delivery of our judgment was completed on the 22nd February 1951 at 11-40 a.m. The petitioner then asked us whether he was free to go as the police officers were present in court. We then told him that he was at liberty to go wherever he pleased as he became a free citizen. The petitioner has filed an affidavit in support of this petition, which is also supported to some extent by the affidavit filed by Mr. V. G. Row, an advocate of this court, who was advising the petitioner in several proceedings before this court and was present in court when Crl. M. P. No. 153 of 1951 was argued and when we pronounced judgment on the 22nd February 1951. The events that transpired subsequently have been narrated in these two affidavits and the facts are not seriously controverted by the respondents.



Immediately after our order was pronounced, the petitioner, along with his advocate, Mr. Row, went out of the court hall with the intention of proceeding to the office of the advocate in the Andhra Insurance Buildings in Thambu Chetti Street, Madras. After they proceeded about ten yards from the gate of the High Court two C. I. D. officers who followed them from the High Court told the petitioner that he was under arrest as there was an order of detention against him. This happened within five minutes after our judgment was pronounced. At the time of the arrest, the petitioner was not shown the order of detention but was taken in a car to the office of the Commissioner of Police, Egmore, Madras. In the car the order was shown to the petitioner. He was taken to the office of the Commissioner of Police and the order of detention was served on him at the office of the Commissioner at about 12-30 p.m. He was thereafter taken to the Penitentiary where on the same day he swore to an affidavit before an Honorary Presidency Magistrate, Madras, setting out these facts and contending that his arrest and detention were clearly intended to flout the order of this court and that it was illegal. He filed this petition on 22-2-1951 under Art. 226 of the Constitution of India and Section 491 Crl. P. C. to order his production before this Honourable Court and to set him at liberty by issuing a writ of habeas corpus. He was taken to the Cuddalore Jail on the morning of 23-2-1951, in a Police Van.

(2) The petition and affidavit were placed before us on the 23rd for orders by the direction of the Honourable the Chief Justice. The matter was posted to 26th February 1951 as the petitioner wanted permission to argue the petition for the purpose of issuing a rule nisi and it was taken up for consideration on that day. We admitted the petition after hearing arguments and issued a rule nisi. As the learned Advocate General was present in court at that time, in consultation with him, the petition was posted for final disposal on 5th March 1951.

(3) Two counter affidavits were filed on behalf of the respondents one by the Deputy Secretary to Government, Public Department and the other by the Assistant Commissioner of Police, Intelligence Section, Madras City Police. The Assistant Commissioner in his affidavit states that he was present in the High Court when the order releasing the petitioner was pronounced by this Court and under instructions of the Superintendent of Police, Special Branch, C. I. D. he arrested the petitioner in pursuance of an order of detention, a copy of which, intended to be served on the petitioner was presumably in his possession and custody at that time for he admits in the affidavit that after he got into the car along with the petitioner after arresting him, he showed the order to the petitioner. From this affidavit, it is a legitimate inference to draw that the order of detention which is now questioned in these proceedings, bearing date 22-2-1951 was made before we pronounced our judgment on that date. This fact is admitted in the further affidavit filed on 14-3-1951 by the Deputy Secretary. This fact was not disputed and indeed, it could not be disputed. The Deputy Secretary, in his long counter affidavit, states the circumstances under which the order of detention was passed on 22-2-1951. It would be convenient to

quote his own language relating to this matter. He says in paragraph 2:

"The petitioner had moved the High Court in Crl. M. P. No. 153 of 1951 for a writ of Habeas Corpus challenging the legality of his detention, his main contention being that the order passed by the Government under S. 12 (2) of the Preventive Detention Act, 1950, continuing his detention under the said Act did not specify the period of his detention. After the arguments in the case were over, the Government were informed by their legal advisers that the petitioner would, in all probability, be released by the High Court on that technical contention. In view of the petitioner's antecedents & his violent nature as manifested by him in his activities both when he was at large and when he was inside the Jail, the Government were satisfied that in the event of his being released by the High Court, the petitioner would go underground at once and carry on subversive activities prejudicial to the security of the State and the maintenance of public order. Immediate action was therefore called for; and after full consultation with their legal advisers the Government issued a fresh order of detention under the Preventive Detention Act, 1950, on 22nd February 1951."

(4) After we reserved judgment in this case, in view of certain events which happened in court, it became necessary to direct the Deputy Secretary to give particulars in an affidavit on two questions:

- "1. Who the legal advisers were that were consulted and were referred to in paragraph (2) of the counter affidavit;
2. the reason why the fact that an order of detention which was made before we pronounced the judgment was not communicated to the legal adviser, i.e., the learned Advocate General who was present in court when we pronounced our judgment."

These particulars have been given by the Deputy Secretary and he states in the affidavit now filed as follows:

- "1. In connection with the reference to "Consultation with the Legal Advisers of the Government" in paragraph 2 of my original affidavit, the legal Advisers referred to, and, who were consulted, were the learned Advocate General, the learned Public Prosecutor, and the Secretary to the Government of Madras in the Legal Department."
2. On 22nd February 1951, the order of detention was passed at 10-30 a.m. and it did not at all occur to Government then that it was necessary to communicate the fact of making the order to the learned Advocate General or the Public Prosecutor."

(5) In the counter affidavit, the Deputy Secretary denies also the allegation made by the petitioner that the detention order was passed by the Government mala fide in order to flout the orders of the High Court and asserts that it was passed solely with a view to prevent the petitioner from acting in a manner prejudicial to the security of the State and the maintenance of public order. After setting out fully the state of affairs existing on 22-2-1951 before the Government passed the order, the rest of the affidavit sets out the long history of the petitioner's detention in custody for one reason or



another from 1947. The grounds of detention communicated to the petitioner on 24-2-1951 are substantially the same grounds on which the previous order of detention was made. As the learned counsel for the petitioner finally confined his arguments to the question whether the order of detention was bona fide or not, it is unnecessary to advert to the other allegations in the counter affidavit or to the grounds of detention.

(6) At the outset, no doubt, learned counsel for the petitioner attacked some of the provisions of the Amending Act of 1951 as being ultra vires on the ground that they infringed the provisions of sub-clause (7) of Art. 22 of the Constitution; but he later abandoned that contention. The learned Advocate General also stated that he is not going to rely upon the first order of detention read with Act IV of 1951 in this proceeding (to?) justify the legality of the order of detention which is now challenged. The point for consideration in these proceedings, therefore, is whether the order of detention made by the Government on the 22nd February was a bona fide one and whether the order of release passed by this court on 22-2-1951 does not affect the legality of the fresh order of detention made on the same day before our judgment was pronounced and it does not in our judgment automatically terminate the fresh order of detention as well.

(7) That an order of detention passed under the law relating to preventive detention can be challenged on the ground that there is lack of bona fides on the part of the authority exercising the statutory power is established by the Full Bench decision in — '*Narayanaswami v. Inspector of Police*', ILR (1949) Mad 377 and is stated as proposition (c) at page 427 by the learned Chief Justice and at page 454 by *Govindarajachari J.* A statutory authority, it is established law, must always be exercised honestly and without fraud or malice. This view is based upon the observations in — '*Liversidge v. Anderson*', (1942) A.C. 206, — '*Greene v. Secy. of State for Home Affairs*', (1942) A.C. 284 and — '*Emperor v. Sibnath Banerji*', 1945 2 Mad L J 325 (PC) and — '*Rex v. Haliday*', (1917) A.C. 260. See also the observations of *Viswanatha Sastri J.* in — '*Mani v. District Magistrate, Mathurai*', 1949-2 Mad L J 310, at page 326 where the point was considered by the learned Judge. The power, therefore, should be exercised bona fide and it should not be a fraudulent or colourable exercise of the power and the power conferred under the Act should not be abused with a view to gain an ulterior object; in other words, it should not be a mala fide exercise of the power. It may not be possible to state when and under what circumstances, it can be inferred that the power was exercised mala fide. In my opinion, it is a question to be decided according to the circumstances of each case & no hard & fast rule can be laid down.

(8) The practice in England in matters relating to habeas corpus seems to be that when a rule nisi is issued, a return is made containing a copy of all the causes of the prisoner's detention. It should also state the facts relied on as constituting a valid ground for detention of the person alleged to have been illegally detained. It is open if sufficient ground is shown, to amend or substitute another return by leave of the court or Judge. The following passage at page 737, paragraph 1258 of Hals-

bury's Laws of England, Hailsham Edn. Vol. 9 may be quoted:

"A prisoner who has been discharged from illegal custody on habeas corpus cannot be again imprisoned or committed for or in respect of the same offence; but is not privileged from being immediately rearrested on criminal process in relation to some matter other than that in respect of which he has been discharged, though he is privileged from rearrest on civil process whilst returning to his place of abode from the court discharging him."

All this applies to a warrant issued to arrest the person after an order of discharge was made by the court. An order of detention passed when the judgment in an application for habeas corpus was pending, stands on a different footing. I shall presently consider the effect of the order of release on the fresh order of detention made on the same day.

(9) Is the contention of the petitioner that the order lacks bona fides and was made with the intention of flouting the order of this court and disobeying it well founded? The situation at the time the order was made by the Government, was, they were uncertain about our decision and even if they gathered that our decision was going to be against them, they could not be certain about the ground or grounds on which our judgment was going to be rested. A perusal of the judgment in Crl. M. P. No. 153 of 1951 would indicate that arguments before us in that petition covered a wider ground. The validity of the grounds to sustain the order of detention, the power of this court to consider the matter afresh in view of the order of the Supreme Court, were all matters, which were debated before us and on which we took time to consider our judgment. There was also the additional argument that since the decision of the Supreme Court dismissing his petition in September last, fresh circumstances had arisen and that we were not precluded from considering the legality of the order of detention. It was therefore impossible for any person to have made up his mind regarding the basis of our judgment.

According to the counter affidavit of the Deputy Secretary, even the legal advisers of the Government did not definitely assure them that the order of this court is going to be rested on a technical ground that the detention was illegal as the period of detention was not specified in the order. All that the legal advisers stated to the Government, according to this counter affidavit, was that in all probability the petitioner would be released on the technical contention. That does not exclude the possibility of the order of detention being set aside by us on all or any of the grounds that have been urged before us.

Was there then any basis for the Government to make up its mind that our judgment was going to be rested on technical grounds and that therefore they would be entitled to pass a fresh order of detention as there was going to be no pronouncement by this court on the legality of the grounds or on the question whether there was fresh material or change in situation which warranted the release of the detenu? Without actually seeing the judgment or hearing it, it was impossible, in my opinion, for any person much less the legal advisers of the Government or even the Government, to



have made up its mind regarding the grounds on which we were going to set aside the order of detention even if it was evident that we were going to set it aside. It does not stop there. Having made the order, they have communicated it to the Superintendent of Police, Special Branch, C. I. D. who in his turn issued instructions, even, before our judgment was pronounced to the Assistant Commissioner, to arrest the petitioner, in pursuance of the order of detention which can only mean that if we should release the petitioner, he should immediately be rearrested. This circumstance is beyond doubt as is clear from the affidavit of the Assistant Commissioner of Police itself. He stated in clear unambiguous terms that he had received instructions from the Superintendent of Police, which must only mean before he came to the High Court as he admits he was present in the High Court when the order was pronounced by this court and what is more, he had in his pocket at the time a fresh order of detention. The stage therefore was set for the arrest of the petitioner immediately after our order of release was pronounced and he was set at liberty. What is the justification for these preparations and for this order of detention after taking legal advice? It can only be to flout the order of this court, if it should go against them and to disobey it by arresting the petitioner before he enjoyed freedom for a few minutes.

The reason urged for making the order is that in the event of the petitioner being released by the High Court, he would go underground at once and carry on subversive activities prejudicial to the security of the State and maintenance of public order. It, therefore, according to the affidavit, called for immediate action by passing an order of detention. The affidavit also says that the detenu would go underground thereby suggesting that the moment he steps out of the compound of the High Court, he is a danger to the public order and to the security of the State and that it would be almost impossible to rearrest him & that the Government were certain that he would carry on subversive activities prejudicial to the security of the State and the maintenance of public order. It is rather difficult to accept this as a reason justifying the conduct of the Government in making an order of detention with such haste on that day and making arrangements to rearrest him immediately after the judgment was pronounced. Suppose the petitioner goes to his own district or to some other part of the State, was it impossible for the Government with its police, regular and special, and its C. I. D. establishment to have traced and arrested a single individual if he is going to be a danger to the State? Does it mean that as against this one man, the entire establishment of the police would be impotent and incapable of tracing him out and arresting him? Did the situation really demand that he should not be allowed to enjoy freedom even for a few minutes? Even if it is assumed that the situation was so precarious and dangerous were there not other methods of catching him and depriving him of his freedom? And was it necessary to make an order of detention, almost suggesting that whatever the order of the High Court may be "they were going to circumvent it by their order of detention passed and kept ready".

If, as was strenuously contended on behalf of the Government by the learned Advocate Gene-

ral, the Government acted in a perfectly legal and constitutional manner and really felt that there was a serious danger to the State of Madras by the release of this man by the High Court, why was not the fact, that a fresh order of detention was made, brought to our notice at least on the day on which we pronounced our judgment. The affidavit of the Deputy Secretary dated the 14th March 1951 states that the order of detention was passed at 10-30 a.m. on the 22nd February 1951. This order was issued, as stated in the counter affidavit, after full consultation with their legal advisers, viz., the learned Advocate General, the learned Public Prosecutor and the Secretary to the Government of Madras in the Legal Department. At the time we pronounced our judgment on that day, the Assistant Commissioner of Police was present in court with instructions from the Superintendent of Police, Special Branch, C.I.D. Madras to arrest the petitioner in pursuance of the order of detention after his release. We proceeded to deliver the judgment at about 10-50 a.m. The Assistant Commissioner of Police was in court by that time, if not earlier. Between the time of the passing of the order at 10-30 a.m. and his presence in court, he had received instructions from the Superintendent of Police, Special Branch, C. I. D. to arrest the petitioner in pursuance of an order of detention which he must have come into possession by then as he showed it to the petitioner when he was in the car. The order actually served on the petitioner, which was produced in court, shows that it was communicated among others to the Superintendent of Police, Special Branch, C. I. D. Madras. So within fifteen minutes time, the order was communicated to the Superintendent of Police with a copy and he issued instructions after sending a copy of the order of detention to the Assistant Commissioner to arrest the petitioner after release. The quick movement of these events within a very short interval of fifteen minutes indicates that the Government moved in the matter with surprising alacrity to give effect to the order of detention.

Be that as it may, the order was undoubtedly within the knowledge of the Deputy Secretary and the Assistant Commissioner of Police, the latter of whom was actually present in court and yet no steps were taken to bring the order to the notice of this court and according to the affidavit of the Deputy Secretary dated 14th March 1951, it did not occur to the Government then that it was necessary to communicate the fact of making the order to the learned Advocate General or the Public Prosecutor. This is really an unconvincing explanation. In view of the affidavit now filed by the Deputy Secretary it may be taken that the order of detention actually passed i.e., the fresh order, was not communicated to the Advocate General on that day. The counter affidavit originally filed and now amplified establishes that the fresh order of detention was issued by the Government "after full consultation with their legal advisers", viz., the learned Advocate General, the learned Public Prosecutor, and the Secretary to the Government of Madras in the Legal Department. The consultation could only have been whether it was proper for the Government to make a fresh order, particularly in view of the fact that our judgment was pending. The propriety to be considered could only be with reference to the situation going to be created if



we were to direct the release of the petitioner by our judgment. They had no definite knowledge that our judgment was going to be based upon any particular view. Whatever other questions may be that would have received attention at that consultation the Government and its legal advisers must have weighed and considered the propriety of passing a fresh order so as in effect to prevent the operation of our judgment. Whether the arrest could be made within or outside the premises of the High Court must also have received attention. It was a "full consultation" in the sense that all aspects of the various questions were discussed and considered and it was then determined that a fresh order of detention should issue. It must have been a conference of the officials of the Government and the legal advisers. All of them must have put their heads together to decide the difficult question of the propriety of issuing a fresh order and its terms and the manner and mode of giving effect to it. Though the fair copy of the order and its issue to the Police was not within the knowledge of the Advocate General, in view of the categorical statement of the Deputy Secretary in the affidavit, it is obvious that the legal advisers were aware of the fact that the Government had made up their minds to issue a fresh order of detention. What remained to be done was merely the formal act of issuing a fair order.

The distinction between knowledge of the decision reached by the Government in consultation with the legal advisers and the knowledge of the existence of a fair order is not very much. It should have at least put the legal advisers on enquiry to ascertain whether the decision reached sometime that day to issue a fresh order of detention so as to prevent practically giving effect to our order of release took the shape of a fair order or not. The omission by the Government to bring to our notice the fresh order passed after due deliberation on that day prior to the delivery of our judgment which was communicated even to the police to put it into effect is a serious circumstance reflecting upon the bona fides of the Government in making the order.

It was contended that the Government had discretion under the statute to make a fresh order of detention and this power could be exercised validly by them. To a situation where there is a conflict between the exercise of the power by the Government and by the Judiciary, the law stated by Sir George Farwell in the judgment of the Privy Council in the — '*Eastern Trust Co. v. Makenzie, Mann & Co. Ltd.*', (1915) A. C. 750 applies. It was a case in which when a person was restrained by court from receiving certain monies from the Government, received the money from the Government notwithstanding the order of the court and the Government claimed that they were entitled to pay the amount as they were given such a power over the subject-matter by the legislature and that the court had no ground for interfering at all directly or indirectly with the exercise of such a discretion by the executive. At page 759, Sir George Farwell observes:

"If it was the case of a private individual, he would be clearly liable to make good the wrongful payment and to purge his contempt. In the case of the Crown there is no ground for Idington J's proposition that the Government may fairly say that they were given

such power by the Legislature over the subject-matter and that the courts have no ground for interfering at all, directly or indirectly, with the exercise of such a discretion. There is nothing on which to found the existence of the alleged discretion or to support a decision which pronounced the Executive Government free to dispose of money the right to which is sub judice inter partes and held in medio by the order of the court.

The second point taken by Idington J. is equally untenable and even more important. The non-existence of any right to bring the Crown into court, such as exists in England by petition of right, and in many of the colonies by the appointment of an officer to sue and be sued on behalf of the Crown does not give the Crown immunity from all law, or authorise the interference by the Crown with private right at its own mere will. There is a well-established practice in England in certain cases where no petition of right will lie, under which the Crown can be sued by the Attorney General and a declaratory order obtained, as has been recently explained by the Court of Appeal in England, in — '*Dyson v. Attorney General*', (1911)-1-K. B. 410 and in — '*Burghes v. Attorney General*', (1912)-1 Ch. 173. 'It is the duty of the Crown and of every branch of the executive to abide by and obey the law. If there is any difficulty in ascertaining it the courts are open to the Crown to sue, and it is the duty of the Executive in cases of doubt to ascertain the law, in order to obey it, not to disregard it'. (The underlining (here in " ") is mine).

If, as is now contended, the situation was such that the detenu, the petitioner, was a dangerous communist and should not be allowed to be set at liberty, if we were to reach the conclusion in our judgment that the prior order of detention was defective only on a technical ground, it was open to the Government, as pointed out by Farwell J. in the passage underlined (here in " ") above, to state frankly to this court, immediately after the judgment was pronounced that in view of the imperative necessity and immediate danger to the State its security and peace and in view of our judgment not based on merits, but only on a technical point, that they propose to pass a fresh order of detention and that to meet such a contingency they had prepared one and wished to proceed to arrest the petitioner in pursuance of that order. The Government is as much bound to obey the law as an ordinary citizen and show respect to the law. In view of the circumstances considered above which speak for themselves, it is my opinion clear that the fresh order of detention lacks bona fides. I regret the conclusion but the facts leave no option.

(10) I adopt in this connection the language of Desai J. in — '*Hirji Shivram v. Commissioner of Police, Bombay*', AIR 1948 Bom 417, where the learned Judge observed in a similar situation:

"Where then a situation arises which lends itself to the construction that the action of the police commissioner is an attempt to supersede the order of the Magistrate, courts of justice must be vigilant to see that justice is not brought into ridicule and rendered impotent and that a tendency towards autocracy does not prevail in the minds of the representatives of democracy."



To similar effect are the observations of Das J. in — 'Subodh Singh v. Province of Bihar', AIR 1949 Pat 247, where under somewhat analogous circumstances, the learned Judge observed:

"Even if there were any practical difficulties, they cannot override the law; nor can they override the basic principle of the liberty of the subject on which the ordered progress of society and the state depends. I consider it necessary that it should be made clear at once for all that no officer can flout or disobey the order of this court for the release of a prisoner. If any officer, however highly placed he may be, does so intentionally, he does so at his peril."

With great respect to the learned Judges of the Bombay and Patna High Courts, I have no hesitation in accepting these pronouncements. It must be observed, as I observed during the course of the arguments, that this court is not concerned with persons or personalities and has to administer justice according to law without consideration of the character of the person who invokes our jurisdiction and if he is entitled to his liberty under the law, it should not be denied to him on a consideration of expediency. The Judiciary is after all another limb of the same Government and it is as much the duty of the executive as that of anybody else, to maintain the dignity of this court and to see that its prestige is not lowered in the eyes of the public. The situation on the facts of this case, is certainly regrettable, but it cannot be helped.

(11) The Patna High Court in — 'Subodh Singh v. Province of Bihar', AIR 1949 Pat 247 has taken the view that when the court is called upon to exercise its jurisdiction under S. 491, Cr. P. C. it is not restricted to a consideration of the validity of the order of detention which was the subject-matter of the petition but if subsequently before the judgment was pronounced, another order of detention was made, the validity of that also can be considered. This view is based on the decision of the Federal Court in — 'Basanta Chandra v. Emperor', AIR 1945 F. C. 18, where it was pointed out that the analogy of civil proceedings in which the rights of parties have ordinarily to be ascertained as on the date of the institution of the proceedings cannot be invoked in habeas corpus proceedings. It is open to the court in such a proceeding to consider if there was a valid order which came into existence later directing the detention and decline to release the person even if the earlier order was invalid. If, however, the Government did not disclose the existence of such an order and allow the judgment of the court directing the release of the detenu to be pronounced, the second or the fresh order of detention would also automatically cease to have operation. As pointed out, if 'once a return to the writ is made it is a recognised practice of the courts in England to permit an amendment of the return or a substitution of the return by leave of the court. It was perfectly open to the Provincial Government to have pleaded even before we pronounced the judgment that there was a subsequent order of detention passed by the Government which is not vitiated by the defect of not stating the period of detention. But it has not done so.

We are concerned in a writ of habeas corpus with the justification for the detention. The justification may be based upon an order originally passed or an order which was subsequently

made and brought to the notice of the court. But the essence of the matter is that if an order came into existence before the judgment is pronounced, it is the duty of the Government to bring it to the notice of the court. If the Government does not produce it and does not seek to justify the detention on that ground, the fault is that of the Government and they must thank themselves for their default. It is not open to the Government thereafter to put forward the fresh order of detention for arresting and detaining the person if the judgment is pronounced. As observed by the learned Judge, Das J. in — 'Subodh Singh v. Province of Bihar', AIR 1949 Pat 247:

"I am clearly of the view that it was the duty of the Provincial Government to bring to the notice of this court all orders of detention which might justify the detention of the person whose application for release was being considered by this court on 7th October 1948."

In an earlier part of the judgment, the learned Judge stated:

"If the Provincial Government have a second order of detention, which would justify the detention of the prisoner, it is clearly the duty of the Provincial Government to bring forward that order to the notice of the court."

Of course, these observations are confined to antecedent orders of detention passed before an order of discharge made by the court but not to orders of detention passed on a later date. I do not see any reason nor is any sufficient ground urged for not accepting the principle of that decision and apply it to the present case. In view of this decision it follows that apart from the question of the mala fide nature of the order, our order directing the release of the petitioner on the 22nd February 1951, automatically discharged the fresh order of detention passed earlier on that day. For these reasons, I am of opinion that the rule nisi must be made absolute and the petitioner should be set at liberty forthwith.

(12) RAGHAVA RAO J.: This case has raised rather embarrassing questions for argument of the learned Advocate General and rather far-reaching issues for determination of the court. The material facts have been stated in full and, with respect, correct detail by my learned brother and need not be repeated by me. They are by no means complicated and are more or less even beyond the pale of controversy. The difficulty involved in the case which I have rather keenly and anxiously felt is as to the inferences from them so far as such inferences are pertinent to the decision of some of the questions debated. The difficulty has only stood aggravated and not lightened because of the psychological considerations on which the inferences are in 'rerum naturae' dependent. An analysis and ascertainment of the motives at the basis of individual conduct is a task hard enough, for not even the devil can dive into the mind of man. Harder still must of course be an analysis and ascertainment of the motive springs of action of that theoretically abstract but practically concrete, corporate body known as the Government which is the supreme executive of any State functioning through its many officers in its many departments of activity.

(13) Before I proceed to deal with the questions arising for decision, I must express my



genuine appreciation of the commendable restraint and sobriety with which the learned Advocate General, who was called upon, on the very second day of his assumption of office, to deal with a case of this complex kind, has conducted himself throughout the argument, with due regard to his dual position as the accredited head of a Bar responsible in the matter of its conduct to this court, as the highest Court of the Province, who is required generally to accept with respect any remark emanating from this Bench, right or wrong, and as the accredited champion of the highest official rank of the powers and privileges of the Government who is sometimes called upon to press and stress such powers and privileges if somewhat unduly. I must also declare, to all whom it may concern, that the judgment of this Court even on such delicate questions as arise here shall never issue except in accordance with the oath of our high office, that is, except in a true spirit of faith and allegiance to the Constitution and its laws which we have to uphold and in performance of our duties to the best of our ability, knowledge and judgment, without fear or favour, ill-will or affection.

(14) Mr. Nambiar for the petitioner has raised as many as five points for our consideration which, according to his formulation are as follows:

1. That the order of detention now challenged must be treated as void 'ab initio' because it was intended to flout our decision in Cri. M. P. No. 153 of 1951.
2. That the order is invalid because it contravenes the provisions of the Constitution which ensure for the High Court its power to issue the writ of habeas corpus.
3. That the Government in issuing the order acted mala fide, that is, without the proper kind of satisfaction under the relevant statute (Central Act IV of 1951) and that, therefore, the order is liable to be quashed by us.
4. That there was no service of the order on the petitioner simultaneously with his arrest and that the arrest is, therefore, illegal.
5. That Sec. 12(1) of the Amending Act (Central Act IV of 1951) is ultra vires and that, therefore, the order of detention based upon it is lacking in validity.

This last contention although persisted in for the better part of a whole day was eventually abandoned by the learned Counsel for the petitioner. We are not, therefore, called upon to pronounce upon the validity of the contention. Nor are we called upon seriously to notice the fourth point raised before us. Non-service of the detention order simultaneously with the arrest does not necessarily render the arrest illegal. It is all a question of substance, whether subsequent service is or is not sufficient compliance with law. In the present case there was no such long or even seriously noticeable interval between the actual arrest and the exhibition of the order to the petitioner in the van as may nullify the process of the Government. It thus remains for me to deal only with the three other points.

It may be mentioned at the outset that the first and third points are allied to each other in the sense that if we hold in favour of the first, we must necessarily hold in favour of the third. The contention of the learned counsel

on these points comes to this: that the conduct of the Government and its officers in promulgating this order of detention was inspired by malice and stands thereby vitiated. Malice in law, generally can mean nothing more than an intention to injure another by doing an act in disregard of the latter's right wrongfully, & wilfully, without reasonable & probable cause. It does not necessarily mean personal illfeeling or spite. Further "mala fides" & "malice" in relation to the contention before me are cognate terms expressive of the legal idea of an intention on the part of the Government to misuse or abuse the power vested in it and not necessarily connotative of moral turpitude on the part of the Government or of anybody connected with it. Mr. Nambiar could not and did not, seriously suggest any kind of personal ill-feeling or spite between any officer of the Government and his client. He did not and could not, therefore, frame his contention as on the basis of anything more than an ulterior intention on the part of the Government to somehow flout our order in Cri. M. P. No. 153 of 1951. That if such circumvention were made out the order of detention must be held to be lacking in the satisfaction on the part of the Government requisite under the Statute cannot be seriously disputed. It is open to the detenu as held in — '*Basant Chandra v. Emperor*', AIR 1945 F. C. 18 to show that the order was a fraudulent exercise of the power vested in the Government. The burden of showing that is on him and he can only sustain the burden by successfully rebutting the presumption of bona fides on the part of the Government.

(15) This Bench had occasion recently in — '*App. No. 13 of 1948*' to consider want of bona fides alleged in relation to a power vested in the Government to acquire property under the Land Acquisition Act. I had occasion then to observe as follows referring to the relevant passages in Lord Halsbury's *Laws of England*, 2nd Edn:

"As to the law on the matter, I wish to make it clear that, as I apprehend it, in the case of fraudulent execution of a statutory power as in the case of fraudulent execution of a power to appoint under a deed or will or of any common law power, the fraud does not necessarily imply any moral turpitude, but consists in the exercise of the power for purposes foreign to those for which it is in law intended. Persons exercising such a power cannot be held responsible and the exercise of such power by them cannot be held invalid except on proof of mala fides or indirect motive or of some improper conduct materially affecting such exercise."

Applying these tests of irrelevant purpose, indirect motive and improper conduct to the situation with which we are concerned, what we are called upon to decide is firstly, whether the purpose for which the power has been exercised by the Government is such irrelevant purpose and secondly, whether the motives which actuated the Government in making the order are such indirect motives, and thirdly whether there is improper conduct of the Government proved materially affecting the exercise of the power.

(16) The purpose of the arrest is said to be the prevention of activities prejudicial to the security of the State on the part of the petitioner. Since the soundness of the grounds of



detention was not pronounced upon by us in our judgment in Crl. M. P. No. 153 of 1951, and has not been canvassed before us now, I am prepared to assume that the purpose behind the order is not foreign to the power exercised through it. But then what of the indirect motive and improper conduct alleged against it by the petitioner which still remain for consideration?

(17) As to motive, what is contended by the learned counsel for the petitioner, to use his own language, is that the order of detention was intended to flout our order on Crl. M. P. No. 153 of 1951. Although the use of the word "flout" in this context was not accepted by the learned Advocate General it could not be disputed by him that the order was intended to render our judgment in Crl. M. P. No. 153 of 1951 of no force and effect whatsoever in relation to the release of the petitioner which would automatically follow on it. The learned Advocate General has given us reiterated assurances that the Government never intended to disrespect our order but only desired to devise some further method of ensuring the continuance of the detention of the petitioner in the interests of public safety, which would be a legitimate means of getting over the difficulty created by our judgment. If the mode of circumvention of our judgment resorted to by the Government is something substantially justified by the law I do not think we can pronounce the order as void at the inception as contended by Mr. Nambiar. The law on the point is perfectly clear. That an order of detention can be passed against a person who is already under detention and that there is nothing inherently illegal about successive orders passed against him on the same grounds, where the sufficiency of the grounds is not examinable by the court has been ruled by the Federal Court in — '*Basanta Chandra v. Emperor*', AIR 1945 F. C. 18. Again, that where the court has declared the detention of a person to be without justification upon the merits, a fresh order of detention made in order to circumvent the decision would be mala fide has been decided by the Full Court of Orissa in — '*Prahalad Panda v. Province of Orissa*', AIR 1950 Orissa 107 (FB). Further, a Full Bench of five Judges of the High Court of Calcutta have ruled in — '*Bupendra v. Chief Secretary, Govt. of West Bengal*', AIR 1949 Cal 633 (FB) that if however the decision proceeded simply on the ground that the law under which the order had been made was invalid or the order was irregular in form, a fresh order of detention in a valid form or under fresh legislation would not be necessarily mala fide. Justification for the order in the present case is sought by Government not in any fresh legislation like Act IV of 1951 (Central) as conceded by the learned Advocate General but in the circumstances that our judgment in Crl. M. P. No. 153 of 1951 did not proceed on a consideration of the grounds of the petitioner's detention but only on the technical ground that there was a time limit required by the law to be fixed in the original as well as the confirmatory order of detention under S. 3 and S. 12 respectively of the Preventive Detention Act, IV of 1950. It is contended that the order under challenge was thought of in order to set right the technical defect of the previous order of detention as it was competent to Government so to do, after it had been informed of the expectation of the learned Advocate General at the conclusion of

the argument before us that we were in all likelihood going to base our decision upon the technical ground. It is also contended that in drawing up an order even before our delivery of judgment the Government acted only '*ex majore cautela*'; and only desired to lose no time over service of the order on the petitioner for the purpose of his re-arrest. The order was not, it is said, intended to take effect in any other contingency than that of our judgment proceeding on the narrow basis of the technicality referred to above.

In order to assess and ascertain the validity of these contentions it is necessary to advert to certain circumstances which the contentions overlook. If it was really the intention of the Government to make the order in view of the possibility that we might rest our decision on the technical ground, one should find some mention in the order of the time limit which we held it necessary for the Government to specify in any order under S. 3 of the Act IV of 1950. If the Government had sought to abide by such decision which they aver they anticipated bona fide we should have expected them to issue the order in a manner consonant to our decision as to the time limit. That, however, is not the position which we find Government took up in issuing the order as it did. The order was prepared on the same grounds of detention as before and without the slightest attempt at rectification of the defect which we actually pointed out in our judgment. If indeed the Government is to justify the omission of any time limit in the order by any suggestion that there was a decision of the Supreme Court or an unreported decision of this court (*Govinda Menon and Basheer Ahmed Sayeed JJ.*) to the contrary of our judgment—decisions adverted to before this court on the 12th inst. in a statement by Mr. Kuttikrishna Menon, the predecessor in office of the Advocate General who has argued this case before us—it was for the Government to have brought these decisions to our notice before our delivery of judgment on the 22nd February 1951.

The then Advocate General, Mr. Kuttikrishna Menon, did endeavour to avert our judgment till after the production by him of an authenticated copy of the amending Act (IV of 1951) Central, but did not mention to us the decisions above referred to. The fact of the non-mention of the decisions to us—for which there is no explanation at all forthcoming—can only lead to the inference that these decisions were not responsible for the admission in the order of the time limit required by our judgment. The Government was in all honesty and fairness bound to respect our judgment and introduce the time limit into the order in accordance with our decision. Our decision might be right or wrong; but the Government had no business to disregard it even if there were decisions to the contrary, of which they do not seem to have been aware, of which they did not inform us and on which they could not have and do not seem in truth and in fact, to have acted.

It turns out too on information supplied to us by the learned Advocate General himself during the delivery of this judgment that the decision of the Supreme Court to the contrary of our judgment was in fact pronounced on 23-2-50, a day after ours and published in the Hindustan Times only on 24-2-50 two days later than ours. The decision was not and could not



be within the knowledge of the Government on the date of our judgment on which date it was that the Government framed the order now under challenge in anticipation of our judgment. It was scant respect therefore which Government showed to us in framing the order as they did even on the assumption that they expected our judgment to rest upon the technical ground on which it eventually rested. It is difficult to resist the conclusion in the circumstances that the intention of the Government in promulgating the order was not so much to devise legitimate means for surmounting the difficulty created by our judgment but to somehow evade its operation.

That, in my opinion, is sufficient proof of the lack of bona fides vitiating the order under the Full Bench decision reported in — 'Narayana-swami v. Inspector of Police', ILR (1949) Mad 377. The motives operating on the human mind are not always easy to ascertain and often mixed in character and even if one could not, on the basis of non-mention of any time limit in their order of 22-2-51, which certainly assert the intention of the Government to be to flout our prior judgments, such non-mention in disregard of our judgment is, in my opinion, certainly "improper conduct materially affecting the exercise of the power" according to the third of the tests of mala fides indicated supra in this judgment.

(18) Whether the non-production of the order before us on the day of our judgment is not another circumstance strengthening the inference of mala fides on the part of the Government whether from the stand point of "indirect motive" or from the standpoint of "improper conduct" is the further aspect of the matter which we have to consider. It was bad enough of the Government to have done all that they had done before our delivery of judgment on assumptions and premonitions with reference to our judgment which was still pending. Even if they felt themselves justified in doing so in shrewd anticipation of what our judgment was to be, the least that the Government ought to have done—it is indeed surprising that they did not do that much at least—in all fairness to the petitioner as well as to this Court and in their own interest, after reaching their decision in consultation with their legal advisers to re-arrest the petitioner immediately after our order, if it should turn out to be in his favour on the technical ground, was to inform their legal advisers who were to appear on that day in court to take judgment, of the order which they had already made. The production of the order would undoubtedly have a material bearing upon the order to be passed by us on the earlier habeas corpus petition which was then pending judgment.

(19) As I had occasion to point out in my judgment in CrI. M. P. No. 153 of 1951 the writ of habeas corpus is in England a prerogative writ but at the same time it is also a writ of right remedial in nature and grantable 'ex debito justitiae', which is inapplicable if the illegal detention has ceased before the application for the writ. So I said in my judgment in that case having regard to this basic nature of the writ that I did not feel quite so clear as my learned brother did that the disappearance of two of the grounds of detention which were relied upon by the petitioner, did not affect the merits of the habeas corpus petition which was to be decided and disposed of

in accordance with the circumstances in existence at the time of issue of such order without regard to the events which may have happened subsequently to the issue of the order. I feel perfectly clear that in the present case the order under challenge ought to have been brought to our notice at the time of our judgment as a material factor which would have a bearing on the termination or continuance of the illegal detention which was the substance of the complaint on the application for the writ. I am in perfect agreement with the view to this effect enjoined on us by the ruling in — 'Basanta Chandra v. Emperor', AIR 1945 F. C. 18, where it is pointed out that the analogy of civil proceedings in which the rights of parties have ordinarily to be ascertained as from the date of the institution of the proceedings cannot be invoked in habeas corpus proceedings. This view has been accepted and acted upon by the ruling in — 'Subodh Singh v. Province of Bihar', AIR 1949 Pat 247, wherein it is held that the court in exercising its jurisdiction under S. 491, Cr. P. C. is not restricted to a consideration of the validity of the order of detention with reference to circumstances in existence at the time of the application for the writ. So if the order was brought to our notice it was possible for us to have held either in favour of the Government itself or in favour of the petitioner according as our view of the merits of the order may have induced us to hold. This, therefore, shows the unfairness to the petitioner as well as the inexpediency in the interests of the Government itself involved in the withholding of the order from our notice at the time of delivery of judgment. So far as we are ourselves concerned, the regret of the situation which we cannot but feel is that we were prevented from possibly making the right decision by the Government withholding the order from us at the time. Here again, there was improper conduct on the part of the Government materially affecting the exercise of the power, whether or not there was indirect motive operating on their minds in the sense of an intention to flout our order.

(20) As proof of mala fides on the part of the Government Mr. Nambiar has further contended that the Government instead of availing themselves of the right of appeal against our judgment open to them under Arts. 132 and 136 of the Constitution hastened mala fide to make a fresh order of detention against his client. It is pointed out by learned counsel mentioning — 'O'Brien's case' before the House of Lords that in England there is no right of appeal, against an order of release. The position in India is under the Constitution, argues learned counsel, different. I am not satisfied that the failure of the Government to take steps for an appeal to the Supreme Court would vitiate the order, if the Government felt satisfied about the emergency of the situation, as they say they were, so far as to resort to the speedier course of a fresh order instead of to the normal remedy of an appeal which might involve delay in making sure of the detenu, if once he gets off as he might well do. If the course adopted by the Government is otherwise well founded, I am not prepared to say that the failure to pursue the alternative remedy of appeal to the Supreme Court renders the order invalid or illegal.

(21) The writ of habeas corpus more elaborately designated by some such form as habeas corpus, 'ad facisudum sub judicadum et resi-



piandum' (i.e., to do, submit to & receive whatever the Judge or the court awarding such writ shall consider in this behalf) is unlike other writs of habeas corpus such as habeas corpus, 'ad respondendum' (writ used to remove a prisoner from the jurisdiction of an inferior court in order to charge him with action in a higher court) habeas corpus 'ad satisfaciendum' (writ used to remove a prisoner to a superior court in order to charge him with process of execution), habeas corpus ad testificandum (a writ used to bring a witness into court to give testimony in a cause), as pointed out in Bacon's Abridgement and an early English case — 'Rex v. Pell and Offly', (1674) 3 Keb. 279 a writ of right against which no privilege of person or place can avail. The writ is one of the highest constitutional importance, as it is a remedy available to the meanest subject against the most powerful (vide Halsbury's Laws of England, 2nd Edn vol. 9. Sec. 1202 at p. 703). The source of the writ in England is part of the King's jurisdiction in judicial matters. In England the King in Parliament is the supreme legislative organ and the King in Cabinet is the supreme executive organ of the State. The common law regards the King as the source or fountain of justice and certain ancient remedial processes of an extraordinary nature which are known as prerogative writs have from the earliest times issued from the court of King's bench in which the sovereign was always present in contemplation of law. The court of the King's Bench retained all the jurisdiction of the curia regis in so far as it was not distributed among the courts; and this jurisdiction including the grant of the prerogative remedies is now under the Supreme Court of Judicature vested in the High Court of Justice.

As Hyde C. J. points out as early as 1627 in — Darnel's case', (1627) 3 State Tr. 1.

"Where the commitment is by the King or others this court is a place where the King doth sit in presence and we have power to examine it; and if it appears that any man hath injury or wrong by his imprisonment we have power to deliver and discharge him; if otherwise, he is to be remanded by us to prison again."

(22) In India the jurisdiction is embodied so far as the Supreme Court is concerned in Art. 32, and so far as the High Courts are concerned in Art. 226 of the Constitution. The jurisdiction is not traceable to the King for here there is none but to the people of India who having solemnly resolved to constitute India into a sovereign democratic republic have through their constituent assembly, adopted, enacted and given to themselves the Constitution. While this Constitution does not in so many terms provide for a separation of powers in the strict sense of the term between the legislature, the judiciary and the executive, there are specific provisions in regard to the three heads of powers embodied in different portion of the Constitution which have to be read together. Whatever the relative degrees of importance enjoyed by the three organs of the state under the Constitution there is no doubt but that the powers of each one of the three organs have to be exercised as fundamentally subject to the provisions of the Constitution relating to that organ individually as well as to the provisions relating to the other organs.

(22a) It was contended by Mr. Nambiar that the power to issue a writ of habeas corpus conferred upon the High Court as well as upon the Supreme Court is something so absolutely sacrosanct under the Constitution that no legislation can prejudicially affect it, and no executive can under the shelter of a piece of legislation prejudicially affecting it act in disregard of the writ if issued. It may also be that although our attention was not specifically drawn to Arts. 358 and 359 of the Constitution counsel meant to maintain that except in the cases dealt with by these two articles the Constitution makes the judicial power to issue the writ so far absolute that no legislative power provided for by the Constitution could possibly override or encroach upon this judicial power. It was contended too by the learned counsel that the powers of the executive under the Constitution are so far defined as to be liable to be treated as limited by Arts. 53, 154 and 162 of the Constitution. On the other hand, it was contended by the learned Advocate General, that the power to issue the writ is not to be treated as immune from Legislative interference and that the powers of the executive ought not to be treated as confined to what is defined in Arts. 53, 73, 154 and 162.

In support of the latter limb of the contention our attention was drawn by the learned Advocate General to the passages contained in S. 431 of Vol. VI of Halsbury's Laws of England (Constitution law) at pages 431 et seq; and in particular to the statement at page 385 that executive functions are incapable of comprehensive definition for they are merely the residue of the functions of Government after legislative and judicial functions have been taken away. It is unnecessary for me to pronounce upon the rival contentions of counsel on these intricate points as one thing is clear to my mind—viz; that no one of the three organs of the State ought to function in disharmony with the other two organs. It may be that judicial supremacy as under the Constitution of the United States does not exist here. It may be that the theory of legislative omnipotency obtaining in England does not hold the field under our Constitution subject to whose provisions it is that the Union Parliament and the State Legislatures have to function. It is the respect that is accorded by one organ of the State in relation to the others that ensures that healthy working of the Constitution which is the acid test of its merits whatever the paper value of its provisions.

(23) There is no reason why from this standpoint the principle of the ruling in the — 'Eastern Trust Co. v. Makenzie Mann & Co. Ltd.', (1915) A. C. 750 (PC) should not apply to cases under our Constitution although there is here, as I have already pointed out, no King to act as a connecting link between the three organs of the State. The Crown in its executive side is in England bound to observe the law both by the Statute and by the terms of the Coronation oath which embodies the contract between the Crown and people upon which the title to the Crown originally depended and still in a large measure depends. Upon any doubtful point of Prerogative in England the Crown and its ministers must therefore bow to the decision of the legal tribunals (vide Halsbury's Laws of England II Edn. Vol. VI, S. 535 page 455). It is the duty of the Crown and of every branch of the executive to abide



by and obey the law. If there is any difficulty in ascertaining it courts are open to the Crown to sue and it is the duty of the executive in cases of doubt to ascertain the law, in order to obey it, not to disregard it.

Whatever the limits within which the judiciary in this land can function in relation to Union Parliament and State Legislatures and whatever the residual powers of the executive under the Constitution over and above what is defined by the specific articles thereof, I have no doubt at all that the executive must needs respect the decisions of the judiciary and can only avoid, as in England, their due operation by appropriate legislation. In India as well as in England since it is the business of the courts to apply the Constitution and the laws in cases properly brought before them the judiciary exercises control over executive action in so far as it would refuse to uphold as valid any act of the Government which is not supported by the Constitution or by some law. The authority of the Courts as regards the executive action arises when the executive exceeds its authority in which case the agents and instruments through which the action is carried out are personally responsible to law and the courts (Vide D. D. Basu's Commentary on the Constitution of India p. 207). While on the one hand it may readily be conceded that it is not the business of the courts to pass judgment on the policy of executive action, it cannot on the other hand be denied that the Executive has no authority to pass verdict upon the validity of a judgment and it is bound to assist in enforcing it, even though the Executive may believe it to be erroneous. (vide Cooley's Constitutional law page 203).

Thus, in — 'the King v. Speyer', (1916) 1 K. B. 595 at page 610, Lord C. J. Reading observed:

"This is the King's court; we sit here to administer justice and to interpret the laws of the Realm in the King's name. It is respectful and proper to assume that once the law is declared by a competent judicial authority, it will be followed by the Crown."

On the same principle it is that it has been held by the Privy Council in — 'Fischer v. Secretary of State', 22 Mad 270 that Government may in proper cases be bound by an injunction issued in a proceeding to which it is not a party. So quote the Judicial Committee:

"But then it was asked what would happen, if the Collector ignored the order of the Court? What remedy would the appellant have if it had omitted to ask for specific relief against the Collector? It is highly improbable that any officer of the Government would set the court at defiance. It is impossible to suppose that Government would countenance such conduct as that."

Where the powers of the Governor of Nigeria under the Deposed Chief's Removal Ordinance were purely executive the Privy Council have held in — 'Eshugbayi Eleko v. Nigerian Government', (1931) A. C. 662 that it was the duty of the court to investigate the propriety and legality of Executive action, in ordering the deposed chief to leave a specified area and in default in ordering his deportation to another specified place in the colony. Lord Atkin, in delivering the judgment of their Lordships, observes at page 670 of the report thus:

"The Governor acting under the Ordinance acts solely under executive powers and in no sense as a court. As the Executive he can only act in pursuance of the powers given to him by law. In accordance with British jurisprudence no member of the Executive can interfere with the liberty or property of a British subject, except on the condition that he can support the legality of his action before a court of justice. And it is the tradition of British justice that Judges cannot shrink from deciding such issues in the face of the Executive."

(24) Judging the matter from this standpoint, the conclusion seems to me to be reasonably enough irresistible that if the order under challenge in the present proceedings is vitiated either by an intention on the part of the Government to evade the effect of our judgment in the prior petition, Crl. M. P. No. 153 of 1951, somehow or other or by improper conduction on the part of the Government materially affecting the exercise of the power, as already discussed, the order cannot possibly be upheld notwithstanding any belief on the part of the Government that our judgment was erroneous.

(25) The foregoing entails too my answer to the point raised by Mr. Nambiar that the order now under challenge is in contravention of the power conferred upon the High Court by Art. 226 of the Constitution.

(26) There is only one other ground raised on behalf of the petitioner which remains to be dealt with. That is that the non-mention of the order to us at the time of the delivery of our judgment in Crl. M. P. No. 153 of 1951 operates 'proprio vigore' to nullify the order altogether. The ground is sought to be supported and must indeed be taken to be established by what the Patna High Court has held in — 'Subodh Singh v. Province of Bihar', AIR 1949 Pat 247. I am not, I must say, however fully satisfied that the non-mention has this effect, whatever may be its bearing, on the question of mala fides on the part of the Government which I have already dealt with. Assuming that it was the duty of the Government at the time of our judgment to bring to our notice all orders of detention which might justify the detention of the person whose application for release was under consideration then, I am unable to discover as at present advised any intelligible legal principle on which the Government's dereliction of duty in this respect has the legal effect contended for. It is not a question of constructive 'res judicata' applicable to civil proceedings whether by way of statutory provision (i.e., S. 11 explanation IV C. P. Code) or by way of juristic principle 'de hors' the statute; nor is it a matter by necessary implication of our judgment that all prior orders of detention should cease to operate thereafter. What was never actually before our minds cannot by implication be treated as something which we did pronounce against. No intention can be imputed to us to decide matters not brought to our notice and the judgment which we delivered can only relate to the matters in fact brought to our notice.

(27) In conclusion, I cannot help recalling to my mind Lord Mansfield's famous judgment reversing the outlawry of Wilkes in 1768. As that noble and learned Lord there did, so may we not here, from the responsible seats which we have been called upon to fill, and what is



more, to fulfil, by virtue of our appointments, proclaim in solemn tones from this sacred shrine of justice. The Constitution does not allow reasons of State to influence our judgment, 'Fiat Justitiae ruat cælum.'

(28) In the result the petition succeeds; and I agree with my learned brother that the rule nisi must be made absolute and the petitioner set at liberty forthwith.

A/M.K.S.

Petition allowed.

#### A. I. R. 1953 MADRAS 54

RAJAMANNAR C. J. AND VENKATARAMA AYYAR J.

C. Sambandam, Petitioner v. The General Manager, South Indian Railway, Tiruchirapalli, Respondent.

Civil Misc. Petn. No. 14078 of 1950, D/- 13-11-1951.

(a) **Railway Services — (Safeguarding of National Security) Rules (1949) Rr. 3 and 4 — Non-compliance — (Constitution of India, Arts 310, 311) — (Railway Establishment Code R. 148).**

The rule that civil posts under the Government are held at pleasure is part of the law of this country and it involves the consequence that there can be termination of service at will. The Railway authorities have a right to terminate the services of the employee under rule 148 of the Railway Establishment Code and there is nothing in the Constitution which restricts such a right. R. 4 does not differ from S. 240(3) of the Government of India Act (1935) or Art. 311(2) of the Constitution of India.

The petitioner was employed as a wireman in the Marine Department of the South Indian Railway. He was served with a notice, the contents of which were as follows: "Whereas in the opinion of the 'competent authority' as defined in rule 2 of the Railway Services (Safeguarding of National Security) Rules 1949, there are reasonable grounds (which are given below) for believing that you are engaged in subversive activities and that consequently you are liable to have your services terminated under rule 3 of the said rules; You are hereby required to state within 14 days of the receipt of this notice whether you accept or deny the accuracy of the above allegation. If you do not reply within that period, it would be assumed that you admit the allegation. In either case, you may, within the same period, submit any representation you wish to make as to why your services should not be terminated under the said rules. (Copy attached). If after considering your representation the competent authority decides that no further action should be taken against you, you will be informed accordingly. If after considering your representation the competent authority considers that there are sufficient grounds for taking further action, the materials on record together with your representation will be referred to the Committee of Advisers set up by the Government of India for this purpose. You are further asked to state whether you wish to be heard in person by me or by the Commit-

tee of Advisers before orders are passed on your case."

Held that when the services of an employee are terminated he cannot be held to have been dismissed. But whether in fact it is a case of termination of services or dismissal is a question of fact.

This was a case not of termination of service but of compulsory retirement falling within R. 3. The notice did not satisfy the requirements of R. 4. The statement that the petitioner was liable to have services terminated under R. 3 was not any intimation of a decision by the authorities that his services would be terminated. The notice calling upon the petitioner to give his explanation for the charges could in no manner be regarded as falling under R. 4(b). As the proper procedure prescribed in R. 4 had not been followed, the subsequent order of compulsory retirement under R. 3 was illegal and inoperative. AIR 1948 PC 121 Foll. Case law discussed. (Paras 7, 11, 12, 14 & 15)

(b) **Constitution of India, Art. 226 — Other remedy open.**

It is true that the High Court will not ordinarily interfere with an order where there is another adequate remedy available to the party. This, however, is a rule of discretion for the guidance of the Court and not a limitation on its powers.

Held that as the question involved was one of right procedure to be followed in exercise of the powers conferred under the Railway Services (Safeguarding of National Security) Rules and as the rights of the petitioner had been clearly infringed, this was a fit case in which the writ must issue. AIR 1950 SC 163 Foll. (1928) 1 KB 291 Rel. on. (Paras 16 & 18)

K. V. Venkatasubramania Aiyar, for Row and Reddy, for Petitioner; O. T. G. Nambiar for King and Partridge, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

('48) 1948 FCR 44: (AIR 1948	
PC 121)	4, 5, 7, 11
('45) 1945-2 Mad LJ 270: (AIR 1945	
FC 47)	4
('50) 1950 SCR 566: AIR 1950 SC 163	16
('44) AIR 1944 Lah 240: (ILR (1944)	
Lah 325)	4
('37) ILR (1937) Mad 517: (AIR 1937	
PC 27)	11
('37) ILR (1937) Mad 532: (AIR 1937	
PC 31)	11
('44) AIR 1944 Nag 66: (ILR (1944)	
Nag 21)	14
(1895) AC 229: (64 LJ PC 119)	10, 11
(1896) AC 575: (65 LJ PC 82)	10
(1928) 1 KB 291: (96 LJ KB 347)	16
(1870) 5 QB 466: (39 LJ MC 145)	16
(1896) 1 QB 116: (65 LJ QB 279)	10
(1896) De Doshe v. Reg, see foot note in	
1896-1 QB 116	10
(1918) 34 TLR 314	10
(1918) 34 TLR 589: (145 LT 236)	10
(1920) 37 TLR 138	10

VENKATARAMA AYYAR J.: The petitioner was employed as a wireman in the Marine Department of the South Indian Railway Co. On 11-3-1950 he was served with a notice dated 27-2-1950 issued by the respondent under the Railways Services (Safeguarding of National Security) Rules, 1949. The contents of that



notice so far as they are material for purposes of this petition are as follows:

"Whereas in the opinion of the 'competent authority' as defined in rule 2 of the Railway Services (Safeguarding of National Security) Rules, 1949 (who in your case is the Chief Mechanical Engineer, S. I. Railway, Golden Rock) there are reasonable grounds (which are given below) for believing that you are engaged in subversive activities and that consequently you are liable to have your services terminated under rule 3 of the said rules;

You are hereby required to state within 14 days of the receipt of this notice whether you accept or deny the accuracy of the above allegation. If you do not reply within that period, it would be assumed that you admit the allegation. In either case, you may, within the same period, submit any representation you wish to make as to why your services should not be terminated under the said rules. (copy attached.)

If after considering your representation the competent authority decides that no further action should be taken against you, you will be informed accordingly.

If after considering your representation the competent authority considers that there are sufficient grounds for taking further action, the materials on record together with your representation will be referred to the Committee of Advisers set up by the Government of India for this purpose.

You are further asked to state whether you wish to be heard in person by me or by the Committee of Advisers before orders are passed on your case."

Four charges were set out in this notice. On 16-3-1950 the petitioner sent a written explanation to the several charges. On 6-9-1950 the respondent passed the following order:

"I have considered your representation in reply to my letter No. S. 37/3 dated the 27th February 1950 and am of the opinion that you are engaged in subversive activities in such a manner as to raise doubts about your reliability and am satisfied that your retention in public service is prejudicial to national security. I have decided with the prior approval of the President that your services should be terminated under rule 3 of the Railway Services (Safeguarding of National Security) Rules, 1949.

You are, therefore, given a month's pay in lieu of notice in accordance with para 6 of your service agreement dated 6-2-1942 and your service will terminate on the 16th September 1950."

(2) It is the validity of this order that is the subject-matter of this application. The contention of the petitioner is that on a proper construction of the Safeguarding of National Security Rules and of Art. 311 of the Constitution he was entitled to a further notice of the action proposed to be taken against him and as none such was given the order of dismissal dated 6-9-1950 is illegal. He accordingly prays that a writ might be issued under Art. 226 quashing the order dated 6-9-1950. The contention of the respondent is that the notice dated 27-2-1950 given to the petitioner was a sufficient compliance of the requirements of the law and that further the services of the petitioner were terminated by payment of a month's wages in

accordance with the terms of the services and that consequently the order dated 6-9-1950 was not open to question under Art. 311 of the Constitution. It was also urged that the petitioner had a remedy by way of a suit and that, therefore, the application for the issue of a writ of certiorari was not maintainable.

(3) The first question that arises for determination is whether the order dated 6-9-1950 is in accordance with the provisions of the Safeguarding of National Security Rules. Rules 3 and 4 which alone are relevant for the present purpose are as follows:

"A member of the Railway service, who, in the opinion of the competent authority is engaged in or is reasonably suspected to be engaged in subversive activities or is associated with others in subversive activities in such a manner as to raise doubts about his reliability may be compulsorily retired from service;

Provided that a member of the railway service shall not be so retired, unless the competent authority is satisfied that his retention in the public service is prejudicial to national security, and unless where the competent authority is a head of a department, the prior approval of the Governor General has been obtained.

4. Where in the opinion of the competent authority, there are reasonable grounds for believing that a member of the railway service is liable to compulsory retirement under rule 3 it shall—

(a) by order, in writing, require the Government servant to proceed on such leave as may be admissible to him and from such date as may be specified in the order;

(b) by notice in writing inform him of the action proposed to be taken in regard to him under rule 3;

(c) give him a reasonable opportunity of showing cause against that action; and

(d) before passing a final order under R. 3 take into consideration any representation made by him in this behalf."

(4) The contention of Mr. K. V. Venkatasubramania Aiyar the learned advocate for the petitioner is that before a final order could be passed under rule 3 there must be a notice in terms of rule 4, clause (b) informing him of the action proposed to be taken against him and giving him an opportunity under rule 4(c) for showing cause against the proposed action and as that had not been done, the order of dismissal dated 6-9-1950 was in contravention of the rules and, therefore, illegal and he relies on a decision of the Privy Council reported in — 'High Commissioner for India v. I. M. Lall', 1948 F. C. R. 44 (PC) in support of this proposition. That was a case in which the validity of an order of the Punjab Government dismissing an officer of the Indian Civil Service came up for consideration. On 2-9-1937 the Punjab Government framed a number of charges against one Mr. Lall, a District Judge belonging to the Indian Civil Service and gave intimation to him that a departmental enquiry would be held in respect of those charges. He was asked to furnish a written statement of defence which he did on 9-1-1938. Then there was an enquiry and acting on the report of the enquiry, the Government removed Mr. Lall from service by an order dated 31-8-1939.



He then filed a suit challenging the validity of the order of dismissal on the ground 'inter alia' that no notice had been given to him of the proposed action and no opportunity afforded to show against the same as required by S. 240 (3) of the Government of India Act, 1935, and that the procedure was illegal and the order was vitiated thereby. Section 240(3) is in these terms:

"No such person as aforesaid shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him."

The suit was decreed by the Punjab High Court on the ground that there was no proper inquiry. Vide — 'I. M. Lall v. Secretary of State', AIR 1944 Lah 240. The matter was taken on appeal to the Federal Court. The learned Judges disagreed with the finding of the High Court that there was no proper enquiry but held by a majority that on a proper construction of S. 240(3) of the Government of India Act, 1935, there must have been a further notice to the civil servant informing him of the order proposed to be passed, that an opportunity should have been given to him to make representation against the proposed action and that final order could be passed only thereafter and as that was not done the order was illegal.

The learned Judges observed as follows:

"But the real point of the sub-section is in our judgment that the person who is to be dismissed or reduced must know that that punishment is proposed as the punishment for certain acts or omissions on his part and must be told the grounds on which it is proposed to take such action and must be given a reasonable opportunity of showing cause why such punishment should not be imposed. That in our judgment involves in all cases where there is an enquiry and as a result thereof some authority definitely proposes dismissal or reduction in rank, that the person concerned shall be told in full, or in adequately summarised form, the results of that enquiry, and the findings of the enquiring officer, and be given an opportunity of showing cause with that information why he should not suffer the proposed dismissal or reduction in rank." Vide — 'Secy. of State v. I. M. Lall', 1945-2-Mad L J 270 (FC).

(5) Against this decision there was a further appeal to the Privy Council. In affirming the judgment of the Federal Court, Lord Thankerton observed that there was a distinction between giving information to the civil servant about the "grounds on which it is proposed to take action" and giving an opportunity of "showing cause against the action proposed to be taken in regard to him"; that the former would be appropriate in a stage anterior to the enquiry, the object being to afford adequate opportunity of defending oneself while the latter would arise only after the enquiry was held and punishment decided on; and further observed

"In the opinion of their Lordships no action is proposed within the meaning of sub-section until a definite conclusion has been come to on the charges and actual punishment to follow is provisionally determined on. Prior to that stage the charges are unproved and the suggested punishments are merely hypothetical. It is on that stage being reached

that the statute gives the civil servant the opportunity for which sub-sec. (3) makes provision. Their Lordships would only add that they see no difficulty in the statutory opportunity being reasonably afforded at more than one stage. If the civil servant has been through an enquiry under rule 55 of the Civil Services (Classification Control and Appeal) Rules, it would not be reasonable that he should ask for a repetition of that stage, if duly carried out, but that would not exhaust his statutory right and he would still be entitled to represent against the punishment proposed as the result of the findings of the inquiry." Vide — 'High Commissioner for India v. I. M. Lall', 1948 F. C. R. 44 (PC).

(6) In other words, in a case governed by S. 240(3) there will be two stages; firstly an inquiry after notice into the charges against the civil servant and this is the rule of natural justice that no person should be condemned without a hearing and secondly after the enquiry is over and a punishment decided on a further notice in terms of sub-sec. (3) informing the civil servant of the action proposed to be taken and giving him an opportunity to show cause against that action and this is a statutory requirement.

(7) It is argued for the petitioner that this decision will govern the present case because rule 4(b) of the Safeguarding of National Security Rules provides that the servant should be informed in writing "of the action proposed to be taken in regard to him under rule 3", that "reasonable opportunity of showing cause against that action" ought to be given under 4(c) and that under rule (4) any representation made by him in that behalf should be taken into consideration before final order is passed under rule 3. Mr. Nambiar the learned advocate for the respondent could not convincingly assail the soundness of this contention but he argued that the notice dated 27-2-1950 satisfies the requirements of rule (4), because it stated that the petitioner was liable to have the services terminated under rule (3) but this is merely a statement of the effect of rule (3) and not any intimation of a decision by the authorities that the petitioner's services would be terminated. Reliance was also placed on paragraph 3 of the notice but this must be read along with paragraphs 4 and 5 and they clearly show that no action had been decided on.

Indeed when it is remembered that a proper notice under rule 4(b) can only be after an inquiry is held and a punishment tentatively proposed, the notice dated 27-2-1950 calling upon the petitioner to give his explanation for the charges can in no manner be regarded as falling under rule 4(b). In our opinion the present case falls directly within the principles laid down by the Privy Council in — 'High Commissioners for India v. I. M. Lall', 1948 F. C. R. 44 (PC) and the order dated 6-9-1950 must be held to be illegal.

(8) Mr. K. V. Venkatasubramania Aiyar also argued that in case his construction of rule 4 of Safeguarding of National Security Rules was not accepted he would rely on Art. 311(2) which re-enacts the provisions of S. 240(3) of the Government of India Act, 1935 and contend that the Safeguarding of National Security Rules would be void as against Art. 311(2). As we have held that rule 4 of the Safeguarding of National Security Rules does not differ from S. 240(3)



or Art. 311(2) on this point it is unnecessary to discuss this aspect any further.

(9) A further point was taken by Mr. Nambiar that questions relating to the propriety of the notice and the legality of dismissal did not arise in this case because under the rules applicable to railway establishment the services of the petitioner could be terminated on a month's notice; that under the notice dated 6-9-1950 a month's pay in lieu of notice was given to him, that in substance it was a case of termination of services and not of dismissal or removal and that accordingly Art. 311 did not apply. He referred to rule 148(3) and (4) of the Indian Railway Establishment Code which run as follows:

"(3) Other ((non-pensionable) railway servants. The service of other (non-pensionable) railway servants shall be liable to termination on notice on either side for the periods shown below. Such notice is not however required in cases of summary dismissal or discharge under the provisions of service agreements, retirement on attaining the age of superannuation and termination of service due to mental or physical incapacity:

(a) Probationary officers and officers on probation other than those in the medical department—3 months' notice;

(b) Officers on probation in the Medical department—one month's notice;

(c) Permanent Gazetted officers—6 months' notice;

(d) Permanent Non-Gazetted employees—1 month's notice;

(4) In lieu of the notice prescribed in this rule, it shall be permissible on the part of the Railway Administration to terminate the services of a railway servant by paying him the pay for the period of notice."

It is common ground that the petitioner is a permanent non-gazetted employee falling within clause (d) of rule 3 and it is accordingly contended that his services could be validly terminated under that rule and must be taken to have been in fact so terminated. Reliance was also placed on Art. 310 of the Constitution which generally enacts that civil posts under the Union or State are held on pleasure and it is argued that rule 148 is in accordance with Art. 310 & is, therefore, valid. Mr. K. V. Venkatasubramania Aiyar contends in reply that Art. 310 and rule 148 must both be read subject to the statutory rights declared in Art. 311; that the respondent took action avowedly only under the Safeguarding of National Security Rules, that the order is one of compulsory retirement under those rules and not a termination of service under rule 148; and that its validity must be judged by the provisions of rule 4 and of Art. 311.

(10) Article 310 has a long history behind it. It has its origin in the rule well established in British Jurisprudence that all public offices are held at the pleasure of the Crown. Two consequences result from this rule. The services of the civil servant can be terminated without assigning any reason and even in the case of wrongful dismissal no action could be maintained at law for damages, the theory being that the King can do no wrong. In — *Shenton v. Smith*, 1895 A. C. 229, this rule was applied to an appointment made by the Government of Western Australia and it was held that the office was held at pleasure and could be termi-

nated at will and no action for damages would lie for wrongful dismissal. Lord Hobhouse in delivering the judgment of the Judicial Committee observed that:

"Neither principle nor authority has been adduced to show that in the employment and dismissal of public servants the colonial Government stands on any different footing than the Home Government."

In — *Dunn v. Reg*, (1896)-1-Q. B. 116, it was held that even if there was a contract of employment for a period and it was terminated before the period without cause, no action for damages will lie. The following observations of Lord Watson in — *De Doshe v. Reg*, see footnote in 1896-1-Q. B. 116 at p. 118 were quoted and followed:

"In the second place I am of opinion that such a concluded contract if it had been made, must have been held to have imported into it the condition that the Crown has the power to dismiss. Further I am of opinion that, if any authority representing the Crown were to exclude such a power by express stipulation, that would be a violation of the public policy of the country and could not derogate from the power of the Crown."

This decision was followed in — *In the matter of the petitions of Right of Charles Lawrence Hales*, (1918) 34 T.L.R. 314, where there was again a special agreement and this decision was affirmed on appeal in — *Hales v. Reg*, (1918) 34 T. L. R. 589.

In — *Denning v. Secretary of State for India in Council*, (1920) 37 T. L. R. 138, the plaintiff was employed by the Secretary of State for India on a contract for a period of five years. There was a premature termination of the services and there was no misconduct. It was held that the plaintiff could not maintain an action for damages. In — *Gould v. Stuart*, (1896) A. C. 575, the Judicial Committee, while affirming the general rule that Crown servant could be dismissed at pleasure, held that where there was a statute prescribing terms of services and mode of dismissal that would govern the rights of the parties. The law is thus summed up in Halsbury's Laws of England, Vol. VI, page 608 para 782,

"Except where it is otherwise provided by statute, all public officers and servants of the Crown hold their appointments at the pleasure of the Crown and all in general, are subject to the dismissal at any time without cause assigned; nor will an action for wrongful dismissal be entertained even though a special contract be proved."

In India, these rules had been applied to offices held under the Government of India. Mr. Ilbert states the law in the following terms: (Vide Ilbert's Government of India, 1916 Edn.): "The tenure of persons serving under the Government of India or under a local Government is presumably tenure during the pleasure of the Crown."

This principle has been affirmed in all the statutes relating to the Government of India. Section 96-B(1) of the Act of 1919 runs as follows:

"Subject to the provisions of this Act and of Rules made thereunder, every person in the civil service of the Crown in India holds office during His Majesty's pleasure and may be employed in any manner required by a



proper authority within the scope of his duty, but no person in that service may be dismissed by any authority subordinate to that by which he was appointed and the Secretary of State in Council may, (except so far as he may provide by rules to the contrary) reinstate any person in that service who has been dismissed."

Section 240(1) of the Government of India Act, 1935 is in these terms:

"Except as expressly provided by this Act, every person who is a member of civil service of the Crown in India, or holds any civil post under the Crown in India, holds office during His Majesty's pleasure."

(11) This provision is even more emphatic than S. 96-B(1) of the 1919 Act because the qualifying words "And of rules made thereunder" occurring in S. 96-B(1) on which it was possible to contend that the power of dismissal at pleasure could be controlled by the rules, have been omitted. Art. 310(1) of the Constitution re-enacts this principle with verbal alterations not affecting the substance of the matter. It is as follows:

"Except as expressly provided by this Constitution, every person who is a member of the defence service or of a civil service of the Union or of an all India service or holds any post connected with defence or any civil post under the Union holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor or, as the case may be, the Rajpramukh of the State."

Thus the rule that civil posts under the Government are held at pleasure is part of the law of this country and it involves the consequence that there can be termination of service at will. Article 310 provides that this rule is subject to the exceptions "expressly provided by this Constitution". Such exceptions are provided in Art. 310(2) which provides for compensation being paid when a contract for a period is terminated for no misconduct of the civil servant, in Art. 311(1) which enacts that a person cannot be dismissed by an authority subordinate to that by which he is appointed, and in Art. 311(2) which prescribes that a particular procedure should be followed before a person is dismissed or removed from service.

Subject to these statutory restrictions the general rule embodied in Art. 310(1) that all offices under the Government are held at pleasure will govern the rights of the parties. In — '*Venkatarao v. Secretary of State*', ILR (1937) Mad 532 the facts were that a civil servant was dismissed without there having been a proper enquiry in accordance with the rules framed under S. 96-B of the 1919 Act. He filed a suit for damages for wrongful dismissal. It was held by the Judicial Committee that as the office was held at pleasure the breach of the rules would not confer a right of action on the civil servant for damages for wrongful dismissal. The decision in — '*Shenton v. Smith*', (1895) AC 229 was followed. In — '*Rangachari v. Secretary of State for India*', ILR (1937) Mad 517 a police officer was dismissed by an authority subordinate to one which appointed him and it was held that the order of dismissal was illegal as being in contravention of the statutory provision enacted in proviso to S. 96-B.

In — '*High Commissioner for India v. I. M. Lall*', 1948 F. C. R. 44 (PC) already referred to it was held that the dismissal was illegal and inoperative because it contravened the statutory prescription laid down in S. 240(3) of the Government of India Act, 1935.

(12) It will follow from the above that the Government has a right to terminate the services of a civil servant at will and the only restrictions on this power are those expressly enacted in the Constitution. There is accordingly considerable force in the argument of the respondent that he has a right to terminate the services of the employee under rule 148 of the Indian Railway Establishment Code and that there is nothing in the Constitution which restricts such a right.

(13) The question still remains whether this is a case of termination of service under rule 148 of the Indian Railway Establishment Code. The contention of the learned advocate for the petitioner is that the order dated 6-9-1950 is one passed only under the Safeguarding of National Security Rules and its validity must accordingly be determined with reference to those rules. We think that this contention is well founded. The notice dated 27-2-1950 is expressly issued under rule 2 of the Safeguarding of National Security Rules, 1949. It purports to follow the procedure prescribed in rule 4. Four charges are framed against the petitioner. He is asked to submit his explanation and he is told that his representations would be referred to a committee of advisers set up by the Government of India for this purpose. The order dated 6-9-1950 also expressly recites that the services are terminated under rule 3 of the Railway Services Safeguarding of National Security Rules. In the counter affidavit filed by the General Manager it is again expressly stated that action against the petitioner had been taken under the Railway Services Safeguarding of National Security Rules, that the procedure prescribed by the rules had been properly followed, and that the rules have not become void under the Constitution. It is not pleaded anywhere that any action was taken under rule 148 of the Indian Railway Establishment Code. If action was intended to be taken under that rule then there was no need to frame charges, call for explanation and send it for consideration by a special committee. Even the service agreement of the petitioner has not been produced before us.

(14) It appears to us to be amply clear from the record that the respondent did only what he purported to do under the notice and that was to take action against the petitioner under the Security Rules. Reliance was also placed by Mr. Nambiar on the fact that a month's salary was paid to the petitioner, but under rule 7 of the Safeguarding of National Security Rules, it is provided that compensation should be paid when final orders are passed under rule 3. The payment is, therefore, a solatium offered under the above rules under which the petitioner has been removed from service. Mr. Nambiar relied on the following observations occurring in — '*Nagpur Electric Co. v. Anand Vishnu*', AIR 1944 Nag 66 at p. 70,

"The termination of the contract in due course, according to its terms is neither discharge, dismissal or release nor leaving employment."

We agree that when the services of an employee are terminated he cannot be held to have been



dismissed. But whether in fact it was a case of termination of services or dismissal is a question of fact and that must be determined on a consideration of the circumstances of the case.

(15) We are of opinion that the order dated 6-9-1950 is not one terminating services but one of compulsory retirement falling within r. 3 of the Safeguarding of National Security Rules and as the procedure prescribed in rule 4 has not been followed, it is illegal and inoperative.

(16) Mr. Nambiar finally contended that this application is not maintainable as the petitioner can enforce his rights in a regular suit and that where there is another remedy open no relief should be granted in a writ of certiorari. It is true that this Court will not ordinarily interfere with an order where there is another adequate remedy available to the party. This, however, is a rule of discretion for the guidance of the Court and not a limitation on its powers. As observed by Das J. in — '*Rashid Ahmed v. Municipal Board, Kairana*', 1950 SCR 566: AIR 1950 SC 163 at p. 165 the "existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs". In the — '*King v. Postmaster General; Ex parte Carmichael*', (1928) 1 K. B. 291 Avory J. dealing with this very contention observed as follows:

"But even if that remedy is open to her, it is undoubtedly good law that if the application for a certiorari is made by a party aggrieved, then it ought to be granted '*ex debito justitiae*' and the court has not the general discretion which it would have when the application is made by one of the public who is not personally concerned. That was decided long ago in the case of — '*Reg v. Surrey Justices*', (1870) 5 Q B 466 and on that principle, even though she has a remedy by appeal in this case, I am prepared to agree that the certiorari should go, seeing that the application is being made by the applicant as the party aggrieved."

(17) The law is thus stated in Halsbury's Laws of England, Vol. 9, page 878 para 1481:

"Although the writ is not of course it will nevertheless be granted '*ex debito justitiae*' to quash proceedings which the Court has power to quash, where it is shown that the Court below has acted without jurisdiction or in excess of jurisdiction, if the application is made by an aggrieved party and not merely by one of the public and if the conduct of the party applying has not been such as to disentitle him to relief, and this is the case even though certiorari is taken away by statute and although there is an alternative remedy."

(18) As the question involved is one of right procedure to be followed in exercise of the powers conferred under the Safeguarding of National Security Rules and as the rights of the petitioner have been clearly infringed, this is a fit case in which the writ must issue. The order dated 6-9-1950 is accordingly set aside. The petitioner will be entitled to his costs, advocate's fee Rs. 100.

A/D.H.

Petition allowed.

## A. I. R. 1953 MADRAS 59

SUEBA RAO J.

Mannarghat Union Motor Services Ltd., Mannarghat, South Malabar, Petitioner v. Regional Transport Authority, Malabar and others, Respondents.

Civil Misc. Petn. No. 4436 of 1951, D/- 4-9-1951.

(a) Constitution of India, Art. 226 — Submission to jurisdiction — Effect.

Where the petitioners submitted to the jurisdiction of the Regional Transport Authority, it is too late to question the jurisdiction of the Tribunal to which they have submitted on the ground that the proceedings of the Regional Transport Authority were illegal as the earlier proceedings legally instituted and pursued were not finally disposed of. Failure to object to jurisdiction before the lower court is a bar to obtaining a writ of certiorari, whether the objection to jurisdiction is based on a pure point of law or based on facts which were or should have been within the knowledge of the petitioners during the proceedings in the lower Court. AIR 1927 Mad. 130 FB Foll. (Para 1)

(b) Motor Vehicles Act (1939) S. 57(7) — Reasons — Nature of.

A Regional Transport Authority is a tribunal with a duty to exercise its jurisdiction judicially. The provisions of S. 57(7) indicate beyond any reasonable doubt that a Regional Transport Authority should give reasons to the issue of a permit clearly in such a manner that an Appellate Court may be in a position to canvass the correctness of the reasons given by it. Where the reason given by the Regional Transport Authority was that a certain person was the most suitable man, the reason is one not contemplated by the provisions of the Act. (Para 2)

Anno: M. V. Act, S. 57 N. 1.

K. Kutti Krishna Menon; V. Balakrishna Eradi and P. P. Menon, for Petitioner; The Govt. Pleader, P. R. Pakri Sankar and T. Changanvarayan, for Respondents.

REFERENCE .....

(27) 50 Mad 130: (AIR 1927 Mad 130 FB)

/Para

1

ORDER: This is an application for the issue of a Writ of Certiorari to quash the orders of the Regional Transport Authority, Malabar, The Central Road Traffic Board and the State of Madras. The petitioners are the Mannarghat Union Motor Services Ltd. They are plying buses with stage carriage permits in South Malabar since the year 1936. The Regional Transport Authority published a notification R. No. 23589 A. 2/49 on 24th February 1949 inviting application for the issue of a temporary permit for a bus on Calicut-Areakode via Feroke and Kundotty. Two persons applied for the permit but the proceedings were dropped as in April 1949 the Regional Transport Officer and Secretary stated that as the Central Road Traffic Board directed the Regional Transport Authority to issue pucca permits for stage carriages in the same route the notification was cancelled. The Regional Transport Authority, Malabar, issued a notice dated 16th May 1949 under Sec. 57(2) of the Madras Motor Vehicles Act inviting fresh applications for the grant of stage carriage permits for the said route. In response to this notification, the petitioners and



two others applied for permits. It may be mentioned that the fourth respondent is not one of the applicants.

On 11th June 1949, the Regional Transport Authority, Malabar, issued another notification under Sec. 57(3) of the Madras Motor Vehicles Act calling for objections, if any, for the grant of permits to the applicants. Objections were filed. But curiously those proceedings were not pursued but it is represented to me that they were dropped as the Government issued directions to the Regional Transport Authority that no new routes should be opened without the previous permission of the Central Road Traffic Board. But the petitioners were not informed of this notification or the dropping off the proceedings pursuant to the directions. On 4th April 1950, the petitioners received another notice under Sec. 57(2) of the Madras Motor Vehicles Act stating that the Regional Transport Authority, Malabar will receive applications on or before 2nd May 1950 for the grant of stage carriage permits over the same route. The petitioners, the 4th respondent and others applied. Notice under S. 57(3) of the Act was duly issued and representations were called for. No representation was made either by the petitioners or by any other person that the proceedings were illegal as the previous proceedings duly instituted under the provisions of the Act were not finally disposed of. The Regional Transport Authority passed a laconic order.

"Nos. 4, 9 and 15 do not press. Granted to M/s C. C. Automobiles Ltd. as the most suitable. Time for production of vehicles two months."

Against that, an appeal was filed to the Central Road Traffic Board, and that was dismissed without any reasons. When a revision was filed, the Government of Madras declined to interfere with the Subordinate Tribunal's orders. Mr. Kuttikrishna Menon, the learned counsel for the petitioners, raised before me two points. The proceedings of the Regional Transport Authority initiated by its notification dated 4th April 1950 are illegal as the earlier proceedings legally instituted and pursued were not finally disposed of. The Regional Transport Authority gave a reason which on the face of it cannot be tested by a Court of appeal and therefore the said order did not comply with the provisions of Sec. 57(7) of the Act. I cannot say that there is no force in the first argument of the learned counsel for the petitioners but I do not propose to express my final opinion thereon as on the facts it is clear that the petitioners submitted to the jurisdiction of the Regional Transport Authority.

If the petitioners thought that the Regional Transport Authority had no jurisdiction, they should have raised that plea without taking a chance of getting a decision in their favour. Designedly or ignorantly they kept quiet or perhaps they did not want to displease the Regional Transport Authority, or they expected that it would decide in their favour. It is too late to question the jurisdiction of a Tribunal to which they have submitted. A Full Bench of this Court held in — 'Latchmanan Chettiar v. Corporation of Madras', 50 Mad. 130 (FB) that failure to object to jurisdiction before the lower Court is a bar to obtaining a writ of certiorari, whether the objection to jurisdiction is based on a pure point of law or based on facts which were or should have been within the knowledge of the applicants during the proceedings

in the lower court. The said judgment is binding on me.

(2) But I cannot say that the second contention of the learned counsel is without substance. It is now settled law and it has not been disputed either by the Government Pleader or the counsel for the fourth respondent that a Regional Transport Authority is a tribunal with a duty to exercise its jurisdiction judicially. Sec. 64 of the Motor Vehicles Act confers a right of appeal to an aggrieved party against the order of a Regional Transport Authority to the Central Road Traffic Board. Sec. 57(7) of the Act specifically states that if a Regional Transport Authority refuses to issue a permit it must give in writing its reasons for its refusal. The provisions of the Act indicate beyond any reasonable doubt that a Regional Transport Authority should give reasons to the issue of a permit clearly in such a manner that an Appellate Court may be in a position to canvass the correctness of the reasons given by it. Otherwise the right of appeal conferred by the Act will become otiose.

The reason given by the Regional Transport Authority is a curious one. It says that the fourth respondent is the most suitable man. No Appellate Court can question the correctness of such a general statement. A person may be suitable for many reasons — reasons with which one court may agree and another may disagree. It is incumbent upon such a Tribunal whose order is subject to appeal to give reasons succinctly for its order to enable the Appellate Court to test the correctness of that finding. I cannot therefore hold that the reason given by the Regional Transport Authority is a reason contemplated by the provisions of the Act.

(3) The next question is what is the procedure to be adopted at this stage. Though the petitioners are precluded from raising the question of jurisdiction in view of the Full Bench decision, it is apparent that the entire procedure followed from the beginning to the end is vitiated by some confusion introduced in the proceedings by the direction given by the Government under Sec. 43(A) of the Act. In the circumstances, I think the proper and the only course is to quash the entire proceedings and to direct the Regional Transport Authority to issue permits afresh in accordance with law. In the circumstances each party will bear its costs.

A/D.H.

Order accordingly.

#### A. I. R. 1953 MADRAS 60

RAJAMANNAR C. J. AND VENKATARAMA AYYAR J.

Gosukonda Venkatanarasayya and others, Petitioners v. The State of Madras, represented by the Collector of Nellore, Respondent.

Civil Misc. Petn. No. 5671 of 1951, D/- 20-3-1952.

Constitution of India, Art. 226 — Other remedy open — Petitioner's contentions that grant in their favour being of less than a village, Mad. Act 26 of 1948 did not apply and that the proceeding under colour of Act are not legal — Proper and adequate remedy of the petitioner held was by way of a suit and not by a petition under Art. 226 — (Madras Estates Land Act (26 of 1948), S. 9).

(Para 1)

V. Vedantachariar, for Petitioners; Advocate General, for Respondent.



RAJAMANNAR C. J.: The petitioners' case is that the grant in their favour comprised less than a village and therefore it is not an estate still less an under-tenure estate within the meaning of the Madras Estates Land Act. If the grant is less than a village then obviously Madras Act XXVI of 1948 can have no application whatever. S. 9 of that Act provides for the determination after inquiry of the question whether any inam village is an inam estate or not. Presumably, when the contention is that the grant does not comprise a village, the proceedings under S. 9 would not be strictly open to the aggrieved party. There is no other provision in the Act under which a special Tribunal has been set up to decide a dispute of the nature which arises in this case, viz, whether a particular grant comprises less than a village. In these circumstances, in our opinion, the aggrieved party will have a right of suit as he would have a good cause of action when proceedings are taken under colour of an Act which does not apply to the facts of the case. We have already held in petitions arising under Madras Act XXX of 1947 that in similar circumstances, the aggrieved party will have a right of suit. We accordingly hold that the proper and adequate remedy for the petitioners is by way of a suit. As they have such a remedy it is not necessary to invoke our jurisdiction under Art. 226 of the Constitution. The application is therefore dismissed.

(2) The learned Advocate General states that the Government will not take the objection under S. 80 Civil Procedure Code in case a suit is filed.

B/R.G.D.

Application dismissed.

#### A. I. R. 1953 MADRAS 61

MACK AND SOMASUNDARAM JJ.

In re Ravipati Sitaramayya, Appellant.

Criminal Appeal No. 104 of 1951, D/- 5-12-1951.

(a) Criminal P.C. (1898) Ss. 162 and 164 — Practice — Murder case — Desirability of having statement of accused on first questioning recorded under S. 164.

Per Mack J.: The shutting out under S. 162 of what an accused person tells a police officer particularly in a case of murder when first questioned, opens the way for all kinds of statements being made in the committing Magistrate's Court and also at the trial in conformity with advised lines of defence, which are, of course, impossible to verify and places the prosecution at a great disadvantage. In cases of this kind, the police would do well to take an accused person before a Magistrate, whether he makes a confession or not, and have a statement recorded under S. 164, so that the accused person can be fixed to one explanation when placed in a position which becomes incriminating unless he can offer a satisfactory explanation for his behaviour.

(Para 3)

Anno: Cri. P. C., S. 162 N. 2; S. 164 N. 2.

(b) Criminal P.C. (1898) S. 164 — Retracted confession — Conviction on retracted and uncorroborated confession.

Per Mack J.: There is no authority to the effect that conviction on an uncorroborated but retracted confession before a Magistrate is illegal. Each case has to be dealt with on its own facts. Where

a man, whose wife has been strangled to death at night in a house occupied solely by them has voluntarily confessed before a Magistrate to his guilt, he should not be acquitted.

(Para 4)

Per Somasundaram J.: The question whether a retracted confession can be acted upon without material corroboration will arise only when the confession is true and can safely be acted upon. Where, though the confession is a voluntary one, it contains allegations which contradict the main aspect of the prosecution case, it is unsafe to act upon it without further corroboration.

(Para 16)

Anno: Cri. P. C., S. 164 N. 18.

(c) Criminal P.C. (1898) Ss. 429 and 378 — Difference of opinion among Judges — Reference to third Judge — Duty of such Judge — Method of approach.

Obiter: The system of Referred trials from the moffussil tried by a Sessions Judge and assessors, with whose individual opinions the trial Judge is free to disagree, places an extremely heavy burden on criminal benches, who do not themselves hear the witnesses. It is inevitable that differences of opinion should arise in the discharge of this extremely heavy responsibility in which two Judges finding themselves unable to agree on a difficult case, require and welcome the opinion of a third Judge to alleviate their responsibilities. It is in this spirit that differences of opinion in criminal cases should be resolved and it is also the method of approach the statute requires.

(Para 8)

It is the duty of the Judge who is asked to resolve the difference of opinion to examine the whole evidence himself and come to a final judgment after giving due consideration and weight to the reasons given by the two Judges on whose difference of opinion the case comes before him for his opinion. Neither S. 378 nor S. 429 contemplates the dice being loaded heavily in favour of either view.

(Para 18)

The opinion expressed by some Judges, viz. that the normal disposal by a third Judge should be one of agreement with the opinion of acquittal, is not correct. It would be tantamount to a judgment of acquittal in practice prevailing over a judgment for conviction. (1887) All. W.N. 125 and ILR (1949) 1 Cal. 43, Approved; Observations of Rajagopalan J. in R. T. No. 31 of 1951 (Mad.) and Mahmood J. in (1886) All. W.N. 275, to the contrary, Disapproved.

(Para 5)

Per Mack J.: (Obiter; Somasundaram J. Contra) The third Judge cannot pass a death sentence in a case, where the Judge favouring conviction thinks a sentence of transportation is appropriate with the other Judge favouring acquittal, on the simple ground that it is only a Bench of two Judges, who should confirm a death sentence in agreement with each other. Although the law may not be specific on this point, this extreme can always be guarded against by the Bench referring the case expressing their opinion that in the event of the conviction being confirmed, the sentence of transportation is the appropriate one, in which case, the third Judge would be bound by such an opinion



as regards which there would be no difference for him to resolve. 27 Mad. 271, Disapproved. (Para 8)

Per Somasundaram J. (Obiter). When on a difference of opinion a case is referred to a third Judge no fetter can be placed on the third Judge. He is at liberty to express and act upon the opinion which he himself arrives at. If he chooses he can pass a sentence of death, even though one Judge favours an acquittal and the other gives a sentence of transportation for life when convicting the accused. (Para 19)

(Note: See Note after Judgment of Somasundaram J.).

Anno: Cri. P. C., S. 378 N. 2; S. 429 N. 3.

V. Rajagopalachari, J. Krishnamurthy and A. Sambasiva Rao, for Appellant; Asst. Public Prosecutor, for the State.

REFERENCES: Courtwar/Chronological/ Paras  
(86) 1886 All WN 275 6  
(87) 1887 All WN 125 6, 18  
(49) ILR (1949) 1 Cal 43 8, 18  
(04) 27 Mad 271: (14 Mad LJ 226) 7, 8  
(51) R T No. 31 of 1951 (Mad) 5

MACK J.: This is a case, which has given us anxious consideration. Appellant, a man aged 43, has been found guilty under S. 302 I. P. C. of the murder of his 17 year old wife, Balakotamma, by strangling her to death during the night of 29-5-1950 in his house in Vetapalam village in which there were admittedly no other inmates. The next morning appellant asked a washerman (P. W. 7) to take a message to his wife's uncles, P. Ws. 1 and 5 and her maternal uncle and foster father P. W. 6 who all lived at Vadlamudi, a village three miles away to the effect that she was found lying speechless and unconscious in his house. On receipt of this message at 7 A. M. P. Ws. 1, 5 and 6 hastened to Vetapalem and found Balakotamma lying dead on a cot.

According to P. W. 1, appellant when questioned first made no reply and then denied knowledge of anything. There were no visible injuries on the body. Suspecting that appellant and his concubine one Subbamma had poisoned her, they made a complaint to this effect Ex. P. 1 at the Vadlamudi Police station at midday. The only evidence that the village munsif of Vetapalam (P. W. 9) gives is that he was a Panchayatdar at the inquest held by the Circle Inspector (P. W. 11) who reached Vetapalam at 4 p.m. Near the corpse was lying a rice pounder M. O. 3. On the body was a blouse M. O. 1 put on, as is described, inside out and a sari M. O. 2. P. W. 1 says when he saw it was slightly wet. Postmortem held by Miss Annapoornama, Assistant Surgeon of Tenali the following morning at 8 a.m. showed that death was due to asphyxia as a result of strangulation. An echymosed patch was found on the neck extending upwards to the lower jaw and downwards to the upper part of both collar bones. The trachea and larynx were congested, oesophagus echymosed and the hyoid bone broken. There can be no doubt about the cause of death, which was strangulation by great pressure on the throat.

(2) The Circle Inspector returned the post mortem certificate to Vetapalam and arrested the accused on the 2nd June. He produced him before the Sub-Magistrate of Tenali (P. W. 4) on the evening of the 3rd of June with a requisition Ex. P. 3 to record his confession. As it was after lock up time, the Magistrate asked him to be produced the following morning and he was then kept in the sub-jail after being given the necessary

warnings. He was produced again before the Magistrate on 5-6-1951 and after giving clear warnings to the appellant in full conformity not only with S. 164 Cr. P. C. but also with Rule 85 of the Criminal Rules of Practice, the Magistrate recorded a long detailed confession from the appellant in which he confessed that he squeezed his wife's throat, while she was asleep with his own hands. Appellant's statement was to the effect that he returned home at mid-night and found his wife asleep, that in view of domestic troubles she was giving him he strangled her, that he slept in the house till the morning, that he fetched his mother, that neighbours gathered and that he sent word to his brothers-in-law. He said that one of them, when he came to the house, kicked him on the head, which struck against the wall and poked him with a stick near the abdomen. The domestic troubles he detailed there related to complaints his wife made to her brothers who continually interfered in his domestic life and when he protested his wife scolded him and said she would get him killed by her brothers. The gist of his confession is that he killed her thinking that after doing so, he would also die at the hands of the Government, rather than be killed by her brothers. This confession was retracted in the committing court where the appellant pleaded that he was coerced by the Circle Inspector and the Deputy Superintendent of Police into making the confession, that the wording was not his and that he repeated what he was asked to say like a parrot. He adopted the same attitude at his trial. There is no other evidence against the appellant.

(3) A curious feature about the confession is that it mentions nothing about the concubine Subbamma, who the appellant continued to keep after he married Balakotamma as his second wife three years ago, after his first wife died. (After discussing the evidence, the Judgment proceeded).

The main contention of Mr. Rajagopalachari for the appellant is that no conviction is possible in the absence of any evidence to corroborate the confession which, he has asked us to reject as not being a true and voluntary one in view of its mentioning several facts, opposed to the evidence in the case. I am myself unable to see any reason for rejecting the finding of the learned Sessions Judge that this confession by the appellant despite its suppression of the existence of Subbamma, and the possibility of other inaccuracies of fact set out there, was voluntarily made by the appellant on being confronted with the results of the post mortem examination.

Mr. Rajagopalachari has suggested in his able argument the possibility of the concubine Subbamma, having entered the house in the absence of the appellant, and having strangled Balakotamma without the assistance or even the knowledge of the appellant who when he returned home and found her dead, in consternation at his discovery, with a moral conviction as to the guilty person, adopted the course he did of sending a message to his mother and his wife's relations only the next morning, and then making this confession, when the post-mortem showed the cause of death, in the manner he did, to shield the real culprit, who was his concubine Subbamma. The material does indeed show that Subbamma did have a strong grievance against Balakotamma whose resentment and protests at her continued association with the appellant had provoked mediation and led to solemn undertakings by her to have nothing to do with the appellant. I do not find any suggestion in the learned Sessions Judge's judgment of any such theory, which has been made for the first time in this court on the basis



of the retracted confession and the statements made by the appellant in the committing court and at his trial.

A defect, in my view, in the material placed before the court arises from the unfortunate state of our law, under which the first statement made by the appellant to the police regarding the discovery of his wife's corpse, the time at which he found it and what he did immediately afterwards is completely shut out in evidence under S. 162 Cr. P. C. The shutting out of what an accused person tells a police officer particularly in a case of this kind, when first questioned, opens the way for all kinds of statements being made in the committing magistrate's court and also at the trial in conformity with advised lines of defence, which are, of course, impossible to verify and places the prosecution at a great disadvantage. The view that I have no hesitation in taking is that in cases of this kind, the police would do well to take an accused person before a Magistrate, whether he makes a confession or not, and have a statement recorded under S. 164 Cr. P. C. so that the accused person can be fixed to one explanation when placed in a position which becomes incriminating unless he can offer a satisfactory explanation for his behaviour. This is a case in which a man and his wife are the sole occupants of a house, in which the wife is found suddenly dead and post mortem has proved conclusively that it is the result of violent strangulation. A prima facie strong suspicion points to the husband. It is in this background that the confession made before the magistrate, without any appreciable delay in the circumstances has to be appreciated. Although this line of defence has not been raised in the trial court, I have carefully considered the possibility of the concubine Subbamma being the sole culprit. There are cases in which an innocent person may take upon himself full responsibility for a crime, even murder, to save someone whom he dearly loves from punishment. My own view is that this is not such a case and that the appellant's confession that he and no one else strangled his wife can be safely acted upon.

(4) Some decisions have been placed before us in which it has been held that a conviction on the uncorroborated confession of an accused is unsafe. There is no authority to the effect that conviction on an uncorroborated but retracted confession before a Magistrate is illegal and each case has to be dealt with on its own facts. I am unable to find any decision in which where a man, whose wife has been strangled to death at night in a house occupied solely by them, who has voluntarily confessed before a Magistrate to his guilt, being, acquitted.

(5) The learned Sessions Judge and all the four assessors who have heard the evidence were of the opinion that the appellant strangled his wife. My own view, which is in agreement with them, is that the case is free from reasonable doubt and that the appellant can safely be convicted of murder.

My learned brother, for whose opinion I have the greatest respect, has shared my anxiety in this case and has considered it unsafe to convict the appellant on the basis of this retracted confession. I have however agreed to enter a judgment of acquittal in this case and not to refer the matter to a third Judge in view of the approach made by a learned third Judge sometime ago on a difference of opinion between us in 'Karuppa Thevan' in 'R. T. No. 31 of 1951'. Rajagopalan J. to whom our difference of opinion was referred under S. 378 Cr. P. C. before going into the merits and delivering an opinion in favour of

acquittal expressed the following view as the method of approach to such a reference:

"Where the main question at issue is identity of the assailants..... the very fact, that one of the two learned Judges, who had to decide that question was of the view, that the identity of the accused with those assailants had not been established beyond all reasonable doubt, should suffice to establish the basis for such a reasonable doubt, the benefit of which, of course, the accused have to get. In my opinion, a third Judge to whom the question is referred under S. 378 Cr. P. C. should normally accept that finding, unless the compelling necessity of conclusive evidence on record drives him to deny the existence of any basis for a reasonable doubt."

It would be a sheer waste of time if I were to ask for a reference of our difference of opinion to a third Judge in this case on the basis of this line of approach by a third Judge to a reference made to him. My learned brother and I are in complete agreement that this is not correct and legal method of approach by a third Judge and we say this with the greatest respect to Rajagopalan J. S. 429 Cr. P. C. which would apply in this case of an appeal from a sentence of transportation for life, is identical in terms with S. 378, which provides for a resolution of differences of opinion in what are known as Referred trials on the submission of sentences for confirmation. S. 429 reads as follows:

"When the Judges composing the Court of Appeal are equally divided in opinion, the case, with their opinion thereon, shall be laid before another Judge of the same court, and such Judge after such hearing (if any) as he thinks fit shall deliver his opinion, and the judgment or order shall follow such opinion."

The opinion, which Rajagopalan J. expressed, viz., that the normal disposal by a third Judge should be one of agreement with the opinion of acquittal is one which we are quite unable to share. It would be tantamount to a judgment of acquittal in practice prevailing over a judgment for conviction. Had the statute intended to lay this down it would have done so.

(6) There is a dearth of case law defining the scope of the third Judge's method of approach to such a reference. Both Ss. 429 and 378 make it mandatory for a judgment or order of the court to follow the opinion of the third judge. The only authority, which supports the view of Rajagopalan J. is the view taken by Mr. Justice Mahmood in — 'Empress v. Debi Singh', 1886 All W. N. 275, a decision of the year 1886. In that case, Mahmood J. expressed the view that when one Judge differs from his brother Judge on a pure question of the weight of evidence as to the propriety of a conviction, the opinion of the Judge for acquittal should, as a general rule, prevail. This view was considered by Edge C. J. in — 'Empress v. Bundu' 1887 All W. N. 125 and rather emphatically dissented from. We must express ourselves in complete agreement with the following view expressed by Edge C. J.

"When Judges unfortunately differ in opinion, I conceive it to be the duty of each Judge to express and act upon the opinion which he himself has definitely arrived at. Before so expressing himself he should of course carefully weigh the reasons adduced by his brother Judge for forming a different opinion; but if those reasons do not commend themselves to his mind, he must not, in the exercise of his duty, allow the fact that his brother Judge has arrived at a different conclusion,



to influence his conduct whether his view to take a criminal case — be in favour of a conviction or of an acquittal. There would be no meaning in Ss. 378 and 429 if it was intended that the opinion of one Judge in favour of an acquittal should prevail."

We need scarcely say that a difference of opinion in Referred trials, and murder cases involving life and death, arises in exceptional cases and after much anxious deliberation. References are never lightly made and when we, as a criminal Bench, make them, we do expect the legal disposal of a reference in accordance with the sections of the statute under which we make the reference. Otherwise, if a Judge is to exercise his own independent view in accordance with his own conscience, the view taken by Mahmood J. with great respect, would mean that he has to subordinate his own independent conviction in favour of an acquittal and sign a judgment to which he is not really a party.

(7) There have been several instances in our own High Court where differences of opinion have been resolved by a third Judge in favour of a death sentence on a murder charge, though one Judge was in favour of acquittal. — '*Ramaswami Gounden v. Emperor*', 27 Mad. 271 was one of the cases which went to the other extreme, in which the Sessions Judge sentenced an accused person on a charge of murder to death. Subramania Aiyar Off. C. J. was of the opinion that the accused was guilty but that the sentence should be one of transportation for life. Boddam J. disagreed and was in favour of acquittal. Bhashyam Aiyangar J. to whom the difference of opinion was referred not merely confirmed the conviction for murder but also the sentence of death passed by the Sessions Judge. When the opinion of Rajagopalan J. in the previous reference was placed before us, the matter came up for some discussion and Mr. Ethiraj who appeared for the five appellants in that referred trial expressed to us his anxiety as regards the possibility of the third Judge following the precedent of Bhashyam Aiyangar J. and restoring the sentences of death on two of the appellants passed by the Sessions Judge. The judgment of conviction, which I favoured found both young men guilty only under S. 326 I. P. C. and would have sentenced them to a Borstal School for three years.

(8) As a criminal Bench, we are, of course, vitally interested in the method of approach by a third Judge to these references. We would like to take the opportunity here as a Bench of expressing our views as to how we would like these references approached by a third Judge. The system of Referred trials from the mofussil tried by a Sessions Judge and assessors, with whose individual opinions the trial Judge is free to disagree, places an extremely heavy burden on criminal benches, who do not themselves hear the witnesses. It is inevitable that differences of opinion should arise in the discharge of this extremely heavy responsibility in which two Judges finding themselves unable to agree on a difficult case, require and welcome the opinion of a third Judge to alleviate their responsibilities. It is in this spirit that we hope future differences of opinion in criminal cases will be resolved and it is also the method of approach the statute requires. In — '*Md. Illias Mistri v. The King*', I. L. R. (1949) 1 Cal 43 Biswas J. to whom a difference of opinion was referred, made the following approach to S. 429, to which we are unable to take the slightest exception.

"There can be no doubt upon the wording of the section that the whole case is now before me,

which means not only that I am at liberty, but that it is also my duty to examine the whole of the evidence for myself and come to a final judgment. It is not a case of merely weighing the opinion of one learned Judge against that of the other deciding which of these opinions I should accept".

I however think though on this point my learned brother does not agree that the learned third Judge cannot with great respect to the decision in — '*Ramaswami Goundan v. Emperor*', (27 Mad 271) pass a death sentence in a case, where the Judge favouring conviction thinks a sentence of transportation is appropriate with the other Judge favouring acquittal, on the simple ground that it is only a Bench of two Judges, who should confirm a death sentence in agreement with each other. Although the law may not be specific on this point, this extreme can always be guarded against by the Bench referring the case expressing their opinion that in the event of the conviction being confirmed, the sentence of transportation is the appropriate one, in which case, the third Judge would be bound by such an opinion as regards which there would be no difference for him to resolve. I have thought it necessary to give expression to these views in this judgment, in which I for my part, agree for the reasons I have given supra to my learned brother's judgment of acquittal.

(9) SOMASUNDARAM J: The Sessions Judge of Guntur has found the appellant guilty of murder and sentenced him to transportation for life, for causing the death of Balakotamma, the wife of the appellant.

(10) The occurrence is said to have taken place on the night of the 29th May 1950 and before dawn of the 30th of May in the house of the accused in a village called Vetapalem. The accused married the deceased about three years before the occurrence, he having lost his first wife about 5 or 6 years before the occurrence. The accused appears to have been keeping a concubine by name Subbamma for about 20 years prior to the occurrence. The accused is aged 43 and the concubine is alleged to be aged about 32 at the time of the occurrence. The accused and his wife (the deceased) appear to have got on well for about a year after the marriage. But soon presumably on account of the influence of Subbamma, trouble started between the accused and the deceased; and it is alleged that the accused started ill-treating the deceased.

About four months or so before the occurrence when P. Ws. 1 and 5, the brothers of the deceased went to Tirupathi, they wanted to take the accused and his wife also; but the accused refused to go and his wife alone was taken. When they returned from Thirupathi, P. W. 5 took his sister to leave her in her husband's house. It appears that the door was bolted against her and the accused remaining inside refused entrance to her. P. W. 5 therefore wanted to take her away but the wife preferred to stay on in spite of all the difficulties. Subsequently, after sometime on receipt of information that the accused had turned out his wife, P. Ws. 1 and 5 the brothers and P. W. 6, their maternal uncle who is said to have brought up this girl came to the village and finding that all was not well with the accused and the deceased, they wanted to take her away with them. They found that the articles that were presented to her at the time of the wedding were missing in the house; and when she was being questioned about it, it is stated that the concubine Subbammal threw them out in the street from her house which is said to adjoin the accused's house.



Thereupon P. Ws. 1 and 5 put the samans in a cart and wanted the deceased also to come with them. There is some discrepancy as to whether the deceased actually got into the cart or whether she still preferred to remain in the house; but the fact remains that ultimately on account of the deceased preferring to live with her husband, they left all the samans with the accused.

At this time, a neighbour by name Ravipati Venkatasubbayya is said to have interfered and brought about a settlement. The understanding arrived at was that the accused should stop his illicit intimacy with Subbamma and that neither of them should visit the other or even talk to each other. Subbamma also appears to have been a party to this arrangement and by way of securing the performance of the promise, two promissory notes were executed, one by Subbamma and another by the accused, each for Rs. 500 in favour of Ravipati Venkatasubbayya, the arrangement being that if either of the party commits a breach of the understanding then the party shall pay a penalty of Rs. 500 the sum for which the promissory note was taken. This appears to have produced a lull in the otherwise a bit of stormy life led by the accused and the deceased. The accused did not like the brothers of the deceased to visit her.

Suddenly on the morning of the 30th May P. W. 7 a washerman by profession carried a message from the accused to P. Ws. 1 and 5 that the deceased was found lying speechless and unconscious in the house. They immediately went to the village with P. W. 6 and found the deceased lying dead. They saw the accused sitting in the house and it is stated that when questioned he did not make any reply; but finally he stated that he knew nothing. They thereupon suspected that the deceased was killed by poisoning either by the accused or his concubine as they did not find injuries on the body and as they learnt from the neighbours that she was alive the previous night till about 9 p. m. P. W. 1 immediately went to the police station and gave the report, Ex. P. 1. This was at about 12 noon.

On express report being sent to the Circle Inspector which was received by him at 2-30 p. m. he came to the village at about 4 p. m. He held the inquest between 4 and 7 p. m. at which he examined P. Ws. 1, 5, 6 and 7 others who were not called as witnesses. The body was then sent for post mortem and the autopsy was held the next morning at 8 a. m. on 31st May. The post mortem certificate Ex. P. 2 was received by the Sub-Inspector on the 1st June. Till then no one knew the cause of death. Every one was under the impression that the deceased was poisoned to death.

(11) The postmortem revealed that the woman must have died of asphyxia as a result of strangulation. There was an echymosed patch round the neck extending upwards to lower jaw and downwards to upper part of both collar bones. The tissues underneath were red and congested. The trachea and larynx were red and congested. The oesophagus was cynosed and the hyoid bone was broken. There were thus clear indications of death being the result of strangulation. The doctor, P. W. 2, gave it as his opinion that the strangulation was by pressure on the throat and death must have been instantaneous; and that the echymosed patch round the neck must have been due to pressing with some force.

(12) The accused was suspected and he was arrested on the 2nd of June. At the time of the occurrence the only persons who were living in the house were the accused and the deceased, the

evidence being that Subbamma was living at a distance of about 50 yards away. The Circle Inspector produced the accused on the 3rd June at 6 p. m. before the Sub-Magistrate P. W. 4, but the magistrate asked him to produce the accused the next morning. He was, therefore, produced the next morning and was remanded to the sub-jail, after giving the necessary warnings to the accused. He was again brought on the 5th. The Magistrate after putting the necessary questions and after satisfying himself that the accused making a confession voluntarily recorded Ex. P. 5 the confessional statement of the accused.

In Ex. P. 5. the accused set out the circumstances under which he committed the murder. According to the confession, his brothers-in-law wanted him to come and live with them but he would not go; and when they once took his wife to Thirupathi and came back he was away on work. She got into the house and closed the door against him when he returned from the fields. He was sleeping outside and next morning he gave her a blow in anger. She sent word to her brothers and maternal uncle who were living in a village called Vadlamudi which is about 3 miles from his village. They came and beat him and took away his samans and also his wife in a cart. He accompanied them till they reached the outskirts of the village asking for his cloth box to be given to him but, ultimately, for some reason not known to himself they brought back his wife and the samans to his house. Then he asked his wife not to allow her people to come. In spite of it, she allowed them stealthily; and this he came to know from her subsequent conduct towards him.

It appears she would not serve food for him on the day when they came and met her. Whenever he scolded her, she used to tell him that she would get him killed by her elder brothers. On the 29th when he returned home at 8 p. m. she was abusing him and served food with chilli powder. When questioned as to why she gave that she asked him to get away if he did not like it. He says he took his meal with butter milk and went to the field and returned at 12 midnight. He found his wife sleeping in a room keeping the door open. He thought that on account of the troubles she was giving and threatening him, it would be better to be killed by Government rather than be killed by her brothers and so he squeezed the throat of his wife who was sleeping and that she died without raising any cry. He says he did this because he became vexed in life and then he slept thereafter for sometime in the house and about dawn he fetched his mother who after coming and seeing the girl, pronounced that she was dead. Neighbours gathered and he sent word to his brothers-in-law and he says they came and kicked him on the head and hit him against a wall. According to his statement, the pain continued till the day before he gave the statement to the Magistrate. This in short is his confession and the case for the prosecution against the accused.

(13) In the committing Magistrate's court he entirely went back on this statement and said that the Circle Inspector and Deputy Superintendent of Police took him from his village to Tenali and from Tenali to Ponnur and coerced and threatened him and said that evil would happen to him if he did not give a statement in the manner wanted by them. He says that the wording of the statement is not his and he repeated their words like a parrot. In this statement before the committing magistrate he says that himself and his wife lived amicably and that on that day when he had gone out



for work and returned he found his wife did not respond to his call. He tried to wake her up; she did not move. Thereafter he sent word to her mother and called near relations. In short, his statement in the magistrate's court is a direct contradiction of what he stated in the confession, and a protestation of innocence and he throws the entire blame for making the confessional statement on the Circle Inspector and the Deputy Superintendent of Police.

In the trial court he simply denied the offence and did not add anything to what he stated in the committing magistrate's court. He reiterated that the Deputy Superintendent of Police and the Circle Inspector compelled him to make the confessional statement which he made before the Magistrate.

(14) The learned Sessions judge believed the confession and found the accused guilty and sentenced him as aforesaid.

(15) In appeal it is contended that the confession was not a voluntary one and is also not true; and, as this is a case depending entirely upon the confessional statement only which has been retracted and as there is no corroboration, the accused cannot be convicted on this evidence. So far as the voluntary nature of the confession is concerned, it is difficult to believe the allegation that the Deputy Superintendent of Police and the Circle Inspector tutored him to say what was stated. It is true that after the arrest of the accused on the 2nd till about 6 p.m. on the 3rd he was not produced before the Magistrate. But, this does not, in my opinion, by itself, lead to the inference that the accused either was threatened or persuaded to make a confession by the Deputy Superintendent of Police or the Circle Inspector. The Circle Inspector says he was investigating into this case. He was camping in the village and he was expecting to examine P. W. 3 who speaks about the promissory note affair and he was examined on the 5th June. Now if the confession was going to be tutored by them, it is unlikely that the police would have dropped Subbamma as there was a strong suspicion that she might have poisoned her and as all the troubles between the husband and wife were due to her. I am not prepared to accept the contention that this accused did not make the statement voluntarily.

But as regards the truth of the averments contained therein, there is considerable force in the contention of Mr. Rajagopalachari. (After discussing the evidence the Judgment proceeded:)

(16) It is clear from the above circumstances that there is a great variation between the evidence given and the averments in the confessional statement. For the above reasons, I am not prepared to rely on the confessional statement. The question whether a retracted confession can be acted upon without material corroboration will arise only when the confession is true and can safely be acted upon. That question does not arise in this case, as in my opinion though the confession is a voluntary one, it contains allegations which contradict the main aspect of the prosecution case and so it is unsafe to act upon it without further corroboration. (After discussing the evidence the judgment proceeded:)

(17) In the circumstances, in my opinion, the prosecution has not proved its case beyond all doubt against the accused. The conviction and sentence are set aside and the accused is acquitted.

(18) I have since perused the judgment of my learned brother. The case has given us great anxiety. My learned brother is however of the opinion that the appellant can be safely convicted

on the evidence in the case. I fully appreciate his observations and the reasons he has given for not making a reference to a third judge under S. 429 Cri. P. C. I entirely agree with him that it is the duty of the Judge who is asked to resolve the difference of opinion to examine the whole evidence himself and come to a final judgment after giving due consideration and weight to the reasons given by the two Judges on whose difference of opinion the case comes before him for his opinion. I do not think either, S. 378 or 429 Cri. P. C. contemplates the dice being loaded heavily in favour of either view. I am in agreement with the view expressed by Edge C. J. in — 'Empress v. Bundu', (1887) All W. N. 125, and Md. III as — 'Mistri v. The King', ILR (1949) 1 Cal 43. To that extent I agree with the view of my learned brother.

(19) As regards the other view expressed by my learned brother that the third Judge cannot pass a death sentence in a case where the Judge favouring conviction thinks a sentence of transportation for life is appropriate with the other judge favouring acquittal, with great respect to my learned brother I am unable to agree with him. It looks odd and strange that when one Judge favours acquittal and the other judge even if he convicts would sentence him only to transportation for life, a third Judge can hang. But that in my opinion is the correct interpretation of S. 378 Cri. P. C. When on a difference of opinion a case is referred to a third Judge no fetter can be placed on the third Judge. He is at liberty to express and act upon the opinion which he himself arrives at. If he chooses he can pass a sentence of death, even though one judge favours an acquittal and the other gives a sentence of transportation for life when convicting the accused.

(NOTE: The following passage from the judgment of Somasundaram J. in R. T. No. 84 of 1951 has been ordered by The Chief Justice as President of the Law Reporting Council, to be appended to the judgment of Somasundaram J. in the above case viz. Cri. App. No. 104 of 1951:)

As this case has to be laid before another Judge on account of difference of opinion, I would like to make it clear what I meant and intended when I expressed my opinion in the case of Sitaramayya Cri. Ap. No. 104 of 1951. It will be clear from that case that the opinions which I expressed about the powers of a Third Judge were purely obiter. I happened to express that opinion because my learned brother expressed his opinion. I did not intend to lay down any guiding principle for the third Judge nor did I intend to indicate the lines on which the third Judge should approach, as I have no jurisdiction to do so. In my opinion even a Bench cannot give any such directions to the third Judge. I only intended to say what I would do if I were the third Judge and not what others should do. It is to make this position clear that I am adding this note to this judgment.

A/V.B.B.

Appeal allowed.

**A. I. R. 1953 MADRAS 66**  
**SATYANARAYANA RAO AND**  
**RAGHAVA RAO JJ.**

The Public Prosecutor, Petitioner v. A. K. Gopalan, Respondent.

Criminal Misc. Petn. Nos. 568 and 690 of 1951, D/- 9-8-1951.

(a) Constitution of India, Arts. 134 (1) (c), 136 — Grant of Certificate by High Court — Considerations involved not same as those under Art. 136.



The principles governing the grant of a certificate under Art. 134 (1) (c) and the granting of special leave by the Supreme Court under Article 136 are not always the same. Possibly the only common consideration which the High Court under Art. 134 (1) (c) and the Supreme Court under Article 136 may well take into account as a ground for granting leave is that "exceptional and special circumstances exist". The other considerations which can be taken into account only by the Supreme Court under Art. 136 are that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against. AIR 1951 Mad 1060, Rel. on; AIR 1950 SC 169, Ref.

(Para 5)

**(b) Constitution of India, Art. 134 (1) (c) — Certificate of fitness under — Considerations involved are same as those under S. 109 (c), Civil P. C. — (Civil P. C. (1908), S. 109 (c)).**

Making allowance in any given case for a possible difference between considerations pertinent to civil cases and those pertinent to criminal in the matter of the application of the tests laid down by cases under Section 109 (c), Civil P. C., the application of the analogy of the latter cases to cases under Article 134 (1) (c) is, broadly speaking, correct. AIR 1951 Mad 1060, Rel. on.

(Para 6)

It is settled by cases under S. 109 (c), Civil P. C. that the grant of a certificate is in the discretion of the Court which must be judicially exercised and sparingly used, that a question will be one of public importance if it affects not merely the parties to the case but also large bodies of persons or communities, that the mere existence of a substantial question of law is not sufficient, that a question of private importance means of private importance to both parties to the litigation and not merely to one of them, and that the fact that the question affects third parties is no ground of fitness. Chitaley's Commentary on Civil P. C., Rel. on.

(Para 6)

**(c) Evidence Act (1872), S. 78 (4) — Amending Act — Notice of — Court cannot take notice in absence of authentic copy as required by S. 78.**

Anno: Evidence Act, S. 78 N. 4.

**(d) Constitution of India, Art. 134 (1) (c) — Certificate of fitness under — Propriety of grant or refusal of an adjournment — Not a question of sufficient importance for granting certificate under the Article.**

(Para 7)

**(e) Constitution of India, Art. 134 (1) (c) — Certificate of fitness under — Order of release on application for writ of habeas corpus — Detenu rearrested within five minutes of release — Second application for same writ also allowed — Government applying for leave to appeal against both orders — Held, no leave could be granted.**

On an application for a writ of habeas corpus by a detenu under the Preventive Detention Act, 1950, the High Court ordered his release. But within five minutes of the order, a fresh order of detention was served on the detenu who again applied for the same writ and was ordered to be released on the ground that the conduct of the Government was lacking in bona fides. The State Government applied for leave to

appeal to Supreme Court under Art. 134 (1) (c) against both the orders:

Held that no leave could be granted in respect of the first order as in the events that followed it, such leave would be of no practical interest.

Further that as the question of bona fides or contra of the Government was essentially one of fact or at the most of mixed question of fact and law, no question of public importance was involved and hence leave to appeal against second order also could not be given. (Paras 7, 8)

**(f) Constitution of India, Arts. 226, 132, 134 (1) (c) — Order of release on application for writ of habeas corpus — Appealability under Constitution — Principles — (Criminal P. C. (1898), S. 491).**

Under the Constitution which contains fuller and wider provisions as to appeal than those of the Government of India Act, 1935, which contained only Section 205 corresponding to Article 132, there is no such immunity from appealability in the case of an order of release on an application for a writ of habeas corpus as obtains in England. The question of appealability of such an order must be judged with reference to the provisions of the Constitution and appealability must be recognised and given effect to within the limits defined by Article 134 thereof. The intention of the framers of the Constitution seems to be that if on the one hand the absolute immunity from appeal against an order of release obtaining in England is not to be imported into India, appealability in India ought not to be treated as a matter of course on the other hand. The Constitution accordingly provides for a certificate of fitness from the High Court or for special leave from the Supreme Court as a 'sine qua non' for imperilling the liberty of a released subject, which is a matter of vital moment. Even so the High Court ought to be extremely chary of exercising its power under clause (c) of the Article against the person released. (Paras 9, 10)

In all other criminal matters than those which fall under sub-clauses (a) and (b) of Article 134 (1), the Constitution of India undoubtedly intends that the High Courts in the respective States in the territory of India should ordinarily be the final Courts of Appeal. This is a fact which must not be lost sight of by the Court when considering the question as to whether a certificate of fitness should or should not issue in any given case. (Para 10)

If the matter of an application for the writ of habeas corpus is not criminal in nature the provision of the Constitution governing appealability will be Article 132 under which, except where a substantial question of law as to the interpretation of the Constitution arises, there can be no question of an appeal to the Supreme Court. (Para 11)

Anno: Cr. P. C., S. 491 N. 14.

**(g) Constitution of India, Art. 134 (1) (c) — Jurisdiction under — Nature of.**

The jurisdiction to certify a case as a fit one for further appeal is to a certain extent discretionary, and like the jurisdiction of the Judges of the Divisional Court in England to give or to refuse leave to appeal to the Court of Appeal from their own decisions, is a very delicate one. When



the question involved is one of principle and the High Court has decided it for the first time, it is not sufficient reason for refusing the certificate of fitness for the High Court to say that they are satisfied that their own decision is right. (1886) 17 QBD 521, Ref. (Para 13)

Advocate General instructed by Public Prosecutor, for Petitioner; M. K. Nambiar, for Messrs. Row and Reddi, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

(45) 1945 FCR 195: (AIR 1945 PC 156)	9
(50) 1950 SCR 453: (AIR 1950 SC 169: 51 Cri LJ 1270)	4
(50) 1950-2 Mad LJ 569: (AIR 1951 Mad 329: 1952 Cri LJ 102)	4
(51) 1951-1 Mad LJ 296: (AIR 1951 Mad 721: 1952 Cri LJ 95)	4
(51) Cri. M. P. Nos. 1261 and 1263 of 1951: (AIR 1951 Mad 1060 :1952 Cri LJ 61)	5, 6
(51) AIR 1951 Pepsu 1: (52 Cri LJ 33)	2, 7
(1890) 15 AC 506: (60 LJQB 89)	9
(1886) 17 QBD 521: (55 LJQB 578)	13

ORDER: These are two petitions for leave to appeal to the Supreme Court under Article 134(1) (c) of the Constitution against two orders of release of A. K. Gopalan passed by us on two applications for a writ of 'habeas corpus' presented by the detenu. The second application for the writ became necessary on account of the fact that within just five minutes of our order of release on the earlier 'habeas corpus' application and just as the detenu and his legal adviser stepped out of the gates of the High Court, he was arrested again under a fresh order of detention. This fresh order was not brought to our notice at the time of the order of release that we made on the first application for the writ, although by that time it had been got ready to be served, the moment that our order on the first application for the writ should turn out to be favourable to the detenu.

(2) On the first application for the writ we are satisfied following a decision of the Pepsu Court in — 'Dr. Teja Singh v. The State', AIR 1951 Pepsu 1, that the non-mention of a time limit in the confirmatory order of detention passed after review under section 12(2) of the Preventive Detention Act 1950 (IV of 1950) vitiated the order. At the time of our pronouncement of judgments in that case it was represented to us by the then Advocate-General that Act IV of 1951 passed further to amend Act IV of 1950 had just received the assent of the President, and an adjournment was asked for that ground. No authenticated copy of the Act was produced to us of which we could take notice or on which we could act. We pronounced our order of release as we had come to the conclusion that the order of detention was illegal. The second petition for the writ which followed on the re-arrest that took place within about five minutes of the pronouncement of our earlier order was based on the ground that the Government had acted 'mala fide' and in contempt of this Court's order. We ordered the second petition on the finding that we reached in all the circumstances of the case including the non-production before us at the time of our judgments of the second order of detention which already had become ready, that the conduct of the Government was lacking in 'bona fides'.

(3) In these petitions for leave the Advocate-General has contended that the cases are fit ones for appeal to the Supreme Court and that

we should so certify. He has taken us in the course of the argument through the several provisions of law which have regulated appeals against such orders from time to time. By Article 132 of the Constitution, the appellate jurisdiction of the Supreme Court against any judgment, decree or final order of a High Court whether in a civil, criminal or other proceeding is provided for, if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution. Apart from this, Article 133 deals with the appellate jurisdiction of the Supreme Court in appeals from High Courts in regard to civil matters, while Art. 134 provides generally for the appellate jurisdiction of the Supreme Court in regard to Criminal Matters, if the High Court (a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death; or (b) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death; or (c) certifies that the case is a fit one for appeal to the Supreme Court. The present petitions for leave to appeal have been argued solely with reference to clause (c) of Article 134(1) and it has not been suggested for the respondent that the jurisdiction involved is anything but criminal.

(4) Certain decisions of this Court — 'In re Paddayya', 1950-2 Mad L J 569; of Panchapakesa Iyer and Basheer Ahmed JJ. and — 'Chunchu Narayana v. Karrapati Kesappa', 1951-1 Mad L J 296 of Govinda Menon and Basheer Ahmed JJ. have been brought to our notice which have proceeded on the basis that the jurisdiction to certify under Article 134(1) (c) should be exercised by the High Court on the same principles as those on which the discretion vested in the Supreme Court under Article 136 of the Constitution for granting special leave to appeal has to be exercised. The learned Advocate-General has criticised these cases as not appreciating the inevitable difference that exists under the Constitution between the kinds of jurisdiction. The principles governing the power of the Supreme Court to grant special leave under Article 136 of the Constitution have been laid down in — 'Pritam Singh v. The State', 1950 S. C. R. 453 in these terms:

"Generally speaking this court will not grant special leave, unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done & that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against."

(5) Of the three requirements for the grant of special leave indicated in the passage cited, the learned Advocate-General has rightly submitted that the second and the third can have no place in the matter of consideration by the High Court when invited to certify that a case decided by itself is a fit one for leave to appeal. He is, in our opinion, right in this submission. Possibly the only common consideration which the High Court under Article 134(1) (c) and the Supreme Court under Article 136 may well take into account as a ground for granting leave is that "exceptional and special circumstances exist" which is the first of the three requirements indicated in the passage cited. As pointed out in the judgment of this court (Satyanarayana Rao and Basheer Ahmed



Sayed JJ.) in — 'M. S. Sheriff v. M. Govindan', Cri. M. P. Nos. 1261 and 1263 of 1951 (Mad) delivered after reservation of our judgment in these petitions, it will not be correct to assume that the principles governing the grant of a certificate under Article 134(1) (c) and the granting of special leave by the Supreme Court under Article 136 are always the same.

(6) While to the extent of this submission the learned Advocate-General is correct, he has still to make out the propriety of our granting the leave sought in terms of clause (c) of Art. 134(1). In section 109(c) of the Code of Civil Procedure similar words are found which have been construed by authoritative decisions of the Privy Council as authorising the High Court to certify where some question of law of public or private importance is involved. It is settled too by cases under the provision of the Code of Civil Procedure that the grant of a certificate is in the discretion of the Court which must be judicially exercised and sparingly used, that a question will be one of public importance if it affects not merely the parties to the case but also large bodies of persons or communities, that the mere existence of a substantial question of law is not sufficient, that a question of private importance means of private importance to both parties to the litigation and not merely to one of them, and that the fact that the question affects third parties is no ground of fitness. We do not consider it necessary to refer to the decisions supporting the proposition as stated by us since the matter is fully discussed and the law correctly stated at pages 1025 and 1027 of Volume I of Chitaley's Commentaries on the Code of Civil Procedure, 4th Edition\*. The applicability of the analogy of decisions under Section 109(c), C. P. C. to cases under Article 134 (1) (c) of the Constitution has been considered in the judgment of this court in — 'M. C. Sheriff v. M. Govindan', Cri. M. P. Nos. 1261 and 1263 of 1951 (Mad) referred to above. Making allowance in any given case for a possible difference between considerations pertinent to civil cases and those pertinent to criminal in the matter of the application of the tests laid down by cases under Section 109(1), C. P. C., we are of opinion that the application of the analogy of the latter cases to cases under Article 134(1) (c) is, broadly speaking, correct.

(7) We shall now deal with the way in which the learned Advocate-General has endeavoured to satisfy us that certificates should be granted in these two cases. In the first case he says that there are two questions of public importance involved, namely,

- (1) Whether the time limit for the duration of the confirmatory order of detention should be mentioned in it; and
- (2) Whether the court should not have taken notice of Act IV of 1951 passed to amend Act IV of 1950 and granted the adjournment sought by the then Advocate-General for production of an authenticated copy of the amending Act.

So far as the second of the questions is concerned, we are of opinion that there is no substance in it. We had prepared our judgments in the case in favour of the detenu and taken our seats to deliver them. The then Advocate-

\*(Now pages 1135, 1137 & 1138 of the 5th (1950) Edition—Ed.)

General did not have an authenticated copy of the amending Act. We could only take notice of proceedings of legislatures, if proved, as required by section 78 of the Indian Evidence Act, by journals of those bodies or by published Acts or extracts or by copies purporting to be printed by order of the Government concerned. The question was the very vital one of freedom for the detenu. We accordingly refused the adjournment, as we thought correctly. In any case, the propriety of the grant or refusal of an adjournment cannot, in our opinion, be a question of sufficient importance for the purpose of a certificate under Article 134(1) (c).

So far as the first question is concerned, it has been brought to our notice that the Pepsu decision in — 'Dr. Teja Singh v. The State', AIR 1951 Pepsu 1 on which we founded our decision has since been overruled by the Supreme Court. That would, no doubt 'prima facie' authorise the granting of the certificates sought if the matter remained at that. But then the point which we have to consider is of what practical consequence the reversal by the Supreme Court of our order of release is to be with reference to that order in the events that have since happened. The Government, anticipating our order, made a fresh order of detention, which, accepting our order as a hurdle in the way of further detention, they served upon the detenu in order to re-arrest him within barely five minutes of our order. Having thus accepted our first order of release and having without resort to the course of an appeal to the Supreme Court served a fresh order of detention upon the detenu which led to the second petition for the writ, the Government, in our opinion, must really make out grounds for a certificate of leave to appeal against our decision on the second petition for the writ, and cannot ask for leave against our decision on the first petition at this juncture. Assuming without deciding that normally in the event of a reversal by the Supreme Court of our order on the first petition, the Government could either in the exercise of its inherent power resulting from such reversal or under Section 3(a) of Act IV of 1950 providing for execution of detention orders claim to re-arrest the detenu, it would not be open to the Government in this case to do so in view of the second order of detention which led to the second petition for the writ. The granting of leave to appeal against our order on the first petition seems to us, therefore, to be a matter more of academic than of practical interest in the circumstances of this case.

(8) As regards the second case before us the learned Advocate-General has formulated two questions as questions of public importance involved in it;

- (1) Whether it was improper for the executive to consider even while a proceeding is pending in court as to what action it should take in the event of an adverse order and pass orders without disclosing the same to the Court; and
- (2) Whether the finding of the court against 'bona fides' of the executive action is good in law.

Though formulated in the shape of two questions the matter involved, it was conceded by the learned Advocate-General, was only a single one, as the failure on the part of the Government to disclose its fresh order to the Court would only be one element of fact which may enter into our decision on the question of 'bona



fides' of the executive action. The question of 'bona fides' or contra seems to us to be essentially a question of fact which we were at pains to determine as best as we could in all the circumstances of the case. It cannot certainly be claimed to be a question on which any decision of the Supreme Court will necessarily be useful as a matter of general guidance to the executive in other case of preventive detention. The question of 'bona fides' on the part of the executive in any and every case of preventive detention must depend for its determination upon its peculiar facts and circumstances. We are not satisfied that in our conception of what constitutes 'mala fides' in the context of a case like the present we erred. Nor are we satisfied that our inference from all the facts is in root analysis anything but one of fact or at best of mixed fact and law.

(9) Mr. Nambiar for the respondent has raised the point that under the present Constitution the position as to the appealability of an order on an application for a writ of 'habeas corpus' in the exercise of our criminal jurisdiction is identical with the position as to the appealability of orders on proceedings under Section 491, Cr. P. C. which as laid down by the Judicial Committee of the Privy Council in — 'Emperor v. Sibnath Banerji', 1945 F. C. R. 195 at p. 210 "is in effect the same as the position stated in — 'Cox v. Hakes', (1890) 15 A. C. 506." The point is obviously fallacious. The very decision of the Judicial Committee cited makes it clear that "the condition of the law of 'habeas corpus' in India and the purpose and the express words of Section 205 of the Government of India Act afford a contrast to the condition of the English Law and the object and general terms of section 19 of the Judicature Act, 1873", under which — 'Cox v. Hakes' was decided. It is perfectly clear to us that under the Constitution which contains fuller and wider provisions as to appeal than those of the Government of India Act which contained only Section 205 corresponding to Article 132, there is no such immunity from appealability in the case of an order of release on an application for a writ of habeas corpus as obtains in England. The question of appealability of such an order must be judged with reference to the provisions of the Constitution and appealability must be recognised and given effect to within the limits defined by Article 134 thereof.

(10) Even so, we do not entertain any doubt but that the High Court ought to be extremely chary of exercising its power under clause (c) of the Article against the person released. The intention of the framers of the Constitution seems to us to have been that if on the one hand the absolute immunity from appeal against an order of release obtaining in England is not to be imported into India, appealability in India ought not to be treated as a matter of course on the other hand. The Constitution accordingly provides for a certificate of fitness from the High Court or for special leave from the Supreme Court as a 'sine qua non' for imperilling the liberty of a released subject, which is a matter of vital moment — within different degrees it may be — for all Countries cherishing or professing the basic principles of British Jurisprudence, and certainly of no small moment to the minds of a people "solemnly resolved to constitute India into a Sovereign Democratic Republic" and to

secure to all its citizens amongst other things the boons and blessings of political justice and liberty of thought and expression. In all other criminal matters than those which fall under sub-clauses (a) and (b) of Article 134 (1) the Constitution of India undoubtedly intends that the High Courts in the respective States in the territory of India should ordinarily be the final Courts of Appeal. This is a fact which must not, in our opinion, be lost sight of by us when considering the question as to whether a certificate of fitness should or should not issue in any given case.

(11) We may add, however, that if the matter of an application for the writ of habeas corpus is not criminal in nature the provision of the Constitution governing appealability will be Article 132 under which, except where a substantial question of law as to the interpretation of the Constitution arises, there can be no question of an appeal to the Supreme Court. This aspect does not arise for any discussion in the present cases which have proceeded on the express basis that the jurisdiction invoked is of a criminal nature governed by Article 134 (1) (c) of the Constitution.

(12) We have carefully considered this matter with a view neither to clutching at jurisdiction which does not exist, so as thereby to put in jeopardy the liberty of the subject nor giving away jurisdiction which does exist, so as to deny the State its legitimate right if any of further appeal. We find no question of principle involved in these cases such as may govern other cases; nor can we say that we have experienced any reasonable doubt about the conclusions that we have reached on the applications for the writs.

(13) The jurisdiction to certify a case as a fit one for further appeal is to a certain extent discretionary, and like the jurisdiction of the Judges of the Divisional Court in England to give or to refuse leave to appeal to the Court of Appeal from their own decisions, is, to use the epithet employed by Lord Esher M. R. in — 'Ex Parte Gilchrist; In Re Armstrong', (1886) 17 QBD 521 at page 528 in relation to that jurisdiction, a very delicate one. In the language of the learned Master of the Rolls in that case, merely to say that we are satisfied that our decision is right is not certainly a sufficient reason for refusing the certificate sought, when the question involved is one of principle and we have decided it for the first time. But bearing in mind if only by way of analogy to the extent to which such analogy is applicable a consideration like that adverted to by the learned Master of the Rolls as well as the considerations laid down by authoritative decisions as those which must be borne in mind for granting or refusing a certificate under Section 109 C. P. C. and considering all the facts and circumstances of the cases before us in the light of the principles underlying such considerations, we have, on the whole, arrived at the conclusion that these petitions must be rejected as raising no substantial questions of law of paramount importance such as may be allowed to override the liberty earned by the respondent under orders of release and as being outside the limits of the restricted jurisdiction conferred on us by the Constitution.

(14) A certificate against this order is asked for by the learned Advocate General under



Art. 132 of the Constitution. We refuse it as in our opinion this order involves no substantial question of law as to the interpretation of the Constitution.

A/D.R.B.

Petitions rejected.

# A. I. R. 1953 MADRAS 71

GOVINDA MENON  
AND CHANDRA REDDI JJ.

M. Arunachalam Iyer alias Vedachalam Iyer, Appellant v. K. N. Lingiah and Brothers, Respondents.

A. A. O. Nos. 581 to 583 of 1948, D/- 19-10-51.

(a) Transfer of Property Act (1882), Ss. 52 and 100, Proviso — Charge created by compromise decree — Decree not satisfied — Purchase of property charged is hit by rule of 'lis pendens'.

A purchaser of properties subject to a charge created by a compromise decree the satisfaction or discharge of which has not been obtained or has not become barred by limitation does not get any assistance from the proviso to S. 100 of the Act even though he is a purchaser for value without notice of the charge. So long as the decree is not satisfied and is kept alive the purchase is hit by the rule of 'lis pendens' irrespective of whether the purchase is a 'bona fide' transaction or not. (Para 8)

Anno: T. P. Act, S. 52 N. 6 a Pts. 1 and 2; S. 100 N. 28 Pt. 15.

(b) Civil P. C. (1908), S. 39 (1) and O. 21 Rr. 6 and 10 — Execution application presented to transferee Court before transfer — Validity of presentation.

The Court to which the decree is being transferred for execution can entertain the execution petition even before the order of transmission is made and the copy of the decree is received and if the execution petition remains in Court till after the passing of the order for transfer by the Court that passed the decree the presentation is a valid one and the executing Court would be vested with jurisdiction to execute the decree the moment the order for transmission is made and not only when the decree is actually received by that Court. AIR 1928 Mad 496 (2) and AIR 1949 Mad 218, Not foll. (Para 16)

Anno: C.P.C., S. 39 N. 13a Pt. 1; O. 21 R. 6 N. 1 Pt. 4; and O. 21 R. 10 N. 6 Pt. 4.

(c) Civil P. C. (1908), Ss. 39 (1) and 48 (1) and O. 21 Rr. 6 and 10 — Decree passed by C Court — According to terms of decree decree-holder to be paid certain money on 13-7-1934 — Application filed on 22-6-1946 for transmission of decree to N Court for execution — Order for transmission passed on 13-7-1946 — On 12-7-46 decree-holder presenting application for execution to N Court — On same day N Court returning application for production of copy of decree — Execution application represented on 19-7-1946 — Order of transmission and order for return held must be presumed to have been made at first moment of day — Application held must have been taken back after order for return was passed — Presentation of application, on 12-6-1946 held was valid and application being in time decree was not barred under S. 48. (Para 22)

Anno: C.P.C., S. 39 N. 13a; S. 48 N. 12; O. 21 R. 6 N. 1; O. 21 R. 10 N. 6.

M. Natesan, for Appellant; V. Rajagopalachari, R. V. Raghavan and N. Srinivasan, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('06) 28 All 655: (3 All LJ 551)	8
(1900) 27 Cal 194	9
('35) 39 Cal WN 725	9
('12) 35 Mad 588: (8 Ind Cas 852)	14
('28) 55 Mad LJ 120: (AIR 1928 Mad 496(2))	13, 14, 15
('33) 56 Mad 692: (AIR 1933 Mad 627)	14
('34) 57 Mad 795: (AIR 1934 Mad 283)	14
('34) 66 Mad LJ 566: (AIR 1934 Mad 353)	9
('39) 50 Mad LW 764: (AIR 1940 Mad 214)	14
('45) ILR (1945) Mad 726: (AIR 1945 Mad 126)	8
('45) 1945-1 Mad LJ 261: (AIR 1945 Mad 350)	8
('45) 1945-2 Mad LJ 555: (AIR 1946 Mad 169)	14
('48) 1948-2 Mad LJ 461: (AIR 1949 Mad 218)	13, 15
('50) 1950-1 Mad LJ 83: (AIR 1950 Mad 396)	8
(1854) 9 Ex 628: (23 LJEx 42)	19
(1859) 28 LJEx 223: (4 H & N 488)	20

CHANDRA REDDI J.: The decree-holder in O. S. No. 15 of 1926 on the file of the Sub-Court, Chittoor is the appellant in all these appeals. In order to appreciate the points arising in these appeals it is necessary to state briefly the facts leading up to these appeals.

(2) The appellant filed a suit in the court of the Subordinate Judge, Chittoor, against his uncle the 1st defendant for partition and separate possession of his share in the family properties and for other incidental reliefs. The 2nd defendant who was the daughter of the 1st defendant was impleaded as she had a claim for maintenance against the family properties. This suit ended in a compromise decree on 8-10-1928 and under the terms of the compromise the plaintiff was to be paid a sum of Rs. 6000 in lieu of his claim, Rs. 4000 being payable on the 29th of Ani 1934 and the balance to be paid in two instalments subsequently. It was provided in the compromise decree that for the due performance of the decree a charge should be created over the suit properties including the three items of property in dispute which lie within the jurisdiction of the Sub-Court, Nilgiris.

(3) In order to proceed against the properties in question several petitions were filed for transmission of the decree to the Sub-Court, Nilgiris and for execution against these three items but all of them proved infructuous. Ultimately the execution petition No. 195 of 1946 giving rise to these appeals was filed on 22-6-1946. No orders were passed till the 13th of July 1946. Meanwhile the appellant presented an execution petition in the court of the Subordinate Judge, Nilgiris on the 12th of July 1946. As already stated the order transmitting the decree to the Sub Court, Nilgiris for execution of the decree was made only on the 13th.

On the same day there was an order by the learned Subordinate Judge, Nilgiris directing the return of the execution petition for the production of a copy of the decree. But we have no evidence as to the exact time at which either the order for transmission of the decree was made by the Subordinate Judge, Chittoor or the latter order by the Sub Court, Nilgiris or as to when the papers were taken back by the appellant in pursuance of the order for return. The importance of the exact time of these acts will become apparent when we deal with the question of the validity of the presentation of the execution petition in the Sub Court, Nilgiris.



(4) The execution petition was represented on the 19th of July 1946 with an endorsement that the decree will be filed later on. In the course of these execution proceedings the properties in question were being brought to sale. It may be necessary to state here that the 2nd defendant sold these properties in the years 1939-40 for debts binding upon the estate of the 1st defendant who died prior thereto. The persons who acquired interest in these properties by virtue of the sales came forward with claim petitions.

(5) In support of their claims two contentions were urged. One was that the present execution petition was barred under S. 48 of the Civil Procedure Code firstly for the reason that the execution petition now presented was beyond 12 years of the date of the decree, that as no time was fixed for the payment of these amounts in the original decree itself limitation began to run from 8-10-1928, the date of the decree and the date 13th July 1934 fixed for the payment of Rs. 4000 was inserted only by way of amendment asked for in I. A. No. 33 of 1942 long after the decree got barred and the judgment-debtors ceased to have any interest in the properties and would not therefore affect them. Secondly even assuming that the decree was not barred there was no valid presentation of the execution petition within 12 years as it was filed in the court of the Subordinate Judge, Nilgiris prior to the passing of the order for transmission and receipt of the decree by the Court to which the decree was transferred for execution. The alternative ground was that the claimants being purchasers for value without notice of the charge created on these properties, the charge could not be enforced.

(6) The trial court while holding that the execution petition was in time and not barred under S. 48 of the Civil Procedure Code found that the claimants were bona fide purchasers for value without notice of the charge and that consequently they were entitled to the benefits of proviso to S. 100 of the Transfer of Property Act which provides

"Save as otherwise expressly provided by any law for the time being in force no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge."

In the result he allowed the claim petitions and dismissed the execution petition.

(7) In these appeals filed by the decree-holder his counsel Mr. Natesan accepting the finding that the respondents are the bona fide purchasers for value without notice of the charge argued that S. 100 of the Transfer of Property Act does not afford any protection to the respondents and that the appellant is not precluded from enforcing the charge created by the consent decree. On the other hand, the decree of the Lower Court is sought to be sustained on behalf of the respondents not only on the basis of the proviso to S. 100 of the Transfer of Property Act but also on the ground of limitation.

(8) We shall first consider whether the proviso to S. 100 of the Transfer of Property Act is a bar to the enforceability of the charge created over these properties. In other words, is the view of the learned Subordinate Judge that the charge created by the compromise decree is not available against the bona fide purchasers for value without notice of the charge is correct. S. 100 of the Transfer of Property

Act as it stood after the Amending Act of 1929 runs thus.

"Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained (which apply to simple mortgage shall, so far as may be, apply to such charge). Nothing in this section applies to the charge of a trustee on the trust property for expenses properly incurred in the execution of his trust (and save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge."

It is manifest that the bona fide purchaser for value without notice of the charge acquires the right by virtue of this proviso only in cases where there is no other provision of law governing such a charge. We have, therefore, to see whether there is any other provision of law in the Transfer of Property Act which governs such purchase of property. There can be no doubt that there is such a provision and that is S. 52 of the Transfer of Property Act which embodies the doctrine of lis pendens. S. 52 lays down:

"During the pendency in any court having authority within the limits of India excluding the States of Jammu and Kashmir or established beyond such limits by the Central Government of any suit or proceedings which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit, or proceedings so as to affect the rights of any other party thereto under any decree or order which may be made therein except under the authority of the court and on such terms as it may impose."

Reading S. 100 in conjunction with S. 52 of the Transfer of Property Act it will be seen that a purchaser of properties subject to a charge created by a compromise decree the satisfaction or discharge of which has not been obtained or has not become barred by limitation does not get any assistance from the proviso to S. 100 of the Act even though he is a purchaser for value without notice of the charge. So long as the decree is not satisfied and is kept alive the purchase is hit by the rule of lis pendens irrespective of whether the purchase is a bona fide transaction or not. We are fortified in this view by some of the decided cases of our court. In — '*Rajagopala v. Kesava*', ILR (1945) Mad. 726 a Bench of this Court decided that S. 100 of the Transfer of Property Act does not override the provisions of S. 52 of the Act and that the Legislature by the Amendment of S. 100 could not have intended to qualify the doctrine of lis pendens, see also — '*Kulandaivelu v. Sowbagyammal*', 1945-1 Mad LJ 261 and also — '*Rajagopala Chetti v. Abdul Shukoor Sahib*', 1950-1 Mad LJ 83 and — '*Maina v. Bachchi*', 28 All 655.

(9) That the incidents of a compromise decree are the same as those of other decrees is seen from — '*Hemlata Devi v. Bhowani Charan Roy*' 39 Cal WN 725 and — '*Kuloda Prosad v. Jageshar Koer*', 27 Cal 194. These cases along with — '*Aramudhu Iyengar v. Zamindari Srimathi Abhiramavalli Ayah*', 66 Mad LJ 566 lay down that question of notice would not



arise in a case of charge created by a decree of a court. Admittedly in this case the properties were purchased by the claimants while the decree remained unsatisfied which means during the pendency of litigation. It is incontrovertible that continues so long as the decree is alive

(10) We cannot, therefore, agree with the lower court that the appellant cannot avail himself of the charge over the properties in the hands of the respondents. It follows that the appellant is entitled to proceed against the properties in the hands of the respondents and that proviso to S. 100 of the Transfer of Property Act is not a bar hereto if the decree is otherwise alive.

(11) There remains the point urged by the learned counsel for the respondents, namely, that the decree is barred by limitation under S. 48 Civil Procedure Code. As in the lower court the contention on behalf of the respondents on this aspect of the case is two-fold. According to them the decree which was passed in 1928 got barred in 1946 when they filed the present execution petition. It is argued that the decree, as it stood originally, did not direct any payment of money on a certain date or at recurring periods and therefore, the limitation for the execution of the decree starts from the date of the decree, that the clause relating to the payment of Rs. 4000 on 13-7-1934 was inserted only by an amendment in 1942 and that this amendment could not in any way prejudice the rights of the respondents as the amendment itself was made after the decree got barred and after the judgment-debtors ceased to have any interest in the properties in question.

In support of this contention several decisions of this Court as well as of other courts were placed before us. It is unnecessary for us to refer to any of these rulings in view of the fact that the basic facts on which such a contention could be founded do not exist in this case. The learned counsel for the appellants submitted that the time for payment of Rs. 4,000 was provided for even in the original decree and not by way of any amendment in 1942. To satisfy ourselves whether the original decree directed payment of money on a specified date we sent for the original records. A reference to them has disclosed that the time for payment of Rs. 4000 was specifically stated to be 29th of Ani 1934 in the original decree itself. All that was sought by way of amendment was to give the corresponding English date to 29th Ani and nothing more. In the circumstances we feel that this contention is devoid of any substance and ought to be rejected.

(12) Next we have to consider whether the presentation of the execution petition on the 12th of July was a valid one and within time. What is urged by the learned counsel for the respondents is that since on the 12th July when the execution petition was filed in the court of the Subordinate Judge, Nilgiris, there was no order of transmission of the decree to that court and no copy of the decree was received by that court, it had no jurisdiction to entertain the execution petition and hence there was no valid filing of the execution petition.

(13) The basis of this contention is the ruling of Jackson J. in — *'Nanjunda Chettiar v. Nallakaruppan Chettiar'*, 55 Mad LJ 120 which lays down that until a court has received the decree it has no jurisdiction to entertain an application for execution, and the application

for execution filed in such a court would not help the decree-holder to save the decree from the bar of limitation and that a mere order directing transmission of the decree would not vest the court to which the decree is to be transferred for execution with jurisdiction to receive execution application unless the decree is actually received by that court. This ruling was followed by one of us in — *'Rachapudi Rangarao v. Subbarao'*, 1948-2 Mad LJ 461.

(14) In — *'Modali Ademma v. Venkatasubbayya'*, 56 Mad 692 it was held that the decision in — *'Nanjunda Chettiar v. Nalla Karuppan Chettiar'*, 55 Mad LJ 120 was wrong and the contrary view taken in — *'Arimuthu Chetti v. Vyapuri Pandaram'*, 35 Mad 588 by Krishnaswami Aiyar J. is the correct one. In this case the following passage from — *'Arimuthu Chetti v. Vyapuri Pandaram'*, is quoted with approval:

"I am not at all sure, having regard to the provisions of rules 6, 7 and 8 of Or. XXI that the court to which a decree is sent for execution is authorised to execute it before a copy of the decree is received; but I think there is force in the contention that, when once an order is made sending a decree to another court for execution, that by itself is sufficient to entitle the decree-holder to apply to the court to which the decree is sent for execution."

The same view was taken by another Bench of this Court in — *'Venkataratnam v. Chennayya'*, 50 Mad LW 764 and by Yahya Ali J. in — *'Perumal Chettiar v. Avula Kotayya'*, 1945-2 Mad LJ 555. In — *'Thiagaraja Thevar v. Sambasiva Thevar'*, 57 Mad 795 a Bench of this court took the view that when an execution petition is filed in a court which had not the jurisdiction to receive it at that time it is not bound to dismiss the petition when it has jurisdiction to decide when the matter comes up for decision simply because it had no jurisdiction at the time of the presentation of the petition.

(15) These rulings which overrule the decision in — *'Nanjunda Chettiar v. Nalla Karuppan Chettiar'*, 55 Mad LJ 120 were not brought to the notice of the court when deciding — *'Rachapudi Rangarao v. Subbarao'*, 1948-2 Mad LJ 461.

(16) What emerges from these decisions is that the court to which the decree was being transferred for execution could entertain the execution petition even before the order of transmission is made and the copy of the decree is received and if the execution petition remains in court till after the passing of the order for transfer by the court that passed the decree the presentation is a valid one and also that the executing court would be vested with jurisdiction to execute the decree the moment the order for transmission is made and not only when the decree is actually received by that court.

(17) So there will be no difficulty in this case if it is found that the execution petition which was filed on the 12th of July was in court by the time the order of transmission was made by the Subordinate Judge, Chittoor on the 13th. But a complication is introduced into this by the fact that on the 13th an order was passed by the Sub Court, Nilgiris directing the return of the execution petition for production of a copy of the decree and it was represented only on the 19th of July 1946. As already observed we have no evidence as to when this order returning the execution peti-



tion was passed or as to when the papers were taken back on behalf of the appellants. In these circumstances, it is argued by the counsel for the respondents that as there is no evidence on record that the execution petition was on the file of the executing court when the transfer was directed to be made by the Sub Court of Chittoor and as by the time the execution petition was represented on the 19th the decree was already barred, the presentation of the petition on the 12th does not enure to the benefit of the decree-holder.

(18) The learned Subordinate Judge sought to get over the difficulty of the want of evidence in the case as regards the exact time when the order for return was made on the 13th by relying on the practice followed by him in passing such orders during the lunch interval at 2 p.m. He deduces that the same practice might have been followed by his predecessor, and assumes that the execution petition was on the file of that court when the order for transfer was made by the Sub Court, Chittoor on the 13th. But we do not think that any inference as to the time of the passing of the order for return by his predecessors could be drawn from the fact that the learned trial Judge was in the habit of passing such orders at about 2 p.m. However that does not present an insuperable difficulty. In the absence of any evidence we have to presume that all judicial acts date from the earliest moment of the day.

(19) Maxwell in his "the Interpretation of Statutes" at page 351 (9th Edn) says thus:

"It used to be laid down as a general rule that courts refused to take notice of 'all fractions and divisions of a day, for the uncertainty, which is always the mother of confusion and contention' and in civil cases a judicial act, such as a judgment is taken conclusively to have been done at the first moment of the day."

In — 'Edwards v. Reginam', (1854) 9 Ex. 628 it was observed at page 631:

"The doctrine that judicial acts are to be taken always to date from the earliest minute of the day in which they are done, stands upon ancient and clear authority."

(20) To the same effect is the decision in — 'Wright v. Mills', (1859) 28 LJ Ex 223.

(21) Applying this principle to the order of transmission it must be presumed that it was passed at the earliest moment of the day. The same presumption governs the order for return also. It follows that both the orders must be presumed to have been made at the first moment of the day.

(22) This would give rise to a further question as to whether the taking back of the return was at the same time as the passing of the order for return i.e., whether the execution petition was on the file of the Sub Court, Nilgiris, when the latter order was passed. Here again we can turn to the passage at page 352 of Maxwell on "The Interpretation of Statutes" 9th Edn. which states thus:

"But as regards the acts of parties, including in this expression acts, which, though in form judicial, are in reality the acts of parties, the courts do notice such fractions whenever it is necessary to decide which of two events first happened."

The learned author has relied upon a number of decisions in support of this statement of law. If as stated by the learned author there is no presumption in the case of acts of private parties as in the case of judicial acts then it

must be taken that the return was taken only after the relevant orders of the court were passed in this case. It is common knowledge that the papers directed to be returned will not be taken back simultaneously with the passing of the order. Some time would intervene between the passing of the order and the taking back of the papers. Hence it must be inferred that the execution petition was on the file of the Sub Court, Nilgiris when the order directing transfer of the decree was passed in the Sub Court at Chittoor and therefore the presentation of the execution petition on the previous day was proper and valid. So the last execution petition out of which these appeals arise was filed by the appellant in time and the decree was not barred and it could be executed by him by proceedings against the properties in the hands of the respondents.

(23) In these circumstances we must hold that the respondents cannot have any claim on the properties which were subject to a charge and purchased by them as against the holder of the decree, that is, the appellant and that the order of the lower court that the appellant is not entitled to enforce the charge cannot be sustained. In the result we allow the appeals but in the circumstances without costs.

A/V.R.B.

Appeals allowed.

#### A. I. R. 1953 MADRAS 74

GOVINDA MENON AND MACK JJ.

In re Kakana Ramana Reddy and others, Accused-Appellants.

Criminal Appeals Nos. 229, 232, 238 and 626 of 1951, D/- 23-4-1952.

(a) Evidence Act (1872), S. 24 — Voluntaryness of confession — Criterion to determine — (Criminal P.C. (1898) S. 164 — Madras Police Standing Order No. 583).

The criterion for the admissibility of a confession is not whether an accused person immediately he is questioned by the police, spontaneously comes out with a full confession of his guilt. If this were adopted as a criterion very few confessions would become admissible in evidence. It is perfectly open to the police to interrogate a person who is suspected before his arrest and confront him with the evidence they discovered and unable to explain it; an accused person may feel that the game is up and then come out with a full confession. It is true that under Madras Police Standing Order No. 583 the practice of resorting to persuasion, trickery or oppression to induce an accused person to confess is prohibited and when once an accused person has been arrested, while the police may and indeed should listen to any statement which he may voluntarily make the police are strictly forbidden to interrogate him or press him to make a statement. But the criterion as to whether a confession is voluntary or not is whether it was voluntarily made by an accused person before the Magistrate recording it under S. 164 Cr. P.C. i.e. after he has been removed from police influence and has been given clearly to understand by the Magistrate in compliance with S. 164 Cr. P.C. that anything he says may be used in evidence against him, that he was not bound to make any confession that if he does so, it would be used as evidence



against him and that he would not be taken as an approver. (Para 6)

Anno: Evi. Act S. 24, N. 3, Cri. P.C., S. 164 N. 14.

(b) Criminal P. C. (1898) S. 164 — 'Upon questioning the person' — Record of confession after adequate warnings — Magistrate is not bound to repeat warnings on second day on which recording is continued — (High Court Rules and Orders — Madras Criminal Rules of Practice, R. 85).

Under S. 164(3), Criminal P.C. it is sufficient if before commencing to record a confession, a magistrate puts the necessary questions required by S. 164 Cri. P.C., to the accused and it is not mandatory that he should keep on repeating these questions to him after every break in the recording of a long confession. There is nothing in S. 164 Cr. P.C. or even in Rule 85 of the Criminal Rules of Practice which requires a Magistrate to put all these questions afresh after any break in the recording of a confession, say after a luncheon interval or the next day. (Paras 7, 8)

Consequently, an omission to repeat the warnings on the second day on which the recording of the confession is continued will not render the confession inadmissible in evidence as not having been voluntarily made. (Paras 4, 8)

It is extremely difficult to split up a confession made one day and continued the following day into something partly admissible and partly inadmissible and either the whole confession should be admitted or rejected. AIR 1946 Pat 169 and AIR 1925 Cal 587 diss. from. (Para 8)  
Anno: Cr. P. C., S. 164, N. 15.

(c) Criminal P. C. (1898) S. 164 (3) — Certificate as to voluntariness of confession — Record of reasons before recording confession is not necessary — Certificate appended after recording is sufficient — (High Court Rules and Orders — Madras Criminal Rules of Practice, R. 85).

S. 164 Cr. P. C. does not require a Magistrate to give reasons before beginning to record a confession for his satisfaction that the accused was going to make a voluntary statement. R. 85 of the Criminal Rules of Practice requires some revision in view of technical and literal non-compliance with each of the suggested questions being sought to be made ground of attack to undermine the voluntary nature of the confession. While the questions required to be put by a Magistrate before the accused made a statement are no doubt absolutely necessary to ensure a confession being a voluntary one, it is only after the accused has made a statement that a Magistrate, after hearing him and observing his demeanour can be in the best position to append the highly responsible certificate required of him to validate a confession that he believes it to have been voluntarily made. (Para 9)

Anno: Cr. P. C., S. 164 N. 16.

M. K. Nambiar, C. K. Venkatanarasimham, V. Rajagopalachari and B. T. Sundararajan, for Appellants; Public Prosecutor for the State Prosecutor, for the State.

REFERENCES: Courtwar/Chronological/ Paras  
(25) 52 Cal 67: (AIR 1925 Cal 587:  
26 Cri LJ 782)

(50) 1950 Mad WN Cr 55: (AIR 1950  
Mad 484: 51 Cri LJ 1137)

(51) 1951 Mad WN Cr 277: (AIR 1952  
Mad 411: 1952 Cri LJ 853)

(45) 24 Pat 646: (AIR 1946 Pat 169:  
48 Cri LJ 30)

MACK J.: Criminal Appeals Nos. 229 and 232 of 1951 are appeals by A. 3 and A. 5 who were found guilty on the unanimous verdict of Jury at the Madras Criminal Sessions under Ss. 120B, 489C and 489-D I.P.C. A. 3 was in addition found guilty under S. 489-A, I.P.C. They were each sentenced to five years rigorous imprisonment by Panchapakesa Aiyar J.

(2) Crl. Ap. No. 238 of 1951 is an appeal by the 6th accused, who was found guilty on a majority jury verdict of 8 : 1 only under S. 489-C IPC and sentenced to three years' rigorous imprisonment. The jury returned a unanimous verdict of not guilty as regards the 6th accused on the count under S. 120-B IPC. The State appeals against his acquittal on this count in Crl. Ap. 626 of 1951.

(3) It may be mentioned that there were six accused charged with conspiracy to counterfeit 100 rupee currency notes. A. 1 who was convicted on four counts on the unanimous verdict of the jury and sentenced to concurrent sentences of five years has not appealed. A. 2 and A. 4 were acquitted.

(4) The appeals by A. 3 and A. 5 which were first filed were admitted by a Bench of which one of us (Mack J.) was a member under S. 411-A 1(a) Crl. P.C. on a point of law. This related to the admissibility of confessions recorded by a Presidency Magistrate, Mr. Ernest from A. 1 and A. 3. The main objection was taken to the admissibility of A. 3's confession Ex. P. 66(b) recorded by Mr. Ernest on 3-2-1950 and continued on 4-2-1950. It was alleged that although Mr. Ernest gave A. 3 all the necessary warnings in question form on 3-2-1950 before he started recording the confession, he did not administer these same warnings again before he continued recording the latter portion of the confession on 4-2-1950. The short point of law is whether S. 164 Crl. P.C. requires a Magistrate to give such warnings again on the second day when the confession could not be completed the previous day, and whether this constitutes an omission, which would render the confession inadmissible in evidence as not having been voluntarily made.

(5) To appreciate the point taken it is necessary to set out some of the salient facts of this prosecution. Ramana Reddi (A. 3) is a graduate aged 33 and a mica miner of Gudur. It is in his house that according to the prosecution, these counterfeit notes were actually manufactured. 1929 counterfeit 100 rupee notes were actually recovered in the case, 976 from the possession of A. 1, 201 from the possession of A. 5, 750 from the possession of A. 6 and 2 from the possession of a servant of A. 5. The accused came from different districts in the State. A. 1 was an electrical engineer and machine commission agent, who lived in Triplicane, Madras. A. 2 came from Travancore. A. 4 was a compositor of Madurai and A. 5 is a Mudaliar landholder of Salem. A. 6 who was A. 5's son-in-law's brother, is a landholder residing at Erode. It was the prosecution case that after several of these counterfeit notes were manufactured and before any of them were actually passed to the public, the conspiracy was nipped in the bud by prompt Police



action. The house of A. 3 in Gudur was searched on the evening of 23-1-1950 and the Police recovered some letters Exs. P. 15 to P. 17. The next day A. 3 is said to have produced a map roller, (M. O. 11) capable of being used in the process of counterfeiting currency notes, though also for innocent purposes. He is also said to have shown the police two wells from which a piece of a block (M. P. 10) used for counterfeiting notes was discovered. A. 3 is said to have been formally arrested on the 24th of January 1950 and to have been brought by car to Madras on 25-1-1950. He was produced before the Commissioner of Police, who passed orders as a Presidency Magistrate under S. 7 of the City Police Act for his detention in Police custody for further investigation.

On 31-1-1950, Mr. Ernest the 6th Presidency Magistrate, received a requisition Ex. P. 65 from the Chief Presidency Magistrate to record a statement under S. 164 CrI. P.C. from A. 3 who was then on remand in the Saidapet sub-jail, whereas A. 1 was on remand in the Penitentiary. A. 3 was produced before Mr. Ernest by the Jail warders on the 1st of February 1950 and he then administered the usual warnings that he was under no obligation to answer questions, that it was not intended to make him an approver and that anything he may say may be used against him. Mr. Ernest made a record Ex. P. 66 of the warnings he gave A. 3 and he gave him 2 days time to reflect till 11 a.m. on 3-2-1950. He was again produced before him and after putting all the necessary questions, which could have left no doubt in the mind of A. 3 that his statement would be used against him at his trial and that it was not intended to make him an approver, recorded from him a very long confession covering more than seven printed pages of matter. By far the greater part of this confession was recorded on 3-2-1950 and there being no time to continue in that day, approximately two pages more were recorded on 4-2-1950 without any further warnings or questions being recorded as having been put that day. At the conclusion of the confession, the Magistrate recorded his certificate of belief that the confession was voluntarily made and in addition appended an explanatory note that he had removed him from police influence for nearly 48 hours, which was given to him for reflection.

(6) Mr. Nambiar has strongly criticised A. 3 being kept in Police custody for nearly six days. That custody was however perfectly legal and under the specific orders of the Commissioner of Police acting within his powers as a Presidency Magistrate. It has to be remembered that the conspiracy was a very widespread one with ramifications in several districts and we can see nothing in this charge of police detention which can afford a basis for any interference, that A. 3 was coerced, ill-treated or as Mr. Nambiar puts it "conditioned by a variety of processes" into an approver on the promise also of being taken as one. The confession he has given is a very long and detailed one, which it was not possible for the magistrate to record in one day. It is true that it was retracted in the committing court. The criterion for the admissibility of a confession is not whether an accused person immediately he is questioned by the police, spontaneously comes out with a full confession of his guilt. If this were adopted as a criterion very few confessions would become admissible in evidence. It is perfectly open to the police to interrogate a

person who is suspected before his arrest and confront him with the evidence they have discovered and unable to explain it; an accused person may feel that the game is up and then come out with a full confession. It is true that under Madras Police Standing Order No. 583 the practice of resorting to persuasion, trickery or oppression to induce an accused person to confess is prohibited and when once an accused person has been arrested, while the police may and indeed should listen to any statement which he may voluntarily make, the police are strictly forbidden to interrogate him or press him to make a statement.

There is every indication in this case that A. 3 before he was actually arrested on 24-1-1950 had made incriminating admissions to the Police and there is no ground for any suspicion that he was coerced, tricked or oppressed into making this long confession while he was in Police custody. The criterion as to whether a confession is voluntary or not is whether it was voluntarily made by an accused person before the Magistrate recording it under S. 164 CrI. P.C. i.e., after he has been removed from police influence and has been given clearly to understand by the Magistrate in compliance with S. 164 CrI. P.C. that anything he says may be used in evidence against him, that he was not bound to make any confession that if he does so, it would be used as evidence against him and that he would not be taken as an approver. Under S. 164(3) CrI. P.C.,

"No Magistrate shall record any such confession unless upon questioning the person making it, he has reason to believe that it was made voluntarily."

All the questions suggested in Rule 85 of the Criminal Rules of Practice as useful questions, which a Magistrate may put to an accused person before he proceeds to record a confession have a two-fold object (i) to make perfectly clear to the accused the consequences of making a confession and (ii) to assist a magistrate to satisfying himself that the confession was voluntarily made, these questions giving as they do every opportunity to the accused freed from Police custody to inform the Magistrate about any police torture or improper inducement to which he has been subjected by the police.

(7) We can find nothing in S. 164 CrI. P. C. or even in Rule 85 of the Criminal Rules of Practice which requires a Magistrate to put all these questions afresh after any break in the recording of a confession, say after a luncheon interval or the next day. Under Section 164(3) CrI. P.C. these questions have to be put before "recording any such confession".

(8) Our attention was drawn at the time these appeals were admitted to — '*Punia Mallah v. Emperor*', 24 Pat. 646, a Bench decision of the Patna High Court in which Das J. took the view that where a confession was recorded from an accused person on the 27th of October 1943 and continued to the 28th of October 1943 without any further warnings being given on the second day, there was a failure to comply with S. 164(3). With great respect we are unable to follow that view, which followed the view taken by Mukherjee J. in — '*Emperor v. Panchkowri Dutt*', 52 Cal. 67. Mukherjee J. sitting by himself took the view that where a confession made on one day was continued the next day and the Magistrate did not question the accused again and there was nothing to satisfy himself that the confession made on the



second day was voluntary, that part of the confession so made was inadmissible. With respect we find it extremely difficult to split up a confession made one day and continued the following day into something partly admissible and partly inadmissible and think either the whole confession should be admitted or rejected. In the Patna decision, it was pointed out by Das J. that the confession as regards the particular dacoity with which that accused was concerned, was narrated on the second day on which no warnings were given. In this particular case by far the greater part of the confession was made on 3-1-1950 and all that would according to the view taken by Mukherjee J. be admissible and only the latter portion recorded on 4-2-1950 would be ruled out. We have no hesitation in taking the view that it is sufficient if before commencing to record a confession, a Magistrate puts the necessary questions required by S. 164 CrI. P.C. to the accused and that it is not mandatory that he should keep on repeating these questions to him after every break in the recording of a long confession.

(9) Mr. Nambiar has referred us to — 'Mannickappa Nagendra Bhagavathar v. The King', 1950 Mad. W.N. Cr. 55 in which one of us Govinda Menon J. and Basheer Ahmed Sayeed J. held that when a Magistrate recording a confession did not record the questions and answers from the accused in direct form but swore in the witness box that he had rule 55 (85?) of the Criminal Rules of Practice before him and put all the necessary questions suggested there, to satisfy himself that the statement was voluntarily made, it was a sufficient compliance with S. 164 CrI. P.C. In — 'Ramaswami v. The State', 1951 Mad. W.N. Cr. 277 a Bench of this Court consisting of one of us Mack J. and Krishnaswami Nayudu J. held that failure to warn an accused that it was not intended to make him an approver as required by Rule 85 did not render the confession inadmissible. In that case, the question had been put in another form as to whether the police had offered inducements that the accused would be released if he made a confession. Mr. Nambiar has also stressed the failure of the Magistrate to act in strict compliance with rule 85 of the Criminal Rules of Practice in not recording his reasons for believing the statement to be voluntary before beginning to record it. The Magistrate however appended the certificate required by S. 164 CrI. P.C. at the end of the confession. S. 164 CrI. P.C. does not require a Magistrate to give reasons before beginning to record a confession for his satisfaction that the accused was going to make a voluntary statement. We think that Rule 85 of the Criminal Rules of Practice requires some revision in view of technical and literal non-compliance with each of the suggested questions being sought to be made a ground of attack to undermine the voluntary nature of the confession. While the questions required to be put by a Magistrate before the accused made a statement are no doubt absolutely necessary to ensure a confession being a voluntary one, it is only we think after the accused has made a statement that a Magistrate, after hearing him and observing his demeanour can be in the best position to append the highly responsible certificate required of him to validate a confession that he believes it to have been voluntarily made.

(10) We see no substance in the legal objection taken to the admissibility of the confes-

sions of either A. 3 or A. 1 as evidence in this trial. Mr. Nambiar has not referred us to any misdirections in the long, exhaustive and able summing up of the learned trial Judge, who has been very fair to all the accused.

(11) On behalf of A. 5 Mr. Rajagopalachari has referred us to some alleged misdirections. Though the appeals were admitted on the legal point of the admissibility of the confessions and not on any misdirections pointed out at the time of admission we would like to deal with them briefly. The evidence against A. 5 was that from his rice mill 201 counterfeit notes were recovered and also a paper cutting machine (M. O. 6) on 23-1-1950. A 6 who was A. 5's son-in-law's brother had been arrested in Erode on 22-1-1950 and from his possession 750 notes and a diary and some letters were recovered. In a telegram Ex. P. 3 was found the Triplicane address of A. 1. In addition to the 201 counterfeit notes recovered in a search of A. 5's house, a telegram Ex. P. 8 from A. 1 to A. 5 "to meet Ramaswami (A. 6) Cochin express and deliver 750 out of your stock" was also recovered. They recovered from A. 5's house a letter Ex. P. 7 and a diary Ex. P. 9. From A. 1's house a letter Ex. P. 39 was recovered purporting to be written by A. 5 on 22-1-1950. According to the Police, it arrived on 23-1-1950 by post when the police were in A. 1's house. A. 5 denied having written this letter, his general defence being that A. 6, who was a lorry owner, was staying in his rice mill and he sought to throw the responsibility for the counterfeit notes found there on A. 6.

The alleged misdirection is that the learned Judge asked the Jury to compare the signature on Ex. P. 39 with A. 5's admitted writing and signature. There was A. 5's writing on his diary Ex. P. 9. Mr. Rajagopalachari however said he was unable to find anything in the nature of an admitted signature by A. 5 on the record. He was not present at the trial nor unfortunately was he instructed by the advocate who was himself present. There must have been admitted signature of A. 5 on record such as his statement in the committing Court and it may well have been one of these signatures, which the learned Judge placed before the jury. We are wholly unable to make any inference of misdirection from the mere inability of the learned advocate to find amongst the actual exhibit an admitted signature of A. 5. It is also urged that the learned Judge did not refer to A. 5's line of defence. We find that he has done so on more than one occasion in his long and elaborate summing up. We are, in fact, quite unable to find any trace of misdirection in the elaborate summing up of the learned Judge, which has been scrupulously fair to each of the accused.

(12) The learned advocate for A. 6 in CrI. Ap. No. 238 of 1951 has conceded that the summing up has been fair to him and is free from any misdirection and that his appeal must fail if the confessions of A. 1 and A. 3 are held to be admissible. A. 6 admitted that he got 750 notes from A. 5 on the night of 22-1-1950. He pleaded that he had to pay about 3½ lakhs in income-tax and that he had approached several persons for loan and also asked A. 1 for a loan of a lakh. There can be no doubt that he received 750 counterfeit notes. The jury did not think that he was in the conspiracy to manufacture and pass off counterfeit notes and gave him the benefit of a reasonable doubt on the count under S. 120-B IPC. We can see no grounds, which would warrant our interference with the



unanimous verdict of the jury. We have no hesitation in dismissing A. 6's appeal Crl. Ap. No. 238 of 1951 and also the state appeal Crl. Ap. No. 626 of 1951 against his acquittal on the conspiracy charge, but we reduce the sentence passed on him from 3 years' to 2 years' rigorous imprisonment. We see no reason for any reduction in the sentences the learned Judge has seen fit to impose on the other appellants whose appeals are dismissed.

A/K.S.

Order accordingly.

**A. I. R. 1953 MADRAS 78****RAMASWAMI J.**

Sampoornam, Petitioner v. N. Sundaresan, Respondent.

Criminal Revn. Case No. 86 of 1952 and Criminal Revn. Petn. No. 77 of 1952, D/- 6-8-1952.

**Criminal P.C. (1898), S. 488(8) — "Resided" — Temporary residence of parties — Jurisdiction to entertain application.**

Sub-Section (8) of S. 488, Criminal Procedure Code, does not necessarily refer to a permanent residence. It refers also to temporary residence. The word "residence" implies something more than a brief visit but not such a continuity as to amount to domicile. Each case has to be dealt with on its merits. In those cases where the parties have no home of any sort and have been moving about from place to place, each place where they do live would be their home for the time being. And the Court within whose jurisdiction they resided last can entertain an application under S. 488. AIR 1918 Cal 785; AIR 1940 Lah 449 and AIR 1942 Mad 666 Rel. on.

(Para 6)

Anno: Cr. P. C., S. 488, N. 28.

A. Nagarajan, for Petitioner; T. S. Venkataraman, for Respondent; The Asst. Public Prosecutor, for the State Prosecutor, for the State.

REFERENCES: Courtwar/Chronological/ Paras

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| ('27) AIR 1927 All 291: (28 Cri LJ 494)                                      | 6    |
| ('46) ILR (1946) All 879: (AIR 1947 All 4: 48 Cri LJ 208)                    | 5    |
| ('29) AIR 1929 Bom 410: (31 Cri LJ 331)                                      | 6    |
| ('30) AIR 1930 Bom 348: (31 Cri LJ 1157)                                     | 6    |
| ('17) 21 Cal WN 872: 18 Cri LJ 706: (AIR 1918 Cal 785)                       | 6    |
| ('40) AIR 1940 Lah 449: (42 Cri LJ 105)                                      | 6    |
| ('35) 1935 Mad WN 475  | 6    |
| ('42) 1942 Mad WN 369: 1942 Mad WN Cri 73: (AIR 1942 Mad 666: 44 Cri LJ 741) | 5, 6 |
| ('21) 63 Ind Cas 870: (AIR 1921 Oudh 168(1): 22 Cri LJ 710)                  | 5    |
| ('26) AIR 1926 Oudh 268: (27 Cri LJ 820)                                     | 6    |
| ('38) AIR 1938 Sind 223: (40 Cri LJ 117)                                     | 6    |

**ORDER:** This is a criminal revision case which has been filed against an order made by the learned Chief Presidency Magistrate of Madras in M. P. No. 745 of 1951.

(2) The short facts are: The petitioner before us Sampoornam aged about 25 was married to the respondent Sundaresan in Madras in 1939. They lived for a year at No. 2 Hensman Road, T. Nagar, belonging to the father of the petitioner. Then this Sundaresan was employed as an Assistant in the Metallurgical Department at Tatanagar. The marriage was consummated only in June 1940 at Trichirapalli. Then the petitioner joined her husband at Tatanagar. They were visiting Madras as Madras was their first home to attend to busi-

ness or ceremonies etc. In July 1950 the petitioner came to Madras along with her husband. They stayed for some time in Madras and the husband went back leaving the wife here for medical treatment. The husband has been then writing to her to come to Tatanagar after being restored to health and has been sending remittances to the wife at Madras, showing that the husband was keeping a second establishment at Madras where this petitioner was staying and receiving remittances. Then the husband and wife have fallen out and after protracted emotional correspondence the husband has now married a second wife and is living in Jamshedpur employed as the Chief Inspector, Metallurgical Department, Tata Iron and Steel Company. Hence this maintenance application in the Chief Presidency Magistrate's Court, Madras.

(3) The respondent raised two objections, viz, that first of all the Chief Presidency Magistrate was not entitled to entertain the application on the ground that he had not last resided with his wife at Madras, and secondly, that under clause (4) of S. 488 Criminal Procedure Code, the petitioner was not entitled to maintenance.

(4) The learned Chief Presidency Magistrate dismissed the maintenance application on the ground that he had no jurisdiction to try the case.

(5) The point for determination here is whether on the facts of this case this respondent can be described to come within clause (8) of S. 488 Criminal Procedure Code, viz, that proceedings under this section may be taken against any person in any District where he last resided with his wife. In other words, the controversy turns upon the word "resided". The word "resided" in S. 488 Criminal Procedure Code, has been the subject of several decisions. It implies something more than paying a casual visit as laid down in — 'Balakrishna Naidu v. Mrs. Sakuntala Bai', 1942 Mad W. N. 369, and — 'Ramakumar v. Mst. Rukmini 63 Ind Cas 870 (Oudh)', but is not equivalent to something in the nature of having a domicile in a particular place as laid down in — 'Rifaquat Ullah Khan v. Emperor I. L. R. (1946) All. 879'.

(6) In 'In re Sama Jetha, A. I. R. 1930 Bom. 348' it was held that the words "last resided" are not restricted to permanent residence but include also a temporary residence of two months with the wife at the house of parents-in-law so as to confer jurisdiction on the court of that place. — 'Mrs. F. H. Jolly v. St. John William Jolly, 21 Cal. W. N. 872-18 Cri. L. J. 706', — 'Sher Singh v. Mt. Amir Kunwar, AIR 1927 All. 291' followed; — 'Mt. Ramdel v. Jhunnilal, AIR 1926 Oudh 268' distinguished and 'In re Khairumissa AIR 1929 Bom. 410' considered. Similarly in — 'Krishnaswami Iyer v. Subbalakshmi Ammal, 1935 Mad. W. N. 475' Burn J. held that where it appeared that the last residence of the counter-petitioner with the petitioner was in the Trichinopoly district, though he was permanently employed in Nagpur (Central Provinces), the Sub-Divisional Magistrate, Trichinopoly, had jurisdiction to entertain a petition under S. 488 Criminal Procedure Code, against the counter-petitioner. The Calcutta High Court in — 'Mrs. F. H. Jolly v. St. John William Jolly', '21 Cal. W. N. 872:18 Cri. L. J. 706', held that the temporary residence was sufficient to give a Calcutta Court jurisdiction under Sub-sec. (8) of S. 488 Criminal Procedure Code. This must be the case especially where the parties have no home, as in this case, of any sort and have been moving about from place to place and in which case, each place where they so live would be their home for the time being and the last known such place where this counter-petitioner resided with his wife was



Madras: Vide — 'Charn Das v. Mt. Surasati Bai', 'AIR 1940 Lah. 449'. In — 'Balakrishna Naidu v. Sakuntala Bai', '1942 Mad. W. N. Cr. 73', Horwill J. pointed out that where a person who follows a profession and is naturally tossed about must necessarily have some place of residence in which he can keep his wife and family and store his furniture and goods and to which he could return and that place of residence would be his permanent residence for the purpose of conferring jurisdiction. In short sub-sec. (8) of S. 428, Criminal Procedure Code, does not necessarily refer to a permanent residence and it refers also to temporary residence and the word "residence" implies something more than a brief visit but not such a continuity as to amount to domicile. Each case has to be dealt with on its merits as has been pointed out in — 'Gangabai v. Pamanmal', 'AIR 1938 Sind 223', bearing in mind that the section should not be so strictly construed as to deprive the woman, who often in these cases is helpless, of assistance from the Court which is most easily accessible to her.

(7) In the present case I have pointed out how the husband was keeping a second establishment at Madras and was working at his profession in Tatanagar and that it was only subsequently that he has got married there and unilaterally terminated the second establishment.

(8) Therefore, the weight of evidence in the case and the principles deducible from the decisions referred to above support the contention of the petitioner that the Presidency Magistrate's Court has got jurisdiction to entertain this maintenance petition.

(9) The order of the learned Chief Presidency Magistrate is set aside and he is directed to restore the petition to file and dispose of it according to law on the merits.

B/V.S.B.

Revision allowed.

### A. I. R. 1953 MADRAS 79

RAJAMANNAR C. J. AND VENKATARAMA AIYAR J.

M. S. Krishnaswami, Petitioner v. The Council of the Institute of Chartered Accountants of India, Respondent.

Civil Misc. Petn. No. 5035 of 1952, D/- 18-7-1952.

**Constitution of India, Art. 133(1)(c) — Orders under S. 21(2) Chartered Accountants Act, are not open to appeal to Supreme Court — "Civil Proceedings" — Applicability of S. 109(c) Civil P. C. — (Chartered Accountants Act (1949), S. 21 (2) ) — (Civil P. C. (1908), S. 109(c) ).**

Orders passed under S. 21(2) Chartered Accountants Act are not open to appeal to the Supreme Court under Art. 133(1)(c). Such orders are not passed in civil proceedings.

(Para 2)

There may be proceedings which are neither civil nor criminal within the meaning of Art. 133 and Art. 134 and it cannot be affirmed that every order passed in proceedings other than criminal is open to appeal under Art. 133 as made in civil proceedings. Case law reviewed. (Para 5)

Disciplinary proceedings under S. 21, Chartered Accountants Act, are not civil proceedings. Case law reviewed.

(Para 11)

It cannot be said that whatever proceedings come before the High Court, must be civil proceedings. (1913) AC 546

and AIR 1916 PC 21 Distinguished. Case Law Ref. (Para 13)

S. 109(c) Civil P.C. after its amendment by the Adaptation of Laws Order (1950) is subject to the provisions of Art. 133. (Para 14)

Wide as is the language of S. 109(c) Civil P.C. and Art. 133(3) it cannot be construed as extending to a case in which the rights of no other person than those of the petitioner are involved and in which there is no other question excepting a question of fact in issue.

Consequently even if the petitioner has a right of appeal under S. 109(c) or under Art. 133(4), it was held that it was not a fit case for grant of leave to appeal to the Supreme Court. (Para 15)

Anno: Civil P.C., S. 109 N. 10.

N. Rajagopala Iyengar for S. Swaminathan, for Petitioner; R. Ramamurthy Iyer, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

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('01) 23 All 227: (28 Ind App 11 PC)	15
('13) 40 Cal 21: (39 Ind App 197 PC)	13
('16) 39 Mad 617: (AIR 1916 PC 21)	13
('21) 44 Mad 293: (AIR 1921 PC 25)	15
('23) 47 Bom 724: (AIR 1923 PC 148)	13
('28) 9 Lah 284: (AIR 1927 PC 242)	13
('50) 1950 SCR 459: (AIR 1950 SC 188)	4
('50) 1950 SCR 453: (AIR 1950 SC 169: 51 Cri LJ 1270 SC)	4
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('33) AIR 1933 All 18: (143 Ind Cas 480)	6, 8
('33) 55 All 246: AIR 1933 All 225	6, 8
('34) 56 All 702: AIR 1934 All 898	6, 8, 11
('37) AIR 1937 All 167: (38 Cri LJ 410)	6, 10
('14) 41 Cal 734: (AIR 1914 Cal 557(2): 15 Cri LJ 52)	6
('29) 56 Cal 512: (AIR 1928 Cal 640 FB)	14
('16) 39 Mad 128: (AIR 1916 Mad 1225(1) FB)	6
('22) 43 Mad LJ 382: (AIR 1922 Mad 440 FB)	6, 7, 8, 10
('29) 52 Mad 361: 56 Mad LJ 369: (AIR 1929 Mad 381 SB)	14
('51) 1951-2 Mad LJ 479: (AIR 1951 Mad 1051)	14
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('41) 20 Pat 561: AIR 1941 Pat 225 (SB)	13
('51) 30 Pat 174: (AIR 1951 Pat 29 FB)	4, 5, 13
('30) 8 Rang 40: (AIR 1930 Rang 150)	7
(1905) AC 369: (74 LJ PC 77)	14
(1913) AC 546: (82 LJ KB 1197)	13

VENKATARAMA AIYAR J.: This is an application for leave to appeal to the Supreme Court against the Order passed by this Court in Refd. Case No. 56 of 1951. Messrs. M. S. Krishnaswami and Jagannathan are a firm of Chartered Accountants and they were the auditors of a company called the Amalgamated Coffee Estates Ltd., during the years 1946, 1947 and 1948. On 5-7-1950 Messrs. Devar and Sons Ltd. preferred a complaint to the Council of the Institute of Chartered Accountants that the auditors had passed balance sheets which "did not exhibit a true and correct view of the state of affairs of the company and were calculated to mislead whomsoever it concerned, more especially the debenture holders of the company."



The complainants held considerable debentures in the company. On receipt of the complaint, the Council obtained the explanation of the petitioner who was the partner concerned with the balance sheets and sent the matter to the Disciplinary Committee for enquiry. The Committee took evidence and recorded a finding that the charges against the petitioner had been made out and that he was guilty of "acts and omissions", which rendered him "unfit to be a member of the Institute."

On this finding, the matter came up before this court for hearing under S. 21 (2) of the Chartered Accountants Act (XXXVIII of 1949). By our order dated 22-4-1952, we held that the balance sheets were defective and misleading and that the petitioner was grossly negligent in the discharge of his duties. We accordingly passed an order that he be removed from the rolls for a period of two years. The petitioner applies for leave to appeal to the Supreme Court against this order. The application is opposed by the respondent both on the ground that the order dated 22-4-1952 is not open to appeal and on the ground that even if an appeal was competent, this was not a fit case for granting of leave. The question whether orders passed under S. 21 of the Chartered Accountants Act are open to appeal to the Supreme Court comes up for determination for the first time and it has been fully argued before us by learned Counsel on either side. After considering the matter deeply we have come to the conclusion that the order in question is not open to appeal and that this petition must be dismissed.

(2) Mr. N. Rajagopalan, the learned advocate for the petitioner argues that there is a right of appeal against the order dated 22-4-1952 under Art. 133 (1) (c) of the Constitution, which is in these terms:

"An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies that the case is a fit one for appeal to the Supreme Court."

(3) For this article to apply, the order must have been passed in a civil proceeding and the question that has been debated before us is whether the proceedings under S. 21 of the Chartered Accountants Act are civil proceedings within the meaning of this Article. The argument for the petitioner is that whatever is not a criminal proceeding must be a civil proceeding; that Art. 134 provides for appeal against orders passed in criminal proceedings and that all other orders must be held to have been passed in civil proceedings and that they will be open to appeal under Art. 133. A classification of proceedings into two categories mutually exclusive and together exhaustive such as civil and criminal proceedings would be quite intelligible. But the question that has to be decided is whether that is the scheme that has been adopted in the Constitution. An examination of the relevant provisions does not lend any support to that position. Art. 132 enacts that appeals shall lie from judgments, decrees or orders of a High Court "whether in a civil, criminal or other proceeding" if the cases involve a substantial question of law as to the interpretation of the Constitution. This is a clear indication that there may be proceedings which are neither civil nor criminal.

Article 133 provides for appeals against orders passed in civil proceedings and Art. 134 against orders passed in criminal proceedings. Art. 135 reserves the jurisdiction and powers of the Supreme Court in matters not falling within Art. 133 or 134, if the Federal Court had jurisdiction over such matters at the time of the Constitution. Article 136 (1) provides that, "Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India."

(4) While Arts. 133 and 134 are limited to orders passed in civil or criminal proceedings, the jurisdiction of the Supreme Court to grant special leave extends to orders passed "in any cause or matter by any court or tribunal." The articles, therefore, clearly contemplate that there may be proceedings other than civil and criminal and that in respect of such other matters, the governing provisions are Arts. 135 and 136. It is also noteworthy that the words used in Art. 136 are "cause or matter" which are of very wide import, as observed by the Supreme Court in — '*Pritam Singh v. the State*', 1950 S. C. R. 453 at page 458, and — '*Bharat Bank Ltd. Delhi v. Employees of Bharat Bank Ltd. Delhi*', 1950 SCR 459.

In — '*Tobacco Manufacturers (India) Ltd. v. The State*', 30 Pat 174 (FB), the point arose for decision as to whether a determination by the High Court on a reference under Sec. 21 (3) of the Bihar Sales-tax Act, 1944, was open to appeal to the Supreme Court under Art. 133. The case was heard in the first instance by Reuben and Das JJ. who held that the order was not one which was passed in a civil proceeding within the meaning of Art. 133. But, there being a difference of opinion as to whether the determination amounted to a judgment within the meaning of that article, the matter was referred to a Full Bench. On the question whether the order was one passed in a civil proceeding, the majority of the Judges, Sarjoo Prosad and Rai JJ. rejected the argument of the petitioner that a civil proceeding means and includes all proceedings except those that are criminal, referred to the decisions under the Income-tax Act in which it had been held that an order passed by the High Court on a reference under S. 66 was not open to appeal to the Privy Council and held that the contention that all proceedings which were not criminal were civil was not warranted by the terms of Arts. 132 to 136. Shearer J. took a contrary view. In — '*Zikar v. State*', AIR 1952 Nag 130 at pages 131-132, the question arose for decision whether a conviction for contempt of court was appealable under Art. 134. A Bench of the Nagpur High Court held that proceedings for punishing for contempt were a special jurisdiction "of an anomalous nature" and "suis juris" (sic) and proceeded to observe, "Further it would appear that the Constitution has not made in Part V an exhaustive division of all proceedings before this court into two broad categories, civil and criminal. A glance at clause (1) of Art. 132 dispels any such suggestion. There the expression 'other proceeding' is mentioned in addition to the words 'civil' and 'criminal'."

(5) We are in agreement with the views expressed by the majority Judges in—'*Tobacco*



*Manufacturers (India) Ltd. v. The State*, 30 Pat 174 (FB) and — *Zikar v. State*, AIR 1952 Nag 130 that there may be proceedings which are neither civil nor criminal within the meaning of Art. 133 and Art. 134 and that, therefore, it cannot be affirmed that every order passed in proceedings other than criminal is open to appeal under Art. 133 as made in a civil proceeding.

(6) The larger ground failing, the learned Advocate for the petitioner argues that disciplinary proceedings are civil proceedings within the meaning of Art. 133 and relies on the decisions in — *Bahadurlal v. Judges of the High Court, Allahabad*, AIR 1933 All 18, — *In re R, a pleader*, 55 All 246: AIR 1933 All 225; in — *S, an advocate v. Judges of the High Court of Allahabad*, 56 All. 702: A. I. R. 1934 All 898 and in — *P, a pleader, Bansi v. Judges of the High Court of Allahabad*, AIR 1937 All 167. Before dealing with these decisions, it will be convenient to refer to the authorities of this court bearing on this question. In — *K. R. Ramachandra Aiyar v. The President of the Vakils' Association, High Court, Madras*, 39 Mad 128, the facts were that the High Court had passed an order suspending a vakil for a period of three months. The petitioner applied for leave to appeal to the Privy Council against that order. It was held that orders passed in disciplinary proceedings were not appealable under Clause 39 of the Letters Patent and the decisions in — *re An Attorney*, 41 Cal 734 and — *G. S. D. v. Govt. Pleader*, 32 Bom 106 were followed. In — *In the matter of E. Raghava Reddi, High Court Vakil, practising at Nellore*, 43 Mad L J 382 (FB), the question was again considered by a Full Bench of five Judges. They held that the order of suspension passed in exercise of a disciplinary jurisdiction was not open to appeal. The following observations in the judgment of the learned Chief Justice might be quoted:

"In my judgment this matter is so far concluded by authority that it would not be possible without a decision of the Privy Council to the contrary to say that there is power in the High Court of Madras to grant leave to appeal to Privy Council in a case where an order is made by the court suspending a vakil from practice."

Reliance was also placed on a decision of the Patna High Court reported in — *Bir Kisore Roy v. Emperor*, 4 Pat LJ 423. In that case a pleader had been suspended by the High Court in the exercise of its jurisdiction under the Legal Practitioners Act. In an application by the petitioner for leave to appeal to the Privy Council against the order of suspension, Dawson Miller C. J. after observing that there was no right of appeal provided by the Legal Practitioners Act, went on to discuss whether such a right was conferred by the Letters Patent. He observed:

"Clauses 9 to 27 of the Letters Patent deal with the different classes of jurisdiction which are conferred on the High Court. They are civil, criminal, Admiralty, Testamentary and Intestate and Matrimonial jurisdiction, Appellate and Original. The next three clauses deal with the procedure, and clauses 31 to 34 deal with appeals to the Privy Council. In my opinion, the clauses dealing with the right of appeal to His Majesty in Council

were meant to be confined to the different classes of jurisdiction above enumerated and not to the administrative or disciplinary powers conferred on the court by earlier clauses in the Letters Patent or by a Statute. The use of the word 'jurisdiction' in clause 31 clearly seems to indicate that the appeals referred to are appeals from judgments, decrees, and orders passed in the exercise of one or other of the classes of jurisdiction conferred by clauses 9 to 27 where the word 'jurisdiction' is used."

(7) The learned Chief Justice then referred to the decision in — *Re James Minchin*, 4 Moo Ind App 220 (P. C.), where the question raised was whether the dismissal of the Master on the Original Side of the High Court under the powers conferred by the Charter on charges of misconduct was open to appeal to the Privy Council and it was held that it was not, notwithstanding that the terms of the Charter provided for an appeal against determinations "in any civil cause". The learned Chief Justice observed that the jurisdiction conferred by cl. 31 of the Letters Patent corresponding to cl. 39 of the Letters Patent of this Court was not wider than that conferred by the clauses in the Madras Charter. In the result, it was held that there was no right of appeal against orders passed in exercise of disciplinary powers whether under the Letters Patent or under a Statute. On this reasoning which was approved by the learned Chief Justice in — In the matter of Mr. E. Raghava Reddi, High Court Vakil, practising at Nellore, 43 Mad L J 382 it would follow that disciplinary jurisdiction is a special jurisdiction conferred on the court and an order passed therein would not be open to appeal as an order passed in a civil proceeding. The question was also considered by the Rangoon High Court in the case reported in — *In the matter of an advocate*, 8 Rang 40. The appealability of orders passed in exercise of disciplinary jurisdiction was considered both with reference to the provisions of the Civil Procedure Code and the Letters Patent. It was held that the provisions of the Civil Procedure Code would have no application to these proceedings which "were in the nature of a purely disciplinary enquiry" and that the appeal would be incompetent under the Letters Patent as well.

(8) We shall now consider the decisions of the Allahabad High Court relied on by Mr. N. Rajagopalan in support of the position that orders passed in the exercise of disciplinary jurisdiction would be appealable under S. 109 (c) of the Civil Procedure Code. In — *Bahadurlal v. Judges of the High Court, Allahabad*, AIR 1933 All 18, leave to appeal to the Privy Council against an order suspending a practitioner was granted under S. 109 (c), the Court observing,

"It appears that this High Court has on previous occasion treated such application as falling under S. 109 (c) C. P. C. and granted leave in fit cases. The words of that section are no doubt general and leave to appeal from any order is allowed when the case is certified to be a fit one for appeal to His Majesty in Council."

There was no discussion of the question and no reference to the authorities of the other courts where a different view had been taken. This decision was followed in — *In re R. a*



pleader', 55 All 246: AIR 1933 All 225, wherein after stating that,

"The learned Government advocate has drawn our attention to several decisions of different High Courts, one from Patna, another from Madras and a third from Calcutta where it was held that in the case of an Advocate or Attorney being suspended from practice, the High Court was not authorised to grant leave to His Majesty in Council"

the learned Judges observed:

"In view of the fact that the practice of this court has been consistent, we do not propose to depart from that practice and we hold that leave may be granted under S. 109 (c) C. P. C. We may point out that if leave cannot be granted under that section of the Civil Procedure Code, it may be granted under S. 30, Letters Patent".

In — 'S, an advocate v. Judges of the Allahabad High Court', 56 All 702: AIR 1934 All 898, the question was discussed more fully. Referring to the decisions in — 'In the matter of E. Raghava Reddi', 43 Mad L J 382 and — 'Bir Kishore Roy v. Emperor', 4 Pat L J 423 the court observed:

"The view which seems to have prevailed in other High Courts is that when the High Court exercises its power to remove or suspend from practice on reasonable cause an Advocate or Pleader, it is not exercising any jurisdiction at all but is merely exercising its special power. It seems to have been assumed that the jurisdiction mentioned in Cl. 30, Letters Patent must mean only Civil, Criminal, Admiralty, Testamentary, Intestate & Matrimonial jurisdiction, whether original or appellate and could not include any other class of jurisdiction. If one were confined to the clauses of the Letters Patent alone, it may well be said that the word 'jurisdiction' was not used therein in connection with any other class of exercise of power."

(9) Having expressed the view that the appeal to the Privy Council might be incompetent under the terms of the Letters Patent, the court proceeded to hold that S. 109 (c) was wide enough to confer a right of appeal in such cases and support for this view was found in the provisions of the Bar Councils Act, 1926 and particularly in S. 13 (4) of that Act which runs as follows:

"Proceedings before a Tribunal or a District court in any such enquiry shall be deemed to be civil proceedings for the purposes of S. 132 of the Indian Evidence Act 1872, and the provisions of that section shall apply accordingly."

(10) This decision was followed in — 'P, a pleader, Bansi v. Judges of the High Court of Allahabad', AIR 1937 All 167. It will thus be seen that the authorities of the Allahabad High Court are largely based upon the practice of that court and if that is to be the guiding principle, we would be bound to follow the settled practice of this court and hold that no appeal lies against orders passed in the exercise of disciplinary jurisdiction. That was the position taken in the Full Bench decision in — 'In the matter of Mr. E. Raghavareddi', 43 Mad L J 382 and the case for following 'cursus curiae' is now, if anything, stronger.

(11) It was argued for the petitioner that whatever might have been the position where disciplinary action is taken in exercise of

inherent jurisdiction, where such a jurisdiction is conferred by a Statute, the proceedings become impressed with the character of civil proceedings and Art. 133 will apply to them. We are unable to agree with this contention. We fail to see how the right of appeal can depend on whether the order was passed in exercise of a jurisdiction which is inherent in the court of a jurisdiction which is conferred by a Statute on the court. If there is a right of appeal only against orders passed in civil proceedings, the determination of this right must depend on the nature of the jurisdiction that is exercised and not on the source of authority which confers that jurisdiction. In fact the decision in — 'Bir Kishore Roy v. Emperor', 4 Pat L J 423, is with reference to an order passed under the special jurisdiction conferred by the Legal Practitioners Act and the court held that the appeal to the Privy Council was incompetent whether the disciplinary jurisdiction was exercised under the clauses of the Letters Patent or under a Statute.

Reliance is placed on the observations in — 'S, an advocate v. Judges of the Allahabad High Court', 56 All 702, where it was held that the disciplinary jurisdiction conferred on the High Court by the Bar Councils Act was a civil proceeding. For the reason already given, we are unable to agree that the conferment of disciplinary jurisdiction by a Statute has any bearing on the nature of the proceedings. Nor are we impressed by the argument that S. 13 (4) of the Bar Councils Act is a legislative declaration that it is a civil proceeding. It merely enacts that the proceedings under the Act shall be deemed to be civil proceedings for the purposes of S. 132 of the Evidence Act. A thing is deemed to be something only when it is not that and the true import of the provision in the Act is that proceedings under the Act are not civil proceedings, but that for the limited purpose of the applicability of S. 132 of the Evidence Act they should be treated as if they were civil proceedings. In the Chartered Accountants Act there is not even a similar provision. We are of opinion that the jurisdiction conferred on this court under S. 21 is only a disciplinary jurisdiction and that it is not a civil proceeding.

(12) Another contention of the petitioner similar to the one just disposed of was that the jurisdiction conferred by the Act is not a disciplinary jurisdiction because while Advocates and Practitioners are officers of court and it might properly be said that the jurisdiction which the Court has over them is a disciplinary jurisdiction, the same could not be said of Chartered Accountants, who are third parties and that any orders passed against them could not be said to be in the exercise of disciplinary jurisdiction. There is no substance in this objection. A disciplinary action consists in punishing a person for misconduct. While in the case of officers of court the jurisdiction may be inherent, in the case of strangers the jurisdiction can be exercised only if it is conferred by a Statute. But when once a Statute confers such a jurisdiction, it stands on the same footing as inherent jurisdiction and it does not lose its character as a disciplinary jurisdiction because it has its origin in a Statute. The jurisdiction over Legal Practitioners Act and Attorneys is also a statutory jurisdiction conferred either under the Letters Patent or the



Legal Practitioners Act or the Bar Councils Act. It may be mentioned that the Chartered Accountants Act expressly provides that the Council should constitute a Disciplinary Committee for enquiry of complaints and that was done in the present case. We are accordingly of opinion that the fact that Chartered Accountants are not officers of Court does not alter the character of jurisdiction which the High Court exercises over them under the Act.

(13) It was next argued that the reference under S. 21 of the Chartered Accountants Act was to the High Court as a court, that a right of appeal against orders made by the High Court is conferred by S. 109 Civil Procedure Code and that on the principle that when matters are referred for the adjudication of a civil court, that will attract the normal procedure of that court including a right of appeal, an appeal would lie to the Supreme Court against the order dated 22-4-1952 and reference was made to the decisions in — 'National Telephone Co. Ltd. v. Postmaster General (2)', (1913) A. C. 546 at p. 552 and — 'Secretary of State for India v. Chellikani Ramarao', 39 Mad 617 (PC). But these authorities do not lay down that whatever proceedings come before a civil court must be held to be civil proceedings. That must depend on the nature of the proceedings. Thus, where the proceedings are in the nature of an arbitration and the order is in the nature of an award, no appeal will lie, notwithstanding that the decision is by a civil court. That was held in — 'Rangoon Botatoung Co. Ltd. v. Collector of Rangoon', 40 Cal 21 (PC) as regards a reference under the Land Acquisition Act.

It was likewise held that in dealing with references under S. 66 of the Indian Income-tax Act the High Court was acting in an advisory and consultative jurisdiction and that orders passed under that section were not open to appeal to the Privy Council. (Vide — 'Tata Iron and Steel Co. Ltd. v. Chief Revenue Authority, Bombay', 47 Bom 724 (PC), — 'Delhi Cloth and General Mills Co. Ltd. v. Commr. of Incometax, Delhi', 9 Lah 284 (PC) and — 'Harihar Gir v. Commr. of Incometax, Bihar and Orissa', 20 Pat 561: AIR 1941 Pat 225 (SB).

The Supreme Court has also held that that is the position as regards orders passed on references under the Bihar Sales-tax Act, 1944 in — 'Prem Chand v. State of Bihar', 1951 SCJ 5; Vide also — 'Tobacco Manufacturers v. State', 30 Pat 174. Therefore what has to be considered is not whether a matter has been determined by a Civil Court, but whether the determination is in a civil proceeding.

In — 'National Telephone Co. v. Postmaster General (2)', (1913) A.C. 546, the question was with reference to the value to be put on a plant sold by the National Telephone Company to the Postmaster General. It was provided in the Telegraph Arbitration Act, 1909, that any dispute regarding valuation should be referred to the decision of a commission which was functioning under the Railway and Canal Traffic Acts. Under those Acts the commission was a court of record and appeals were provided against its decisions. The point for decision was whether, a right of appeal against the decision of the commission not having been expressly conferred under the Act of 1909 the appeal was competent under the procedure applicable to the commission under the Railway

and Canal Traffic Acts. It was held that as the Act of 1909 provided for a reference generally to an existing statutory commission without special provisions as to appeal, the procedure of that court was attracted in all respects. Viscount Haldane, Lord Chancellor, observed as follows:

"When a question is stated to be referred to an established court without more, it, in my opinion, imports that the ordinary incidents of the procedure of that court, are to attach, and also that any general right of appeal from its decisions likewise attaches."

It will be noticed that the dispute which had to be determined in that case was as to the price of a plant to be paid to the vendor by the purchaser and that was clearly a civil right. In — 'Secretary of State for India v. Chellikani Ramarao', 39 Mad 617 though the proceedings arose under the Forest Act, the dispute related to the ownership of islands in a tidal river. As to this, the Privy Council observed as follows:

"The claim was the assertion of a legal right to possession of and property in land; and if the ordinary courts of the country are seized of a dispute of that character, it would require, in the opinion of the Board, a specific limitation to exclude the ordinary incidents of litigation."

This passage clearly shows that it is not sufficient that the determination is by the ordinary courts. Regard must be had also to the character of the dispute. There is nothing in these two decisions to support the contention that all matters which are referred to the determination of civil courts must be held to be civil proceedings without reference to their nature.

(14) It was finally argued that the right of the petitioner to appeal against the order dated 22-4-1952 should be determined with reference to the law as it stood when the misconduct of the petitioner on which the order was based took place, that is in 1946, 1947 and 1948; that under S. 109(c) which was the provision of law then in force any order could be taken on appeal whether it was passed in a civil proceeding or not; that Art. 133 did not take away that right; that Art. 135 expressly reserved it; and that, therefore, the appeal was competent. Apart from the question whether S. 109(c) would apply to such orders, which has been already discussed it has to be noted that the section was amended by the Adaptation of Laws Order promulgated on 26-1-1950 and as amended the section runs as follows:

"Subject to the provisions in Chapter IV of Part V of the Constitution and such rules as may from time to time be made from the courts of India and to the provisions herein-after contained, an appeal shall lie to the Supreme Court from any decree or order when the case, as hereinafter provided is certified to be a fit one for appeal to the Supreme Court."

Article 133 finds a place in Chapter IV of Part V. After 26-1-1950 the right of appeal conferred by S. 109(c) is therefore, subject to the limitations of Art. 133 and that has also been held by this court in — 'Ramaswami Chettiar v. Official Receiver, Ramanathapuram', 1951-2-Mad L J 479 at pp. 483, 484. The petitioner seeks to get over this difficulty by referring to the principle well established that the right of appeal is a vested right and not a mere matter of procedure (Vide — 'the Colonial Sugar Re-



fining Co. Ltd. v. Irwing', (1905) A. C. 369 (PC)). But in this case though the charge against the petitioner was that he was guilty of misconduct in 1946, 1947 and 1948, the complaint itself was filed on 5-7-1950 and the Order of this court thereon was passed on 22-4-1952 and the authorities clearly establish that the right of appeal is to be determined as on the date of the commencement of the proceedings and not on any earlier date when the cause of action on which the proceedings are founded arose. Vide — 'In re Vasudeva Samiar', 52 Mad 361 (SB) and — 'Sadar Ali v. Doliludin Otagar', 56 Cal 512 (FB). This argument must, therefore, be rejected. We are accordingly of opinion that Art. 133 of the Constitution governs this case; that the proceedings under the Chartered Accountants Act are not civil proceedings within the meaning of that article; and that no appeal lies against the order dated 22-4-1952.

(15) This is sufficient to dispose of this application. But we have also considered the matter on the footing that the order in question is open to appeal either under Art. 133(3) or S. 109(c). In either case, the point for determination is whether it is a fit case for appeal under these provisions. The principles governing the grant of leave under S. 109(c) are well settled. In — 'Banarsi Prasad v. Kashi Kishen Narain', 23 All 227 (PC), Lord Hobhouse in dealing with this provision observed as follows:

"That is clearly intended to meet special cases; such, for example, as those in which the point in dispute is not measurable by money, though it may be of great public or private importance."

In — 'Radhakrishna Aiyar v. Swaminatha Aiyar', 44 Mad 293 (PC) Lord Buckmaster explained the scope of this provision in the following terms:

"It is plain that there may be certain cases in which it is impossible to define in money value the exact character of the dispute; there are questions, as for example, those relating to religious rights and ceremonies, to caste and family rights, or such matters as the reduction of the capital of companies as well as questions of wide public importance in which the subject-matter in dispute cannot be reduced into actual terms of money. Subsec. (c) of S. 109, C. P. C. contemplates that such a state of things exists, and rule 3 of Or. XLV regulates the procedure."

The same considerations will also govern applications under Art. 133(3). Applying these tests, we have not been shown that this case involves any question of great public or private importance. The sole question for determination in these proceedings was whether the petitioner was grossly negligent in the discharge of his duties and whether the balance sheets were defective and misleading. The Disciplinary Committee which enquired into the matter was of the opinion that the charges had been made out and this court, on a consideration of all the facts and circumstances of the case, agreed with the conclusion. That is a pure question of fact and does not raise any question of public or private importance. It is contended that our finding must have a serious effect on the professional career of the petitioner. But no case has been cited to us in which leave had been granted under this section when the decision affected only an individual and no question of general importance was involved. Re-

liance was placed on the decisions of the Allahabad High Court where leave to appeal had been granted under this clause against orders suspending legal practitioners on the ground that the order would affect their professional career. This view has not been accepted in this court and would be contrary to the principles laid down by the Judicial Committee as to the true scope of S. 109(c). It was argued that the extent of the duties of an auditor comes up for consideration by the courts for the first time and that is a question of public importance. But those duties are clearly defined and set out in the text books cited on behalf of the petitioner and there has been no dispute before us as to the nature and extent of those duties. What was in controversy was a mere question of fact. Wide as is the language of S. 109(c) and Art. 133(3) it cannot be construed as extending to a case in which the rights of no other person than those of the petitioner are involved and in which there is no other question excepting a question of fact in issue. We are accordingly of opinion that even if the petitioner has a right of appeal under S. 109(c) or under Art. 133(3), that is not a fit case for grant of leave to appeal to the Supreme Court. This petition will, therefore, be dismissed.

A/R.G.D.

Petition dismissed.

#### A. I. R. 1953 MADRAS 84

SUBBA RAO J.

K. Raman and Co., Tellicherry, by its Managing Proprietor, Kodirvo Kannan Chettiar, Petitioner v. The State of Madras and another, Respondents.

Writ Petn. No. 21 of 1951, D/- 29-7-1952.

**Constitution of India, Art. 226 — Certiorari — Writ of — Grounds — Refusal to issue yarn and cloth dealer's license on sole ground that petitioner had not produced income-tax verification certificate and was in arrears.**

The fact that a person is in arrears of income-tax is not germane to the issue of a licence under the Yarn Dealers Control Order. It is a circumstance extraneous to the right of the person concerned to carry on his business. The Incometax Act provides an adequate machinery for realising the arrears due from an assessee.

Hence, where the Collector refuses to renew a yarn and cloth dealer's license on the sole ground that the petitioner had not produced the income-tax and excess profits tax verification certificate and that the firm was in arrears, relying upon the Madras Government G. O. No. 867 (Finance, dated 16-8-1949), the order of the Collector is liable to be quashed by certiorari. The order discloses that the Collector was using his powers under the Yarn Dealers Control Order for the purpose of collecting the amounts due to the Government of India. The restriction imposed was unreasonable and was not in the interests of the general public.

(Para 4)

A. Achuthan Nambiar and P. Anandan Nair, for Petitioner; Govt. Pleader, for Respondent.

**ORDER:** This is an application for the issue of a Writ of Certiorari to quash the order of the Collector of Malabar refusing to renew the licence in favour of the petitioner. The petitioner is a firm carrying on business in Telli-



cherry in North Malabar district under the style of K. Raman and Co. The firm was a holder of a Retail Yarn Dealer's licence No. 10 KTM, wholesale cloth licence No. 26/MBR and Retail cloth licence No. 221/KTM under the provisions of the Yarn Dealer's Order, the Textile Control Order and the Madras Cloth (Dealers) Control Order, 1948. These three licences were renewed upto 31-3-1950. The petitioner applied for further renewal of the licences but the Collector of Malabar refused to renew the licences on the sole ground that he had not produced the Income Tax and Excess Profits tax verification certificates and that the firm was in arrears to the extent of Rs. 37293-14-0.

(2) Learned counsel for the petitioner contended that the order of the Collector was arbitrary and the reason given was not germane to the issue of a licence.

(3) Learned Government Pleader relied upon the order, G. O. No. 867 Finance dated 16-8-1949. The relevant portion of the order reads as follows:

"They (the Madras Government) have decided that financial patronage at their disposal, e.g., in the matter of granting contracts, placing orders for supplies and services, grant of permits and licences etc. should be given only to those who produce a certificate of incometax verification from the incometax authorities on the analogy of the procedure adopted by the Government of India in respect of applications for export and import licences. The heads of departments are accordingly informed that applications for contracts, supplies, permits, licences, quotas and priorities etc., should not be considered unless the individual concerned produces the incometax verification certificates in the forms appended to these proceedings."

(4) The petitioner is a citizen of India and has the fundamental right to carry on the trade which he has been doing. The State can only put a reasonable restriction upon his right in the interests of general public. But, in this case, the order of the Collector discloses that he is using his powers under the Yarn Dealers' Control Order for the purpose of collecting the amounts due to the Government of India. The fact that a person is in arrears of incometax is not germane to the issue of a licence under the Yarn Dealers Control Order. It is a circumstance extraneous to the petitioner's right to carry on his business. The Incometax Act provides an adequate machinery for realising the arrears due from an assessee. I am of the view that the restriction imposed is unreasonable and is not in the interests of the general public.

(5) The impugned order is hereby quashed. The respondents will pay the costs of the petitioner.

A/V.B.B.

Order quashed.

**A. I. R. 1953 MADRAS 85**

**SATYANARAYANA RAO AND VISHWANATHA SASTRI JJ.**

S. M. Zackariah Sahib, at Sathankulam, Applicant v. The Commissioner of Income Tax, Madras, Respondent.

Case Referred No. 59 of 1948, D/- 29-3-1951.

**Income Tax Act (1922) S. 4 A (a) (ii) — "Maintains or has maintained for him a dwelling place" — Expression explained.**

The expression "maintains a dwelling place" connotes the idea that the assessee

owns or has taken on rent or on a mortgage with possession a dwelling house which he can legally and as of right occupy, if he is so minded, during his visit to British India and the expression "has maintained for him" would cover a case where the assessee has a right to occupy or live in a dwelling place during his stay in British India though the expenses of maintaining the dwelling place are not met by him in whole or in part.

(Paras 2 & 3)

The assessee, a Muhammadan merchant, carried on business in Ceylon and usually resided there. His parents lived at S in Madras Presidency in a house owned by his mother. The assessee's wife lived some times with his parents and some times with her parents. The assessee was remitting monies now and then to his parents for their maintenance. The assessee visited British India during years of account and during such visits stayed with his parents in their house at S.

Held that the assessee had no dwelling place maintained for him in British India and he was not a resident in British India within the meaning of S. 4A (a) (ii).

(Paras 1 & 7)

Anno: Income Tax Act, S. 4 A N. 1.

K. Srinivasan and M. J. Swami, for Applicant; C. S. Rama Rao Sahib, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras

(1925) 9 Tax Cas 261 5

(1926) 10 Tax Cas 424 4

(1928) AC 217: (97 LJ KB 385) 4

VISWANATHA SASTRI J: The question referred for decision is as follows:

"Whether on the facts and in the circumstances of the case the applicant had a dwelling place maintained for him and was a resident in British India within the meaning of S. 4-A(a) (ii) in the year of account".

The years of assessment in question are 1941-42 and 1942-43. The facts found by the Tribunal and adverted to in the statement of the case are these. The assessee, a Muhammadan merchant, carried on business in Ceylon and usually resided there. His parents lived at Sathangulam in the Tinnevely district in a house owned by his mother. The assessee's wife whom he married in 1940 lived some times with his parents and some times with her parents in their respective villages in the Tinnevely district. The assessee was remitting monies now and then to his parents for their maintenance. The assessee visited British India during the years of account and during such visits stayed with his parents in their house at Sathangulam. On these facts the Appellate Tribunal held that the assessee was resident in British India within the meaning of S. 4-A(a) (ii) of the Incometax Act overruling the decision of the appellate Assistant Commissioner. Under the statutory provision above referred to, an individual is resident in British India if he

"maintains or has maintained for him a dwelling place in British India for a period or periods amounting in all to 182 days or more in that year and is in British India at any time in that year"

The latter requisite is satisfied in this case and the dispute is whether the assessee maintained or had maintained for him a dwelling place in British India in the years of account.

(2) It cannot be said in this case that the assessee maintained a dwelling place. The house where the assessee stayed during his visits to British India belonged to his mother where she and



the assessee's father lived. The expression "maintains a dwelling place" connotes the idea that the assessee owns or has taken on rent or on a mortgage with possession a dwelling house which he can legally and as of right occupy if he is so minded, during his visit to British India. That is not the case here for the assessee has no legal right to occupy the house in Sathangulam which belongs exclusively to his mother. The further question is whether it can be said that the assessee "has maintained for him a dwelling place at Sathangulam".

(3) In our opinion the expression "has maintained for him" would certainly cover a case where the assessee has a right to occupy or live in a dwelling place during his stay in British India though the expenses of maintaining the dwelling place are not met by him in whole or in part. A member of an undivided Hindu family or of a Malabar 'tarwad' or of an Aliasanthana family has a right to live in the family house when he goes there, though the house is maintained by the manager of the family and not by the assessee from his own funds. If the undivided family is sufficiently affluent or if the members are large enough a separate dwelling house might be set apart by the manager for the occupation of one or more members of the family as a matter of convenience. In such cases it can be said that the assessee has a dwelling place maintained for him by the manager of the family for he has a right to occupy the house during his visits to British India.

(4) Would the actual or 'de facto' use or occupation of the house of another person by reason of some relationship or friendship without any kind of right to use or occupy the premises make a person a "resident" within the meaning of the above definition. The decision in — 'Loewenstein v. De Salis', (1926) 10 Tax Cas. 424 which proceeds on the basis that an assessee need not be the owner or the lessee of a dwelling place or be holding any proprietary interest therein to make him a resident has been relied upon by Mr. Rama Rao Sahib, the learned advocate for the Commissioner of Incometax. In that case Rowlatt J. observed that if the lease of the premises would not put him in any better position so far as having the house and the availability of it, and the power of coming to it were concerned, then it can be said that the house was maintained for the assessee.

In that case the assessee maintained an establishment for throughout the year in the house and as the director of a limited company in which he held 90 per cent of the shares, the assessee was in a position to occupy the house belonging to the company without applying for or obtaining any formal permission from the company. Rowlatt J. also observed that in determining a question like residence, one had to consider a bundle of facts and their cumulative effect. The House of Lords has laid down the rule that the question of residence is one of fact and degree and depends upon a consideration of various factors. See — 'Inland Revenue Commrs. v. Lysaght', (1928) A. C. 217; — 'Levene v. Inland Revenue Commrs'. (1928) A. C. 234.

(5) Mr. Srinivasan, learned counsel for the assessee referred us to the decision in — 'Pickles v. Foulsham', (1925) 9 Tax Cas. 261 particularly to the judgment of Rowlatt J. at pages 275 and 276 of the report. The learned Judge referred to the previous decisions and suggested many points of view from which the question of residence of a person could be viewed. The actual decision in the case was that a person who rented and kept a house for his wife and children in Blackpool in England and who came there now and then on

a holiday visit was resident in England even though his employment obliged him to stay in the West Coast of Africa for some years. If there is a rented house and an establishment kept continuously to which the assessee could always come to and if he stayed in the house for some time in the year he would be a resident according to the English decisions. As Rowlatt J. observed "a good deal depends upon rather minute colouring in a case like this".

(6) In this connection regard must be had also to the habits and usages of the people of this country. In England a man who marries sets up at once a separate establishment for himself and his wife and the parents reside separately from him. In India, at any rate among members of a joint Hindu family, the home of a married man is more often than not the home of his parents. But here the assessee is a Muhammadan and among Muhammadans there is no joint family and sons have no interest in ancestral property during the lifetime of their parents. Moreover, we are not here concerned with the dictionary meaning of the word "reside" or "residence" but with the statutory definition of residence given in S. 4-A(a) (ii) of the Incometax Act.

(7) In referring the question to us in the form in which it has been referred the Tribunal evidently required our opinion on the point whether on the facts found by them they could come to the conclusion that the assessee was a resident in British India. The outstanding fact is that the assessee's mother owns a house at Sathangulam and she and the assessee's father permanently reside there. A dwelling house is maintained by the parents and for the parents of the assessee. The recently wedded wife of the assessee lives sometimes with her own parents and sometimes with her parents-in-law. The assessee goes to his mother's house as a visitor. It is not as if he goes there as going at home.

It is not as if the assessee is going to Sathangulam and staying for long periods of time so as to make his mother's house his second home. His business keeps him in Ceylon and his visits to Sathangulam appear to have been sporadic. He has no establishment maintained for him in Sathangulam. The dwelling place at Sathangulam is maintained for the parents of the assessee and not for the assessee himself. The fact that the assessee remits money now and then for the maintenance of his wife or his aged parents does not mean that the dwelling house owned by his mother and in which his parents live becomes a dwelling place maintained for him. He may maintain his wife or parents and from this circumstance it cannot be said that the mother's house is maintained for the assessee. For these reasons we answer the question referred to us in the negative and against the Commissioner of Incometax. The assessee will get Rs. 250/- the costs of this reference.

A/V.R.B.

Question answered.

**A. I. R. 1953 MADRAS 86**

**RAJAMANNAR C. J. AND VENKATARAMA AYYAR J.**

**V. O. Vakkan, Appellant v. The Government of the Province of Madras, represented by the Collector of Malabar at Calicut, Respondent.**

Appeal No. 185 of 1950, D/- 28-3-1952.

**(a) International Law (Private) — Statute of one country imposing tax on non-resident foreigner in respect of profits earned in transactions taking place within its territorial limits — Statute cannot be held to be inconsistent with rule of international law.**



It is no doubt a rule of international law that the laws of one country can have no intrinsic force, *proprio vigore*, except within the territorial limits and jurisdiction of that country. They can bind only its own subjects, and others who are within its jurisdictional limits; and the latter only while they remain therein. Another maxim or proposition is that no State or nation can by its laws directly affect or bind property out of its own territory or bind persons not resident therein whether they are natural born subjects or not.

(Para 6)

But from this rule of law which is certainly well established it does not follow that one who is not a resident of a State can escape from or evade the imposition of taxes by the particular state if the necessary requirements are fulfilled which would justify the levy of a tax. The statute of any country imposing a tax on the profits earned by a person in transactions which take place within the State is not inconsistent with the above rule of international law.

(Paras 7 & 8)

**(b) Sales Tax — Madras General Sales Tax Act (9 of 1939), S. 2(b) — “Dealer” — Non-resident assessee — Principal place of business in Cochin State — Contracts of sale executed in Madras State — Delivery of goods also made in Madras State — Assessee held was dealer and was liable to sales tax in respect of such sales — (Constitution of India, Art. 286).**

The assessee's principal place of business was in Palluruthy in the Cochin State. He was also a resident of that place. He had large dealings with European firms in Fort Cochin (part of Madras State) to whom he sold coir yarn. The contracts of sale were made in Fort Cochin. The assessee or his son was present in Fort Cochin and executed the contracts. The delivery of the goods was undertaken to be given in the yards of the respective buyers who were all carrying on business in Fort Cochin.

The assessee was assessed to sales tax under the Madras General Sales Tax Act in respect of such sales which had taken place in Fort Cochin.

Held that the assessee must be held to be a person who carried on the business of buying or selling goods in the State of Madras and therefore a dealer within the meaning of S. 2(b) of the Act. The Sales tax is a tax levied on the occasion of the sale of goods. The sales must be deemed to have taken place in Fort Cochin which is part of the State of Madras. The assessee was, therefore, rightly assessed under the Act. Case law discussed.

(Para 17)

T. V. Muthukrishna Aiyar, N. R. Sessa Aiyar, C. T. Verghese and A. V. Ramanatha Aiyar, for Appellant; Govt. Pleader and V. Balakrishna Eradi, for Respondent.

**REFERENCES: Courtwar/Chronological/ Paras**  
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 (19) 42 Mad 455: (AIR 1919 Mad 209) 9, 10  
 (21) 44 Mad 773: (AIR 1921 Mad 212 SB) 16  
 (29) 52 Mad 207: (AIR 1929 Mad 409) 10  
 (1896) AC 325: (65 LJ QB 410) 9, 14  
 (1908) AC 46: (77 LJ PC 31) 9, 15  
 (1926) AC 37: (95 LJ KB 165) 8  
 (1879) 12 Ch D 522: (41 LT 46) 7

(1860) 157 ER 1364: (5 H & N 711) 11

(1882) 8 QBD 414: (51 LJ QB 86) 12, 13, 14

(1888) 20 QBD 753: (57 LJ QB 323) 13, 16

**RAJAMANNAR C. J.:** This appeal arises out of a suit filed by the appellant in the Court of the Subordinate Judge of Cochin for a declaration that certain orders passed by the Deputy Commercial Tax Officer, by the Commercial Tax Officer on appeal and by the Board of Revenue on revision in respect of sales tax assessment for 1945-46 are illegal, *ultra vires*, unauthorised and opposed to the provisions of the Madras General Sales Tax Act and the rules framed thereunder. The learned Subordinate Judge dismissed the suit and hence the appeal.

(2) The facts of this case can be better understood by first referring to the material provisions of the Madras General Sales Tax Act (Act IX of 1939) and the rules framed thereunder. This Act was amended in 1947 and 1949. But we are concerned in this case with the provisions of the Act as they stood before these amendments. The descriptive title of the Act is:

“An Act to provide for the levy of a general tax on the sale of goods in the Province of Madras.”

The following definitions in section 2 are important.

“(b) ‘dealer’ means any person who carries on the business of buying or selling goods.

\* \* \* \* \*

Explanation (2) — The agent of a person resident outside the Province who carries on the business of buying or selling goods in the province shall be deemed to be the dealer in respect of such business for the purposes of this Act.

“(c) ‘goods’ means all kinds of movable property other than actionable claims, stocks and shares and securities and includes all materials, commodities and articles;

“(h) ‘sale’ with all its grammatical variations and cognate expressions means every transfer of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration, but does not include a mortgage, hypothecation, charge or pledge;

Explanation: A transfer of goods on the hire-purchase or other instalment system of payment shall notwithstanding the fact that the seller retains the title in the goods as security for payment of the price, be deemed to be a sale.

(i) ‘turnover’ means the aggregate amount for which goods are either bought by or sold by a dealer, whether for cash or for deferred payment or other valuable consideration provided that the proceeds of the sale by a person of agricultural or horticultural produce grown by himself or grown on any land in which he has an interest whether as owner, usufructuary mortgagee, tenant or otherwise, shall be excluded from his turnover.

Section 3 is the charging section and is in the following terms:

“3(1) Subject to the provisions of this Act, every dealer shall pay in each year a tax in accordance with the scale specified below:

(a) If his turnover does not exceed	Five rupees
twenty thousand rupees.	per month
(b) If his turnover exceeds twenty	One half of one
thousand rupees.	percent of such
	turnover.



Provided that any dealer whose turnover in any year is less than ten thousand rupees shall not be liable to pay the tax under this sub-section for that year."

There is another proviso which is not relevant. Section 3(2) provides that the turnover for all the purposes of the Act shall be determined in accordance with, and the tax shall be assessed, levied and collected in such manner and in such instalments as may be prescribed by the rules made by the Government. Every dealer whose turnover is Rs. 10,000 or more for a year shall submit such return or returns of his turnover in such manner and within such periods as may be specified in the rules made under sub-section (2) of section 3 (section 9(1)). If the assessing authority is satisfied that any return so submitted is correct and complete he shall assess the dealer on the basis thereof (section 9(2)(a)). If no return is submitted before the prescribed date or if the return submitted appears to the assessing authority to be incorrect or incomplete the assessing authority shall proceed to determine the turnover in accordance with the rules, provided that before taking action under this clause the dealer shall be given a reasonable opportunity of proving the correctness and completeness of any return submitted by him.

Section 10 provides for the recovery of the tax, section 11 for appeals against the orders of assessment and section 12 for revision by the Board of Revenue. An officer duly empowered by the Provincial Government may require any dealer to produce before him the accounts and other documents and to furnish any other information relating to such business (section 14(1)). Section 14(2) provides for inspection of accounts and registers, goods, offices, shops etc.

(3) In exercise of the powers conferred by sub-section (2) of section 3 of the Act rules were framed called the Madras General Sales Tax (Turnover and Assessment) Rules 1939. Rule 6(2) provided that every dealer commencing business after the first day of October 1939 whose estimated nett turnover for the first twelve months of his business is not less than Rs. 10,000 shall, within 30 days of commencing his business, submit to the assessing authority of the area in which his principal place of business is situated a return in form A-1 showing his estimated gross turnover and the nett turnover for the first 12 months of his business. Rule 6(3) ran thus:

"Every dealer commencing business, who has not submitted a return under sub-rule (2) but whose turnover reaches Rs. 10,000 within the first 12 months of the commencement of the business, shall, within 30 days of the day on which his turnover reaches Rs. 10,000 submit to the assessing authority of the area in which his principal place of business is situated a return in form A-1".

Rule 11(1) is in the following terms:

"Paragraph 1: Every dealer liable to submit a return under rule 6, except those who have elected to be assessed by the method prescribed in rule 13, shall, on or before the first day of May, in every year submit to the assessing authority of the area in which his principal place of business is situated a return in form A showing the actual gross and nett turnover for the preceding year.

"Paragraph 2: Every dealer not liable to submit a return under rule 6 who has a nett turnover of not less than Rs. 10,000 for any year shall (unless he has elected to be

assessed by the method prescribed in rule 13) submit to the assessing authority of the area in which his principal place of business is situated, a return in form A showing the actual gross and nett turnover for that year on or before the first day of May of the succeeding year and thereafter, for every year on or before the first day of May immediately following such year."

(4) On 15th March 1947 the Deputy Commercial Officer, Chowghat issued a notice to the appellant informing him that it was seen from the records of the companies stationed in British Cochin that the appellant had sold coir yarn etc. to them to the extent of Rs. 13,37,431-12-3 (the details of which were appended) during the year 1945-46, that as such sales had taken place in British Cochin he was liable to pay tax under the Madras General Sales Tax Act, 1939, that he had neither furnished the turnover in Form A-1 after having reached a taxable turnover of Rs. 10,000 as required by rule 6(3) of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939, nor submitted a return in form A for the said year on or before 1st May 1946 as required by rule 11(1) of the said rules, and giving him notice that if no satisfactory explanation was received from him accompanied by the accounts, if any, on or before the 19th March he would be finally assessed to the best of his judgment on the nett turnover of Rs. 13,37,431-12-3 for 1945-46 without further notice.

To this notice the appellant sent his objections (Exhibit B. 5). He stated that he was resident in Palluruthy and that his principal place of business was also situated in Palluruthy which was in Cochin State, that he had no place of business in British Cochin or in the Province of Madras, that the Sales Tax authorities had no jurisdiction or authority under the said Act to call upon him to submit a return of his turnover in British Cochin and that the provisions of the Madras General Sales Tax Act did not apply to dealers whose place of business was situated outside the Province of Madras unless there was an agent in the Province. He therefore disclaimed any liability to submit a return of his turnover or to pay any tax under the Madras General Sales Tax Act. These objections were overruled and the Deputy Commercial Tax Officer by his order dated the 22nd March 1947 held that the appellant was liable to be assessed on a nett turnover of Rs. 12,30,124/- for the year ending 31st March 1946 and called upon him to pay a sum of Rs. 12,301-4-0 within 21 days.

The plaintiff filed an appeal to the Commercial Tax Officer of Malabar at Calicut against this order of assessment and raised the same contentions. But the Commercial Tax Officer confirmed the order of the Deputy Commercial Tax Officer by his order dated the 22nd May 1947. The appellant then took the matter in revision to the Board of Revenue, but his petition was rejected by the Board by its order dated the 20th October 1947. Thereupon the appellant filed the present suit making more or less the same allegations which he made and raising the same contentions as he raised before the Sales Tax Officers and the Board of Revenue. The learned Subordinate Judge held that the appellant had been rightly assessed under the Act and dismissed the suit.

(5) From the evidence adduced in the case the following facts emerge. The plaintiff's principal place of business is in Palluruthy in



the Cochin State. He is also a resident of that place. He had large dealings with European firms in Fort Cochin to whom he sold coir yarn. The contracts relating to these sales were several if not all of them, executed in Fort Cochin. They were signed either by the appellant or by his son. D. W. 3 a clerk in Messrs. Pierce Leslie and Co. Ltd. produced on behalf of his company contracts entered into with the appellant and he deposed that these contracts were signed, some of them by the appellant and the others by his son Joseph, in Fort Cochin in the office of Pierce Leslie & Co. Ltd. The goods were despatched from the appellant's Palluruthy office to Fort Cochin and delivered to the merchants in Fort Cochin.

(6) Mr. Muthukrishna Ayyar, learned counsel for the appellant, raised two main contentions. His first contention was that as the appellant was a resident of Cochin State and his place of business was in that State he was not bound by the laws of a different country, viz., the State of Madras. He cited to us passages from leading text writers on conflict of laws. Story in his book (VIII Edn., page 8) says:

"It is plain that the laws of one country can have no intrinsic force '*proprio vigore*', except within the territorial limits and jurisdiction of that country. They can bind only its own subjects, and others who are within its jurisdictional limits; and the latter only while they remain therein."

Again at page 22 he says:

"Another maxim or proposition is that no State or nation can by its laws directly affect or bind property out of its own territory or bind persons not resident therein whether they are natural born subjects or not."

See also Dicey's Conflict of Laws, sixth edn., page 154.

(7) In — 'Ex parte Blain, In re: Sawers', (1879) 12 Ch D 522, James L. J. observed thus: "It appears to me that the whole question is governed by the broad, general, universal Principle that English legislation, unless the contrary is expressly enacted or so plainly implied as to make it the duty of an English Court to give effect to an English statute, is applicable only to English subjects or to foreigners who by coming into this country, whether for a long or a short time have made themselves during that time subject to English jurisdiction."

In our opinion, from this rule of law which is certainly well established it does not follow that one who is not a resident of a State can escape from or evade the imposition of taxes by the particular state if the necessary requirements are fulfilled which would justify the levy of a tax.

(8) In — 'Whitney v. Commissioners of Inland Revenue', (1926) AC 37, the facts were these. The Appellant, a citizen of the United States of America and having possessions in the United Kingdom from which he derived a larger income, was required by the Special Commissioners for income-tax to make a return of his income for the purposes of super-tax. Having failed to make the return he was assessed by the Commissioners to the best of their judgment. It was held by the House of Lords that the assessment was rightly made. The statute of any country imposing a tax on the profits earned by a person in transactions which take place within the State is not inconsistent with the rule of international law of which mention has been made.

(9) Mr. Muthukrishna Ayyar's next contention was in fact the main contention which he strongly pressed before us. The contention was that the appellant cannot be deemed to be a 'dealer' within the meaning of the definition of the term in the Act. Before the appellant could be held to be a dealer it must be established that he carried on the business of buying or selling goods. A person who has no place of business in an area or locality cannot be said to be a person who carries on any business in that place. Even assuming that there have been sales in Fort Cochin the sales alone cannot warrant the inference that the appellant carries on a business in that area or locality. So his argument ran. He relied upon certain decisions to which we shall refer briefly. In — 'Municipal Council of Cocanada v. The 'Clan' Line Steamers, Ltd', 42 Mad 455, the question was whether a Shipping Company which earned profits by carriage of goods by sea and in the course of its business the ships called at several ports in various parts of the world including Cocanada and which employed sub-agent at Cocanada could be assessed by the Municipality of Cocanada to a tax under S. 52 of the District Municipalities Act for exercising a trade and carrying on business in Cocanada. It appeared from the evidence in the case that all contracts with the shippers could be and were entered into by the agent of the Company at Madras. Wallis C. J. after referring to the decision of the House of Lords in — 'Grainger and Son v. Gough', (1896) AC 325, and the decision of the Privy Council in — 'Lovell and Christmas Ltd. v. Commissioner of Taxes', (1908) AC 46 (PC) observed thus:

"Looking at the facts of the present case in the light of these decisions, I think there is no ground for holding that the Clan Line exercises a trade at Cocanada. It is a shipping company which earns profits by the carriage of goods by sea, and in the course of its business trades, in Lord Herschell's language, with, but not necessarily within, Port towns in various parts of the world. It has not been contended before us that a ship-owner exercises his trade at all the ports at which his steamers habitually call to discharge or load cargo, which latter operation may involve entering there and then into contracts with shippers.....It is unnecessary to pursue this question, because it is, I think, clear upon the authorities that where, as in the present case, the freight-earning contracts with shippers which enable profits to be earned by sea carriage are not entered into at the port in question by the ship's master or the local agent of the ship-owner, but elsewhere, the ship-owner cannot be held to exercise his trade at the port, merely because he employs a shipping agent there to attend to other matters, such as issuing shipping orders and signing bills of lading pursuant to contracts already made and receiving payment of advance freight."

Napier J. formulated the test thus:

".....In this class of cases if the contract out of which the profit arises is not made in the place where the tax is sought to be imposed, the liability does not arise."

(10) In — 'Municipal Council, Dindigul v. Bombay Co., Ltd.', 52 Mad 207, the principle laid down in — 'Municipal Council of Cocanada v. The 'Clan' Line Steamers Ltd', 42 Mad 455, was followed. The plaintiff company in that case which had its chief place of business in Madras purchased produce such as cotton and



groundnuts through its agent in Dindigul. Contracts in respect of such purchases were entered into at Madras and after purchase the produce was sold abroad at Madras. The agent of the plaintiff company in Dindigul had no power to conclude any contract. The question was whether the company transacted business, that is to say, carried on business within the municipality. *Coutts Trotter C. J.* said:

"In my opinion it would be no more reasonable so to hold than to hold that a company who sends a commercial traveller all over India to make purchases for them can be said to carry on business in all the various places at which he calls to fulfil the purpose of his employment."

Madhavan Nair J. discussed all the relevant decisions of the English Courts on the point. He came to the same conclusion mainly on the ground that all the business contracts were concluded at Madras. To use his language

"what we have to find out mainly from the evidence is as to where the contracts relating to the business of this company are habitually made"

(11) Mr. Muthukrishna Ayyar referred us to a very early case in — '*Sulley v. The Attorney-General*', (1860) 157 ER 1364, but that decision as well as subsequent decisions have all been reviewed both by the House of Lords and by the Privy Council in the two cases above mentioned. The facts in that case were peculiar, as one of the partners in a firm resided at Nottingham in England, whereas the other partners resided in New York where the principal business of the firm was carried on. The profits which arose on the resale of the goods purchased in England at an increased price in America were held not to be subject to the income-tax in the United Kingdom.

(12) As *Jessel M. R.* pointed out in — '*Erichsen v. Last*', (1882) 8 QBD 414:

"there is not.....any principle of law which lays down what carrying on trade is. There are a multitude of things which together make up the carrying on of trade, but I know no one distinguishing incident, for it is a compound fact made up of a variety of things."

Nevertheless the learned Master of the Rolls attached great weight to the fact that the company concerned in the case entered into contracts in England with English subjects for the right of carriage. *Brett L. J.* observed thus:

"The only thing that we have to decide is whether upon the facts of this case, this company carry on a profit earning trade in this country. I should say that wherever profitable contracts are habitually made in England, by or for foreigners, with persons in England, because they are in England, to do something for or supply something to those persons, such foreigners are exercising a profitable trade in England, even though everything to be done by them in order to fulfil the contracts is done abroad."

In that case it was held that though the principal place of business of the company was at Copenhagen they carried on business also in England, because the contracts were made with the company in England.

(13) In — '*Werle and Co. v. Colquhoun*', (1888) 20 QBD 753, the facts were these. A firm of wine merchants at Rheims in France employed a London firm to obtain orders for their wine in England. They had no wine in England, and all orders were forwarded to

Rheims and the wine was packed and sent direct from thence to the customers. Payments were made direct to the firm or to the London firm who remitted the amount to the firm at Rheims. It was held that the firm at Rheims exercised a trade within the United Kingdom and were therefore assessable to income-tax in respect of profits arising therefrom. The test enunciated in — '*Erichsen v. Last*', (1882) 8 QBD 414 was applied, viz., where were the profitable contracts made? Lord Esher, M. R. summed up the position thus:

"The making of contracts in such a case as the present is the whole substance and essence of the trade, and so the appellants exercise a business in England."

(14) In — '*Grainger and Son v. Gough*', (1896) AC 325, a foreign merchant who canvassed through agents in the United Kingdom for orders for the sale of his merchandise to customers in the United Kingdom was held not liable to income-tax in the United Kingdom as he did not exercise a trade therein because the contracts for the sale and all deliveries of the merchandise were made in a foreign country. Stress was laid by the learned Lords on the fact that no contracts were ever made by the canvassing agents on behalf of the assessee. All they did was to transmit the orders received, and it was open to the merchant to accept them or not. Lord Herschell approved of the test enunciated in — '*Erichsen v. Last*', (1882) 8 QBD 414, namely where were the contracts habitually made?

(15) The same test was applied by the Privy Council in — '*Lovell and Christmas Ltd. v. Commissioner of Taxes*', (1908) AC 46 (PC). The rule is stated thus by Their Lordships:

"One rule is easily deducible from the decided cases. The trade or business in question in such cases ordinarily consists in making certain classes of contracts and in carrying those contracts into operation with a view to profit; and the rule seems to be that where such contracts, forming as they do the essence of the business or trade, are habitually made, there a trade or business is carried on within the meaning of the Income-tax Acts, so as to render the profits liable to income-tax."

(16) In — '*Chief Commissioner of Income-tax v. Bhanjee Ramjee and Co*', 44 Mad 773 (SB) the test laid down in — '*Werle and Co. v. Colquhoun*', (1888) 20 QBD 753, was expressly applied. In that case the person sought to be taxed under the Indian Income-tax Act resided and had his principal place of business in Cochin State in Mattancherri which adjoined British Cochin and practically formed one town with it. The facts found were that contracts for the supply of goods were entered into and signed at the offices of the firm in British Cochin and the goods were delivered at the jetties of the purchasers. The sale proceeds were paid to the firm's agent or other duly authorised servant in cash in British India or by cheques which were encashed in banks in British India. In these circumstances it was held by a Special Bench consisting of *Wallis C. J.* and *Ayling and Krishnan JJ.* that the profits and gains arising through these transactions were assessable under the Indian Income-tax Act.

(17) In the light of the above authorities let us see the facts of this case. The contracts of sale were made in Fort Cochin. The plaintiff or his son was present in Fort Cochin and executed the contracts. The delivery of the



goods was undertaken to be given in the yards of the respective buyers who were all carrying on business in Fort Cochin. On these facts we have no hesitation in holding, agreeing with the learned Trial Judge, that the plaintiff must be held to be a person who carries on the business of buying or selling goods in the State of Madras and therefore a dealer within the meaning of S. 2 (b) of the Act. The Sales tax, as observed in — 'The Province of Madras v. Boddu Paidanna and Sons', 1942 FCR 90, is a tax levied on the occasion of the sale of goods. The sales must be deemed to have taken place in Fort Cochin which is part of the State of Madras. The appellant was therefore rightly assessed under the Act.

(18) The appeal is dismissed with costs.

B/K.S.

Appeal dismissed.

### A. I. R. 1953 MADRAS 91

P. V. RAJAMANNAR C. J. AND  
VENKATARAMA AYYAR J.

Poppatlal Shah, Partner of Messrs. Indo-Malayan Trading Company, Accused-Appellant v. State of Madras Represented by the Deputy Commercial Tax Officer, Sowcarpet, Madras, Respondent.

Criminal Appeal No. 129 of 1952, D/- 29-8-52.

(a) Sales Tax — Madras General Sales Tax Act (9 of 1939), S. 2 (h) — Sale — Meaning of — Extra-territorial operation of Act — Validity of Act.

The word 'sale' in the Madras General Sales Tax Act must be understood in a popular sense and sales tax can be levied under the Act if the transaction substantially takes place within the Province, notwithstanding that the property in the goods does not pass within the State. Though on this construction the Act would have extra-territorial operation affecting transactions concluded in other States, it cannot be held to be 'ultra vires' on that ground. (Paras 13 and 14)

(b) Sales Tax — Madras General Sales Tax Act (9 of 1939), Preamble — Object of Act.

The object of the Sales Tax Act is to impose a tax on all sales and it is a tax imposed on the occasion of sale. (Para 4)

(c) Sales Tax — Madras General Sales Tax Act (9 of 1939), S. 2 (h), Explanation 2 (introduced by Madras General Sales Tax (Amendment) Act, 25 of 1947 — Explanation should be construed as enacted for removing doubts and not to effect change in law. (Para 13)

V. T. Rangaswami Ayyangar and M. M. Ismail, for Appellant; Advocate General, for the State Prosecutor, for the State.

REFERENCES: Courtwar/Chronological/ Paras

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| ('48) 1948 FLJ 32: (AIR 1948 PC 118)                   | 14       |
| ('42) 1942 FCR 90: (AIR 1942 FC 33)                    | 4        |
| ('49) 1949 FLJ 18: (AIR 1949 FC 18)                    | 14       |
| ('52) W. P. Nos. 21 and 41 of 1952: (AIR 1953 Mad 105) | 4        |
| ('52) 65 Mad LW 793: (AIR 1953 Mad 86)                 | 4, 9, 14 |
| ('52) CS 446 of 1947 (Mad): (1952-3 STC 19)            | 11       |
| (1900) AC 588: (69 LJPC 87)                            | 14       |
| (1949) AC 36 (PC)                                      | 14       |
| (1903) 191 US 441: 48 Law Ed 254                       | 5        |
| (1905) 196 US 133: 49 Law Ed 417                       | 5        |
| (1946) 329 US 69: 91 Law Ed 80                         | 7        |

VENKATARAMA AYYAR J.: The appellant is a partner of a firm of merchants called

'Indo-Malayan Trading Company' and has been convicted in proceedings taken under Section 15 of the Madras General Sales Tax Act for failure to pay the tax which had been imposed on the said firm. The Indo-Malayan Trading Company carries on the business of purchasing and selling groundnut oil, sago and kirana articles and has its head office in the City of Madras.

The usual course of business is that the firm receives orders from merchants in Calcutta for the supply of these articles; the orders are accepted in Madras; the articles are purchased in the local markets and despatched to Calcutta by rail or steamer. The relative railway receipts or bills of lading are taken in the name of the sellers and so are the insurance policies. They are then forwarded to their bankers in Calcutta who deliver the same to the consignees on payment of the price and other charges. During the period from 1-4-1947 to 31-12-1947, which is the period of assessment concerned in these proceedings the turnover of such transactions amounted to Rs. 37,75,357. The point for decision is whether sales tax is leviable on this amount.

(2) The contention of the assessee is that the title to the goods sold passed only in Calcutta because the documents of title were taken in the name of the sellers and delivered to the purchaser on payment of the price at Calcutta and that consequently there was no sale within the Province of Madras and therefore, no liability to pay the tax arises under the Act. The Deputy Commercial Tax Officer passed an order on 12-3-1949 rejecting this contention and assessing the firm to sales tax on these transactions and this decision was affirmed on appeal by the Commercial Tax Officer by his order dated 29-5-1949. On 2-6-1949 notice of the final assessment and demand for payment of the amount of tax was issued to the firm.

The assessee preferred a revision to the Board and that was dismissed on 23-5-1950. On 14-8-1950 the assessee filed a suit O. S. No. 903 of 1950 on the file of the City Civil Court, Madras, for a declaration that the imposition of the tax was not justified by the Act and was in consequence illegal. That suit was dismissed on 31-7-1951 and an appeal against that judgment is pending in this Court, C. C. C. A. No. 131 of 1951. Meanwhile, the Government instituted the prosecution under Section 15, C. T. No. 1358 of 1950, out of which the present appeal has arisen. The accused pleaded in defence that the firm was not liable to be taxed under the provisions of the Act and that the assessment was illegal. That plea was overruled and the appellant was ordered to pay a fine of Rs. 1,000 in addition to the tax. Against the said order the accused has preferred this appeal.

(3) The substantial question that arises for determination in this appeal is whether the sales in question took place within the Province of Madras. Mr. V. T. Rangaswami Iyengar, the learned Advocate for the appellant argues that on the facts already stated — and there is no dispute about them — the sellers continued to be the owners of the goods until they were paid for and cleared in Calcutta and under the provisions of the Sale of Goods Act, the property in the goods passed to the purchasers only in Calcutta and that, therefore, the sale took place only there. The contention of the learned Advocate General, on the other hand, is that for purposes of General Sales Tax



Act the question whether there was a sale within the Province of Madras would have to be determined on a factual basis as to where the transaction took place and not on a consideration of questions as to where property passed in the goods.

It is conceded on behalf of the Government that if the correct principle to apply is to determine where property in goods passed, the sales in question could not be held to have taken place within the Province of Madras. On the other hand, it is equally indisputable that if the true test is to determine where the transactions took place, the finding that the sales in question took place within the Province of Madras is unassailable, because the firm had its head office at Madras; its accounts were maintained at Madras; the goods which were the subject matter of sale were in Madras and delivered to common carriers in Madras; and the sale price was entered in the Madras accounts. The question is which of these two stand-points is the correct one to adopt under the Act.

(4) The word 'sale' has both a legal and a popular sense. In the legal sense it imports passing of property in the goods. In its popular sense it signifies the transaction which results in the passing of property. To a lawyer the legal sense would appear to be the correct one to be given to the word in the Sales Tax Act. That is the conception which is familiarised in the provisions of Sale of Goods Act. If one leaves out of account sales tax legislation which is of comparatively recent origin, questions relating to sale of goods usually come up before the Courts only in connection with disputes between the sellers and purchasers. If the goods perish, on whom is the loss to fall? If the purchaser becomes insolvent before payment of price can the goods be claimed by the trustee in bankruptcy?

For deciding these and similar questions it is necessary to determine at what point of time the property in goods passed to the purchaser. Sometimes when the point for determination is as to jurisdiction of Courts to entertain suits based on contract, it may be material to consider where property in the goods passed, that being part of the cause of action. These being the questions which are accustomed to be debated in connection with sale of goods, it is natural that a lawyer should, as a matter of first impression approach the question of sale under the Sales Tax Act with the same concept of a sale. But if the matter is further considered it will be seen that considerations which arise under the Sales Tax Act are altogether different from those which arise under the Sale of Goods Act.

The object of the Sales Tax Act is to impose a tax on all sales and it is a tax imposed on the occasion of sale. Vide — 'The Province of Madras v. Boddu Paidanna & Sons', 1942 FCR 90, — 'Vakkan v. Province of Madras', 65 Mad. LW 793 and — 'V. M. Syed Mohamed & Co. v. State of Madras', W.P. Nos. 21 and 41 of 1952. So far as the Government is concerned, it would be immaterial at what point of time property in the goods actually passed from the seller to the buyer. Of course, there must be a completed sale before tax can be levied and there would be a completed sale only when property passes. That is the scope of the definition of 'sale' in section 2(h). But when once there is a completed sale, the question when property passed in the goods would be a matter of no concern or consequence for purposes

of the Sales Tax Act. The Government is interested only in collecting the tax due in respect of the sale and the only fact about which it has to satisfy itself is whether the sale took place within the Province of Madras. In this context the popular meaning of the word is the more natural one and there is good reason for adopting it.

The Officers who have got to assess the tax under the Act need not necessarily be lawyers and it is difficult to believe that the Legislature would have entrusted to their decision abstruse questions as to passing of property which have taxed the legal acumen of learned Judges and lawyers. It is far more probable that they were expected to base their decision on facts and circumstances showing where the transaction took place. They would, in this view, have to enquire where the office of the dealer is located, where the accounts are maintained, where the bargains are made, where the goods were actually lying at the time of the bargain, where they were consigned in pursuance of the contract, and where the sale proceeds were dealt with. These and similar matters are questions of fact which could properly be left to the determination of administrative tribunals.

(5) In — 'Norfolk and W. R. Co. v. Sims', (1903) 191 US 441: 48 Law Ed 254 at p. 256 the facts were that Messrs. Sears Roebuck and Company who were manufacturers of sewing machines in Chicago in the State of Illinois sold a machine to Mrs. Satterfield of Roxboro in the State of North Carolina and consigned the same through a common-carrier. The sellers took out a bill of lading and sent the same to an agent at Roxboro who delivered the same to Mrs. Satterfield on receipt of the price. Before Mrs. Satterfield could take delivery of the machine, the local authorities seized it for payment of a tax alleged to be due from the sellers by virtue of a statute of North Carolina which imposed a licence tax on all persons "engaged in the business of selling" within the State. The question was whether on the facts found, the sellers could be held to have carried on business in selling in Roxboro. The contention of the local authority was that the property in the machine passed only at Roxboro when the bill of lading was delivered on payment of price and therefore there was "business of selling" within the State. In negating this contention the Court observed:

"While it may be entirely true that the property in the thing sold does not pass under a C. O. D. consignment (collection on delivery) until delivery of the goods and payment to the carrier and hence it may be said that the sale is not completed until then, yet, as a matter of fact the bargain is made, and the contract of sale completed as such, when the order is received in Chicago, and the machine shipped in pursuance thereof. A sale really consists of two separate and distinct elements; first, a contract of sale, which is completed when the offer is made and accepted; and second, a delivery of the property which may precede, be accompanied by, or follow the payment of the price, as may have been agreed upon between the parties.

The substance of the sale is the agreement to sell, and its acceptance. That possession shall be retained until payment of the price may or may not have been a part of the original bargain, but in substance it is a mere method of collection, and we have



never understood that a licence could be imposed upon this transaction except in connection with the prior agreement to sell, although in certain cases arising under the police power it has been held that the sale is not completed until delivery and sometimes not until payment. Were it not for the opinion of the Supreme Court of North Carolina, we should have said that the words "engaged in the business of selling the same within the State" had reference to the word "selling" in its popular and ordinary sense of selling from a stock on hand or upon a special order to a manufacturer and not to a mere method of collecting the money."

In — 'American Express Co. v. State of Iowa', (1905) 196 US 133: 49 Law Ed 417 at p. 422, the question again arose with reference to goods shipped from one State to another under a C. O. D. contract. After observing that opinion was divided as to when under such a contract property passed the Court proceeded on to state:

"But we need not consider this subject. Beyond possible question the contract to sell and ship was completed in Illinois. The right of the parties to make a contract in Illinois for the sale and purchase of merchandise, and in doing so, to fix by agreement the time when and condition on which the completed title should pass, is beyond question."

(6) The precise question which came up for decision in the above cases was with reference to the commerce clause. But the principles laid down therein as to what constitutes sales would equally be applicable on a question as to where the sale actually takes place in a transaction of an inter-state character.

(7) The following observations of Black J. in — 'Richfield Oil Corporation v. State Board of Equalization', (1946) 329 US 69: 91 Law Ed 80 at p. 95 may be appositely quoted:

"This purely intra-State sale transaction cannot properly be held to have lost its intra-State pre-exportation status by reason of the fact that the parties did not intend "title to pass" until the oil was delivered at the purchaser's ship. For formal "passage of title" is not an adequate criterion for measuring a state's constitutional power to tax sales made within the State. Private parties are free to decide, so far as their own interests are concerned, when legal title shall be considered to "pass". But a state surely is not required by the Constitution to forbear from taxing that part of a sale transaction which precedes the particular moment the parties have arbitrarily selected for a conceptual transfer of title.

Nor need a state withhold the exercise of its power to tax sales until an article is delivered or paid for. That delivery, perhaps the last step in executing this agreement to sell, happened to border on the imaginary line where the actual exporter took possession does not justify us in concluding that therefore this wholesale transaction occurred after exportation. Constitutional interpretations which make serious inroads into the power of both the States and the Federal Government to tax sales made by local businesses should not turn on fine legal concepts of when title passed or delivery occurred in relation to the beginning of exportation."

(8) The point for decision in this case also was whether the transaction in question was repugnant to Article 1, Section 10 (2) of the American Constitution. But the observations

quoted above enunciate a general principle which is capable of application to determinations of the power of a State to impose tax on sales.

(9) In — 'Vakkan v. Province of Madras', 65 Mad. LW 793 a subject of the State of Cochin entered into contracts of sale in Fort Cochin in British India and the goods were also delivered in Fort Cochin. On these facts it was held that the sale must be deemed to have taken place in the State of Madras and that taxes were rightly imposed in respect of such sales under the Madras General Sales Tax Act.

(11) Our attention was invited to the decision of Krishnaswami Nayudu J., in — 'Louis Dreyfus & Co. v. Province of Madras', C. S. No. 446 of 1947 (Mad.) on the Original Side of this Court. One of the points that arose for determination there was whether the imposition of sales tax was illegal on the ground that the sales did not take place within the Province. The question was argued on the basis that sale takes place where property in the goods passes and on that basis it was held by the learned Judge that the property in the goods passed at Marma Goa and not in Madras and that, therefore, the imposition was illegal. But the contention now raised by the Advocate General was not put forward in that case and the decision is accordingly of no assistance in the determination of the question now under consideration.

(12) Counsel for the appellant sought to build an argument on the basis of the Madras Act XXV of 1947 which introduced Explanation (2) to the definition of sale of goods under the Act. It runs as follows:

"Explanation (2). Notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale or purchase of any goods shall be deemed, for the purposes of this Act, to have taken place in this Province, wherever the contract of sale or purchase might have been made:

(a) if the goods were actually in this Province at the time when the contract of sale or purchase in respect thereof was made, or  
(b) in case the contract was for the sale or purchase of future goods by description, then, if the goods are actually produced in this Province at any time after the contract of sale or purchase in respect thereof was made."

(13) It was argued that this Explanation recognizes that under the Act as it stood prior to the amendment, the question as to where the sale took place should be determined in accordance with the principles laid down in the Sale of Goods Act and as the Explanation came into force only on 1-1-1948, it has to be ignored for the purpose of the present proceedings which relate to the assessment for the period from 1-4-1947 to 31-12-1947. This argument proceeds on the assumption that the object of the amendment was to effect a change in the law. That, however, is not necessarily the case. Explanations are inserted for removing doubts and declaring the law. Explanation (2) no doubt states that "notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930" the sale should be deemed to have taken place in this Province, wherever the contract of sale or purchase might have been made.

But the Sale of Goods Act contains no provision that a sale takes place where a contract of sale or purchase takes place. There is not even a provision in the Act as to where a sale



takes place, even though there are provisions as to when property passes in the goods. Under the circumstances, it is more natural to construe the Explanation as enacted for removing doubts and not to effect a change in the law. Our conclusion accordingly is that the word 'sale' in the Madras General Sales Tax Act must be understood in a popular sense and sales tax can be levied under the Act if the transaction substantially takes place within this Province, notwithstanding that the property in the goods does not pass within the State.

(14) A contention was raised that on this construction the Madras General Sales Tax Act would have extra-territorial operation affecting transactions concluded in other States & that it would, therefore, be ultra vires. The answer to this contention is furnished by the decision of the Privy Council in — 'Wallace Brothers & Co. Ltd. v. Commr. of Income Tax, Bombay', 1948 FLJ 32 at p. 36. There, a Company incorporated in England having its registered office there was carrying on business in India. The income-tax authorities in India acting under the provisions of the Indian Income Tax Act imposed a tax on the company not merely in respect of the income received in India but also of the income received in England. On the question whether the Indian Legislature was competent to tax the income received from England, the Privy Council observed:

"The resulting general conception as to the scope of income-tax is that, given a sufficient territorial connection between the person sought to be charged and the country seeking to tax him, income-tax may properly extend to that person in respect of his foreign income."

In — 'A. H. Wadia v. Commissioner of Income-tax', Bombay, 1949 FLJ 18, the Gwalior Durbar was advancing large sums on mortgage of debentures over property in British India. The question was whether interest received by the Durbar at Gwalior was assessable to income-tax. The assessee contended that Section 42(i) of the Income Tax Act under which the assessment was sought to be made was extra-territorial in its operation and therefore, ultra vires of the Indian Legislature. It was held by the majority that on the facts there was sufficient connection to clothe the Indian Legislature with competence to impose the tax and that, therefore, the assessment was not illegal.

In — 'Commissioner of Taxation v. Kirk', (1900) AC 588, the question arose with reference to ores extracted in New South Wales and sold as finished products outside the State. The sale proceeds were realised outside the State. The State of New South Wales sought to levy income-tax on the profits made on such sales. The Privy Council held that it was within the competence of the Legislature of New South Wales to impose tax even though the profits were received outside the State, as part of the process was within the State. In — 'International Harvester Co. of Canada Ltd. v. Provincial Tax Commission', (1949) AC 36, the Privy Council after quoting with approval the above decision observed that "regarding profit as arising solely at the place of sale" is fallacious. Vide also the decision of this Court in — 'Vakkan v. Province of Madras', 65 Mad. LW 793. On these authorities, the attack on the Madras General Sales Tax Act on the ground that it is extra-territorial in its operation must fail.

(15) In the result, this appeal fails and is dismissed.

(16) RAJAMANNAR C. J.: I agree.

A/V.R.B.

Appeal dismissed.

# A. I. R. 1953 MADRAS 94

RAJAMANNAR C. J.

AND VENKATARAMA AIYAR J.

In re P. Ramamoorthi, Petitioner.

Writ Petn. No. 244 of 1952, D/- 7-4-1952.

(a) Constitution of India (1950), Art. 226 — Writ of Certiorari — Powers of High Court — Who can apply — Nomination of members to Legislature by Governor — Right of a person either as legislator or as citizen to apply for writ — Infringement of mere political rights no ground for issue of writ.

It is not the province of the High Court to interfere either 'suo motu' or at the instance of any person whenever there is any disregard or violation of any of the provisions of the Constitution. Its power under Art. 226 of the Constitution can only be involved at the instance of a person who has a personal grievance against any act of the State in its executive capacity which inflicts a legal injury on him since the right which is the foundation of a petition under Art. 226 of the Constitution or a corresponding provision is a personal and individual right. — 'Sweatt v. Painter', (1950) 339 US 629; 94 Law Ed 1114, AIR 1951 SC 41, Rel. on. (Para 3)

A person either as a member of the legislature or a citizen has no such personal and direct interest in the matter of the nomination of a member to legislature as to enable him to invoke the provisions of Art. 226 of the Constitution. (Para 4)

As a remote consequence of the nomination it may be that he had been deprived of the opportunity, along with the other members of his party in the legislatures, of forming the ministry and having the nominations to the legislature made on the advice of that ministry. But where that cannot be said to affect his personal rights even in an indirect manner, he cannot question the validity of nomination by an application under Art. 226. (Para 5)

His political rights if any cannot come into play in a Court of law unless such rights have the character of a legal right. Otherwise any discussion of such rights would be outside the scope of judicial decision. (Para 4)

Anno: Civil P. C., App. III; Const. of Ind., Art. 226 N. 13.

(b) Constitution of India (1950), Art. 164 — Quaere — Act of Governor calling a person to form ministry — It is extremely doubtful whether action can be subject matter of any petition in a Court of law. (Para 4)

(c) Constitution of India (1950), Arts. 164 and 171 — Rights of Legislator.

As a Legislator a person has no right to see that the nominations to the legislature are made properly or that any particular individual does not form a ministry which may be entrusted with the Government of the State. (Para 6)

Petitioner in Person.



REFERENCES: Courtwar/Chronological/ Paras  
(51) 1951 SCJ 29: (AIR 1951 SC 41) 3  
(50) 63 Mad LW 89 (Journal Section):  
(1950-339 US 629: 94 Law Ed 1114) 3

RAJAMANNAR C. J.: This is an application under Art. 226 of the Constitution for the issue of a writ of certiorari to call for the records and quash the order of His Excellency the Governor of Madras made in G. O. Ms. No. 1005 Public (Elections) dated 31st March 1952. The said order runs as follows:

"In pursuance of Cls. 3 (e) & (5) of Art. 171 of the Constitution of India, I, Sri Prakasa, Governor of Madras, hereby nominate the following persons to be members of the Madras Legislative Council:

1. Sri Chakravarthi Rajagopalachari
2. Janab Mahammad Usman
3. Sri Vellapuram Bashyam Ayyangar
4. Sri Omandur P. Ramaswami Reddiar."

The petitioner is a citizen of India and one of the members of the Madras Legislative Assembly elected on the Communist's Party ticket in the recent general elections held in January 1952. In this application he attacks in particular the nomination of the second respondent, namely, Sri C. Rajagopalachari, on several grounds. In view of our decision that the application is not sustainable at the instance of the petitioner in this case, it is not necessary to set out except in the barest outline the several grounds on which the validity of the nomination is impugned.

(2) It was first alleged that the nomination is virtually in exercise of fraud of the powers conferred by the Constitution on the Governor, because the nomination was made with the ulterior object of assisting the Congress Legislature party. The next ground on which the validity of the nomination is challenged is that the Governor cannot exercise the power of making the nominations under Art. 171 (3) (e) (5) of the Constitution except on the advice of the Council of Ministers and having regard to the fact that the nominations are to the Legislative Council which has not yet begun to function, the Council of Ministers who can advise the Government in this matter will be the Council of Ministers appointed from and out of the new Legislative bodies. We refrain from making any remarks on the soundness of any of these several contentions.

(3) We must first dispose of the argument that it is not necessary for the petitioner to have any personal and direct interest in the matter in respect of which he makes the application and that it is the duty of this court to interfere under Art. 226 of the Constitution whenever any violation of any of the provisions of the Constitution is brought to the notice of the court 'pro bono publico' by any citizen of the State. The petitioner who argued his case himself went to the extent of saying that even if the attention of this court was not drawn by any person, it was still incumbent on this court so far as it was practicable, to interfere in this manner 'suo motu'. Indeed it was said that this duty followed from the form of oath taken by the Judges of this Court which comprises 'inter alia' the promise to uphold the Constitution and the Laws. We have no hesitation in not accepting this argument. It is certainly not the province of this court to interfere either 'suo motu' or at the instance of any person whenever there is any disregard or violation of any of the provisions of the Constitution. Our power under Art. 226 of the Constitution can only be invoked at the

instance of a person who has a personal grievance against any act of the State in its executive capacity which inflicts a legal injury on him. It has been held over and over again both in the United States of America and in this country that the right which is the foundation of a petition under Art. 226 of the Constitution or a corresponding provision is a personal and individual right. Chief Justice Vinson of the United States in a recent case — 'Sweatt v. Painter', 63 Mad LW 89 (Journal Section), observed:

"It is fundamental that these cases concern rights which are personal and present."

The Supreme Court of this country has also adopted the same principle — 'Charanjit Lal Chowdhury v. The Union of India', 1951 SCJ 29.

(4) It therefore falls to be considered whether the petitioner is in any manner personally injured by the nomination of the second respondent. In the affidavit filed by him in support of the application he states thus in paragraph 10:

"I submit that I am affected by the order of the first respondent inasmuch as I am deprived of the right along with other members of the Legislative Assembly to have the new Government and to have the nominations of the Legislative Council made on the advice of the Council of Ministers responsible to the legislative Assembly. Further, I submit that as the powers conferred under Art. 171 (3) (e) and (5) affect the composition of the Legislature and therefore any legislation that may be passed affects every citizen of the Indian Union."

In spite of the eloquent argument of the petitioner we are unable to agree with him that he has any such personal and direct interest in the matter of the nomination as to enable him to invoke the provisions of Art. 226 of the Constitution. The petitioner developed an argument that he was personally affected by the order of nomination because if Sri C. Rajagopalachari had not been nominated but nevertheless had been called upon to form a ministry as the Chief Minister, then Sri C. Rajagopalachari would have had to face an election at the end of six months from the date of his nomination and at such an election the party to which he belongs might be able to defeat him. In our opinion the petitioner is mixing up two things. What is actually impugned in this petition is the nomination of Sri C. Rajagopalachari and not the act of the Governor in calling upon him to form the ministry. The latter act is not the subject-matter of this petition; and we have grave doubts whether that action can be the subject-matter of any petition in a court of law. So in any consideration of the validity of the nomination, we should completely omit any reference to the action of the Governor in calling upon Sri C. Rajagopalachari to form the ministry. Now, in what way can the petitioner be said to have been personally aggrieved by this nomination? Surely, he cannot say that the majority which his party commands has been upset by this nomination. He is unable to specify any right, be it property right or personal right, which has been infringed in any manner by the nomination. The petitioner spoke of political rights. We presume that these political rights can come into play in a court of law only in so far as they have the character of legal rights. Otherwise, any discussion as to political right



would be completely outside the scope of judicial decision. But we are unable to see even such political rights of the petitioner being infringed.

(5) It was said that but for the nomination, it would have been possible for the petitioner along with the other members of his party to have formed a new ministry and to have the nominations made on the advice of the members of that ministry. This is, to say the least, a very remote consequence of the nomination. We are unable to see any personal right of the petitioner which can be said to have been infringed even in an indirect manner by the nomination by the Governor of the second respondent.

(6) Finally, the petitioner dilated on his right as a Legislator to see that the nominations were made properly. We do not agree that the petitioner has any such right as a Legislator. Nor has he got a right to see that Sri C. Rajagopalachari does not form a ministry which may be entrusted with the Government of the State.

(7) This application must therefore be, and is hereby dismissed.

A/M.K.S.

Application dismissed.

**\* A. I. R. 1953 MADRAS 96**

CHANDRA REDDI J.

In re V. Chakkarai Chettiar, Petitioner.

Writ Petn. No. 430 of 1952, D/- 15-5-1952.

† \* (a) Constitution of India, Art. 226 — Writ of 'quo warranto' — Petitioner not interested in the subject matter — Writ cannot be issued.

The jurisdiction of the High Court under Art. 226 can be invoked only by a person, who has suffered a personal injury. The writ of 'quo warranto', being one of the writs mentioned in Art. 226 falls within the purview of this rule. The contention that Art. 226 enables a citizen of India to ask for the issue of a writ in the nature of 'quo warranto' in order to have the right of a person to an office determined, in the interest of the public, although he has no personal or direct interest in the matter, is, therefore, untenable. So long as the personal rights of the petitioner are not affected and he is not aggrieved by the act of the Government, he is not entitled to question the validity of the act by applying for such a writ. A. I. R. 1953 Mad 94, Rel. on. Case law referred. (Para 11)

(b) Constitution of India, Art. 226 — 'And for any other purpose' — Meaning — Does not allow petitions for agitating public questions.

The expression "and for any other purpose" in Art. 226 does not lend support to the contention that even for the purpose of agitating public questions, the applicant can resort to the process of 'quo warranto' mentioned in the Article. The expression cannot be interpreted to mean a purpose other than protection of the legal rights of a person. Courts are only for the purpose of adjudicating upon legal rights of persons and it is not their province to decide questions of academic importance. The jurisdiction under Art. 226 can be invoked only by or at the instance of a person, who has suffered a legal injury at the hands of the executive Government of the

State or some tribunal and the rights under the Article are personal and direct.

(Para 9)

S. Mohan Kumara Mangalam, for Petitioner.

REFERENCES: Courtwar/Chronological/ Paras  
(44) 48 Cal WN 766 8  
(1864) 11 LT (NS) 372: (148 RR 840) 7  
(1914) 235 US 151: (59 Law Ed 169) 3  
(51) 1951 SCJ 29: (AIR 1951 SC 41) 5, 6  
(52) W. P. No. 244 of 1952: AIR 1953 Mad 94 3, 4

ORDER: This application is by a member of the Legislative Council to call upon the respondent to show cause why writ in the nature of Quo Warranto should not be issued against him to show by what authority he claims to be a member of the Madras Legislative Council. Through the medium of this writ, the applicant calls in question the validity of the nomination of the respondent made by His Excellency the Governor of Madras on the 31st March 1952 in G. O. Ms. No. 1005 Public (Elections). The subject matter of these proceedings runs as follows:

"In pursuance of clauses (3) (e) and (5) of Art. 171 of the Constitution of India, I, Sri Prakasa, Governor of Madras, hereby nominate the following persons to be members of the Madras Legislative Council:

1. Sri Chakravarthi Rajagopalachari,
2. Janab Mahammad Usman,
3. Sri Vellapuram Bhashyam Aiyangar,
4. Sri Omandur P. Ramaswami Reddiar."

(2) The applicant urges that this order nominating the respondent is invalid for two reasons: (1) that this is virtually a fraud of the powers conferred by the Constitution on the Governor, because the Governor by nominating the respondent wanted to assist the Congress Legislature Party; and (2) that the Governor could not exercise the power of making the nomination under Art. 171, clauses (3) (e) and (5) of the Constitution except on the advice of the Council of Ministers and having regard to the fact that by the date of the nomination the new ministry was not formed, the Governor could not have had the benefit of the advice of the Council of Ministers.

(3) Before I examine the soundness of these contentions, I have first of all to see whether the petitioner has 'locus standi' to maintain this application. Attacking the validity of this very nomination, a petition was filed (— 'In re P. Ramamoorthi', W. P. No. 244 of 1952 (Mad)) by one Ramamurthi, an elected member of the Legislative Assembly. The grounds of attack on the nomination of the respondent by His Excellency the Governor in that petition are the same as in the present one. A Bench of this court consisting of the Chief Justice and Venkatarama Aiyar J. rejected that petition on the ground that the petitioner therein could not maintain that petition, as there was no infraction of his personal right.

(4) Mr. Mohan Kumara Mangalam in support of this petition argues that this decision has no application to this case for the reason that the principles that govern the issue of a writ of certiorari are different from those applicable to a proceeding for information in the nature of a quo warranto. On this basis he seeks to distinguish the decision of the Bench in — 'W. P. No. 244 of 1952 (Mad)' and urges that information in the nature of Quo warranto can be filed even at the instance of a private relator, who has no interest in the office in respect of which he seeks that relief.



According to him, Art. 226 enables a citizen of India to ask for the issue of such a writ in order to have the right of a person to an office determined, in the interest of the public, although he has no personal or direct interest in the matter. It is argued by him that if there was no distinction between a writ in the nature of a Quo warranto and other writs mentioned in Art. 226, no useful purpose was served by introducing that writ into Art. 226, because in no case in which information in the nature of Quo warranto is sought is a relator personally or directly interested. I am not very much impressed with this argument. There may be cases in which an applicant seeking that relief may be interested, but that need not detain me here long. An answer to that contention can be found in the provision of Art. 32 of the Constitution Act. Art. 32 (2) enacts:

"The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari whichever may be appropriate, for the enforcement of any of the rights conferred by this Part."

So under Art. 32 information in the nature of quo warranto can be filed even for protecting the fundamental rights. The fundamental rights mentioned in Chapter III are rights personal and direct to a citizen and for the protection of such right resort can be had to the writ of quo warranto under Art. 32 of the Constitution. In the same manner the Writ in the nature of Quo warranto is mentioned in Art. 226. That being so, there is no force in the contention that if the intendment of Art. 226 is only the protection of the rights guaranteed in Chapter III, there is no point in mentioning Quo warranto in that Article. Hence the line of distinction relied upon by the Counsel for the applicant is therefore not available to him. The distinction sought to be made is not a sound one. It must be remembered that the decision of the Bench in — 'Re P. Ramamoorthi', WP No. 244 of 1952 (Mad) is not confined to the issue of a writ of certiorari. There the proposition is stated that the jurisdiction of this court under Art. 226 can be invoked only by a person, who has suffered a personal injury. The writ of Quo warranto, being one of the writs mentioned in Art. 226 falls, in my opinion, within the purview of the decision of the Bench. I do not propose to go at this stage into the history of this ancient writ which is the foundation of the present day information in the nature of Quo warranto prior to the framing of the Constitution.

(5) In this context, I may refer to the observations of the Supreme Court in — 'Charanjit Lal Chowdhury v. Union of India', 1951 SCJ 29:

"It has been held in a number of cases in the United States of America that no one except those whose rights are directly affected by a law can raise the question of the constitutionality of that law."

This principle has been very clearly stated by Hughes J. in — 'Macabe v. Atchison', (1914) 235 US 151 in these words:

"It is an elementary principle that in order to justify the granting of this extraordinary relief, complainant's need of it and the absence of an adequate remedy at law must clearly appear. The complainant cannot succeed because someone else may be hurt. Nor does it make any difference that other per-

sons who may be injured are persons of the same race or occupation. It is the fact, clearly established, of injury to the complainant — not to others — which justifies judicial interference."

(6) In — 'Charanjitlal Chowdhury v. Union of India', 1951 SCJ 29, the validity of the Sholapur Spinning and Weaving Co. (Emergency Provisions) Act passed by Parliament was impugned by a holder of a share in the company by moving for a writ of mandamus and certain other reliefs under Art. 32 of the Constitution. The opinion expressed by the Supreme Court was that an individual shareholder was not entitled to challenge the validity of the enactment, which affects the fundamental rights of the company, except to the extent that it constitutes an infraction of his rights.

(7) It may not be out of place to quote what Crompton J. said in — 'Reg v. Briggs', (1864) 11 LT (NS) 372 that,

"the object of having a relator who has an interest is that a mere man of straw should not be put forward; but surely in such a case as this an owner of property in the town has an interest."

(8) Mr. Mohan Kumara Mangalam invited my attention to some cases as substantiating the proposition that information in the nature of Quo warranto can lie at the instance of a private relator, who has no interest therein. I do not think the cases cited by him have much bearing because it has not been decided in any of these cases that a relator need not have any interest in the matter. In fact, one of the cases relied upon by him, viz., — 'In re Banwarilal Roy', 48 Cal WN 766 contains some observations, which are far from being helpful to him. Das J. at page 797 of the report remarked:

"It is a very well known form of process and an effective weapon in the judicial armoury for the protection of the rights and franchise alike of the Crown and the subjects."

(9) It was next argued by Mr. Mohan Kumara Mangalam that the expression "and for any other purpose" lends support to his contention that even for the purpose of agitating public questions, the applicant can resort to the process of Quo warranto mentioned in Art. 226. I do not think that that expression can be interpreted to mean a purpose other than protection of the legal rights of a person. Courts are only for the purpose of adjudicating upon legal rights of persons and it is not their province to decide questions of academic importance. I think the jurisdiction under Art. 226 can be invoked only by or at the instance of a person, who has suffered a legal injury at the hands of the executive Government of the State or some tribunal and the rights under the Article are personal and direct.

(10) It was alternatively contended on behalf of the applicant that the nomination of the respondent has affected the personal rights of the applicant. It is argued that the nomination of the respondent being unauthorised and invalid, the respondent is in the position of a stranger intruding into the House and as such it affects the personal rights of the applicant. This point has not been mentioned in the petition. Even otherwise, I do not think there is much substance in this. Assuming that the nomination of the respondent is invalid, it cannot be said that there is any invasion of the personal rights of the applicant. I fail to



see how he is aggrieved by this. None of his rights, which are of a legal character, are affected by the nomination of the respondent herein.

(11) So long as the personal rights of the petitioner are not affected and he is not aggrieved by the nomination of the respondent, he is not, in my opinion, entitled to question the validity of the nomination. This obviates the necessity to canvass now whether the nomination is valid or not and to go into the power of His Excellency the Governor to nominate the respondent under the circumstances alleged in the petition.

(12) Learned counsel for the petitioner wanted permission to amend this application into one under Art. 225 and argue it on that basis. I think it is too late now to grant the request. I do not feel called upon to permit the petitioner to amend the application into one under Art. 225 of the Constitution at this stage.

(13) In the circumstances, I decline to issue the Writ nisi and the application is dismissed. A/D.R.R. Application dismissed.

A. I. R. 1953 MADRAS 98 (Vol. 40, C. N. 33)

RAJAMANNAR C. J.

AND VENKATARAMA AYYAR J.

Indian Metal and Metallurgical Corporation, Petitioner v. Industrial Tribunal, Madras and another, Respondents.

Writ Petn. No. 260 of 1951, D/- 3-11-1951.

† (a) Constitution of India, Art. 19 (1) (g) — Right to carry on business — Nature and extent — Award under Industrial Disputes Act compelling continuance of business — Validity — Industrial Disputes Act (1947), S. 10.

Article 19 (1) (g) gives every citizen a right to practise any profession or to carry on any occupation, trade or business. Clause (6) of the same article confers powers on the State to impose restrictions on this right. So far as such restrictions are concerned, the only question to be determined under the Constitution is whether the restrictions are reasonable and in the interests of the general public.

Obviously the right conferred by Art. 19 (1) (g) to carry on any business is not absolute. Undeniably, the State has got the right to regulate any business, and this right need not be confined to "public utility business" only. Businesses which are likely to prove dangerous to public safety or public health may be subjected to severe restrictive regulations.

Where however a business is admittedly not a public utility service and which has not received any special consideration from the Government, an award made by the Industrial Tribunal appointed under the Industrial Disputes Act cannot direct the management of an industry to continue to carry on any business against their will, as it follows from Art. 19 (1) (g) that if a citizen has a right to carry on business, he must be at liberty not to carry it on if he so chooses. Such an award is therefore void to that extent as it is inconsistent with the Constitution. Case law referred. (Paras 9, 10, 13)

† (b) Industrial Disputes Act (1947), Ss. 2 (k) and 10 — Closing down business — Not an industrial dispute — Question outside jurisdiction of Industrial Tribunal.

The question whether an employer could or could not close down a business permanently or temporarily falls outside the purview of the Industrial Disputes Act. No doubt the term "industrial dispute" has been very widely defined in S. 2 (k) of the Act; but it is clear that the definition of an "industrial dispute" and the Act taken as a whole assume the continued existence of an industry. Closing down a business even temporarily is distinct and different from a lock-out just as the discontinuance from service of an employee is not the same thing as a strike. While therefore the Industrial Tribunal has got the jurisdiction to adjudicate on the question whether a particular lock-out was justified or not, it cannot decide the question whether an employer can close down his business temporarily for an indefinite period or permanently. (Para 15)

K. V. Venkatasubramaniam, for Petitioner; V. P. Sarathy, for the State Counsel and Arunachalam of Messrs. Arunachalam, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras  
(1923) 67 Law Ed 1103: 262 US 522 6, 8, 9, 12  
(1877) 94 US 113: 24 Law Ed 77 7  
(1920) 251 US 396: 64 Law Ed 323 7  
(1924) 264 US 286: 68 Law Ed 686 8  
(1925) 267 US 552: 69 Law Ed 785 8  
(1934) 291 US 502: 78 Law Ed 940 9  
(1937) 301 US 1: 81 Law Ed 893 12

ORDER: This is an application made under Art. 226 of the Constitution to issue such directions, writs or orders as may be deemed appropriate to the case and in particular to call for the records of the proceedings in Industrial Dispute No. 5 of 1951 before the Industrial Tribunal, Madras, and to quash the award passed therein and the reference on which it is based and pass such further or other orders as may be deemed fit. The petitioner is the Indian Metal and Metallurgical Corporation, a partnership firm and the affidavit in support of the application has been filed by one of its partners. The firm carries on 'inter alia' the business of manufacture of brass, copper and aluminium sheets at Mettur. It has also a factory at Tondiarpet in Madras where brass and stainless steel utensils are manufactured. On 3rd February 1951 the management put up a notice as follows:

"The factory at Mettur Dam is closed and hence the raw materials for this factory are not coming. Owing to the serious developments in the foreign countries, the present condition in the local market is far unfavourable to work. Further still many machineries are to be installed for economising production. So we are forced to suspend the work for an indefinite period till we are able to complete the erection and trial to get the sheets (raw materials) from our own plant. Therefore the work will be suspended from Saturday 17th instant after the 14th from today."

In pursuance of the said notice a further notice was put up on 16th February 1951 that payment of the wages due to the workmen would be made between 17th February and 19th February, and subsequently the time for disbursement was further extended, but most of the



workers did not turn up to receive their wages. On 18th April 1951 the Government by their Order MS. 1762 referred for adjudication to the Industrial Tribunal at Madras an industrial dispute alleged to have arisen between the workers and the management of the petitioner Corporation. In the annexure to the order were set out the four matters in dispute, namely,

1. Whether the closure of the factory from 17th February 1951 is justified,
2. Whether any compensation is to be paid to the discharged workers;
3. Whether the discharged workers have preferential claim for re-employment at the time of the reopening of the factory; and
4. Whether the discharge of four workers, namely, P. A. Dilly, Turner; T. D. Balakrishnan, Turner; A. Raju, Fitter; and G. Vasudevan, Fitter, is justified.

On notice from the industrial tribunal to the petitioner calling upon the petitioner to present its statement after receipt of the workers' statement, the petitioner filed a counter-affidavit demurring to the competency and validity of the order of reference, the jurisdiction of the tribunal and canvassing the merits of the case. The management also sought to impeach the order of reference made by the Government by an application made to this Court, but this Court felt that there was not sufficient material for deciding the question and also expressed the view that the petitioner may advance its pleas before the tribunal. The matter eventually came up before the Tribunal and the Tribunal after an inquiry made an award on 25th June 1951 directing the payment of all arrears of pay etc., from 17th February 1951 till they were taken back to work to a moiety of the personnel in the different branches, the selection being determined in the strict seniority, the reinstatement of the remaining personnel within a period of four months after the publication of the award and also directing the reinstatement of A. Raju (Fitter) as from 7th February 1951.

(2) The Industrial Tribunal went into the question whether the management was justified in closing the factory. He dealt with the several reasons put forward by the management for the closure. The first reason put forward was that necessary raw materials were not available for continuing the work of the factory. The Industrial Tribunal found that though it was difficult to get steel during the period, it was not impossible to do so and that in any case, there was sufficient steel available with the company to carry on the manufacture in steel for some appreciable period. Even if there was a comparable shortage of brass in the local factory, the shortage could have been easily overcome through purchase in the open market. The second reason was that it was necessary to instal various new machines. In the opinion of the Industrial Tribunal, the installation of new machines would hardly involve the closure of a factory. The Tribunal also rejected the third reason that the management was justified in closing the factory and there could be no complaint by the workers as they were all temporary hands. The last reason was that the factory was working at a loss. Though certain extracts from the accounts were filed before the Tribunal to show that the factory was working at a loss, the Tribunal held that 'prima

facie' the local factory should have earned a considerable profit more particularly since the Mettur factory was said to have resulted in heavy loss. He summed up his finding thus:

"It is clear, therefore, that none of the reasons given by the management would have really justified the closing down of the factory, though the apparent shortage of brass to some extent and the necessity for the installation of new machinery may have justified the actual factory work being reduced to some extent."

(3) The Industrial Tribunal did not go into the question whether the petitioner had an inherent and fundamental right to close down the factory & it is this aspect that has been most strongly pressed before us. The petitioner submits that the management could not in law be compelled to continue the business, if it did not desire to continue it and that the right of an employer to close his factory whenever he desires to do so subject to the legal rights of the workmen to wages and other benefits is part of the fundamental right of property guaranteed by the Constitution. The employer cannot be forced to continue to run his factory; nor can he be compelled to carry on his business to enable the workers to earn wages, so the argument ran.

(4) The application was strongly opposed by the General Industrial Workers Union representing the workers of the petitioner corporation. In the affidavit filed by the Secretary of the Union, it was alleged that the factory was closed down with the intention of putting down the workers and curbing their activities in forming an union of workers. They met the plea that the management could not be compelled to continue the business with the assertion that the management was wrong in thinking that in a Democratic Republic State the management could throw out its workers at its whims and fancies and close down the factory to suit its convenience and pleasure. A preliminary objection was also taken to the maintainability of the application, because there was an appeal against the award to the Industrial Appellate Tribunal.

(5) There is no substance in the preliminary objection. The appeal will obviously be confined to the merits of the case. We doubt if the appellate Tribunal has the power to declare the reference by the Government to be invalid or to hold that Industrial Disputes Act itself is invalid or otherwise. In any event the question which has been raised before us, namely, whether the owner of a business can be compelled to continue it against his will could not have been decided by the Appellate Tribunal.

(6) Mr. Venkatasubramania Aiyar, learned counsel for the petitioner, relied on principles of American Constitutional law bearing on similar questions. The leading decision of the Supreme Court is that in — 'Wolff Packing Co. v. Court of Industrial Relations', (1923) 67 Law Ed. 1103: 262 U S 522. The company was a corporation in the State of Kansas engaged in slaughtering hogs and cattle and preparing the meat for sale and shipment. It had about 300 employees. More than half of its products were packed and sold beyond the State. The president and secretary of the Meat Cutters Union filed a complaint with the Industrial Court, established under the Court of Industrial Relations Act, against the company respecting the



wages its employees were receiving. The Court made an order directing an increase of wages. The company refused to comply with the order and the Industrial Court then instituted mandamus proceedings in the Supreme Court of the State to compel compliance. That Court appointed a Commissioner who made a report that the company had lost heavily during the previous year and that there was no sufficient evidence of an emergency or danger to the public from the controversy to justify action by the industrial court. The State Supreme Court overruled this report and held that the evidence showed a sufficient emergency and upheld the order of the Industrial Court and the validity of the Act. The Supreme Court of the United States reversed the judgment of the State Supreme Court. The opinion of the Court was delivered by Chief Justice Taft. He first pointed out that the necessary postulate of the Industrial Court Act was that the State representing the people was so much interested in their peace, health and comfort that it could compel those engaged in the manufacture of necessities like food and clothing and the production of fuel, whether owners or workers, to continue in their business and employment on terms fixed by an agency of the State, if they cannot agree. The Act therefore in essence curtailed the right of the employer on the one hand and of the employee on the other to contract about his affairs and this was part of the liberty of the individual protected by the guarantee of the due process clause of the Fourteenth Amendment. This abridgement of the liberty of the individual could only be justified by exceptional circumstances. The question was whether there existed such circumstances. The argument on behalf of the State ran on the following two lines: (1) the Act declared that the preparation of human food was affected by public interest and therefore the legislature had power to regulate the business, (2) the power to regulate a business affected with a public interest extended to fixing wages and terms of employment to secure continuity of operation. In discussing the question, the learned Chief Justice divided businesses said to be clothed with a public interest justifying some public regulation into three classes as follows:

"1. Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.

2. Certain occupations, regarded as exceptional, the public interest attaching to which, recognised from earliest times, has survived the period of arbitrary laws by Parliament or colonial legislature for regulating all trades and callings. Such are those of the keepers of inns, cabs and gristmills.

3. Businesses which, though not public at their inception may be fairly said to have risen to be such, and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner, by devoting his business to the public use, in effect grants the public an interest in that use, and subjects himself to

public regulation to the extent of that interest, although the property continues to belong to its private owner, and to be entitled to protection accordingly."

It is not necessary to refer at length to the learned Chief Justice's discussion as to when a business could be said to be clothed with a public interest, as it was common ground before us that the business with which we are concerned in this case is not one such. But even in respect of such a business, he points out that

"to say that a business is clothed with a public interest is not to determine what regulation may be permissible in view of the private rights of the owner."

(7) Dealing with businesses which fall under the third head the learned Judge observes:

"The ordinary producer, manufacturer or shop-keeper may sell or not sell as he likes."

He cites with approval the following passage from the opinion in — 'Munn v. People of Illinois', (1877) 94 U. S. 113: 24 Law Ed. 77:

"When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use but so long as he maintains the use, he must submit to the control,"

and says:

"The power of a legislature to compel continuity in a business can only arise where the obligation of continued service by the owner and its employees is direct, and is assumed when the business is entered upon. A common carrier which accepts a railroad franchise is not free to withdraw the use of that which it has granted to the public. It is true that, if operation is impossible without continuous loss — 'Brooks Scanlon Co. v. Railroad Commission', (1920) 251 U. S. 396: 64 Law Ed. 323 it may give up its franchise and enterprise; but, short of this, it must continue. Not so the owner when, by mere changed conditions, his business becomes clothed with a public interest. He may stop at will, whether the business be losing or profitable."

In the result the court held that the Industrial Court Act in so far as it permits the fixing of wages in the plaintiff's company, was in conflict with the Fourteenth Amendment, as it deprived it of its property and liberty of contract without due process of law.

(8) In — 'Dorchy v. Kansas' (1924) 264 U. S. 286: 68 Law Ed. 686 the principle of the decision in the — 'Wolff Packing Co. v. Court of Industrial Relations', (1923) 262 U. S. 522: 67 Law Ed. 1103 was applied to the coal mines in the same State. It was held that the system of compulsory arbitration violated the Federal Constitution. In the second 'Wolff Packing Co. v. Court of Industrial Relations', (1925) 267 U. S. 552: 69 Law Ed. 785 the Supreme Court held that the Industrial Relations Act was unconstitutional in so far as it authorised an administrative board to fix hours of labour in industries relating to food, clothing and fuel as it was merely a system of compulsory arbitration for the settlement of labour disputes. The judgment in this case affirmed once again



the principles laid down in the — 'first Wolff Packing Co. case', (1923) 262 U. S. 522 : 67 Law Ed. 1103. It is sufficient to extract the following passage from the concluding part of the opinion in this case:

"The system of compulsory arbitration which the Act establishes is intended to compel, and if sustained will compel, the owner and employees to continue the business on terms which are not of their making. It will constrain them not merely to respect the terms if they continue the business, but will constrain them to continue the business on those terms. True, the terms have some qualifications, but as shown in the prior decision the qualifications are rather illusory and do not subtract much from the duty imposed. Such a system infringes the liberty of contract and rights of property guaranteed by the due process of law clause of the 14th Amendment."

(9) We agree with Mr. Venkatasubramania Aiyar, the learned counsel for the petitioner, that the later decision in — 'Nebbia v. New York', (1934) 291 U. S. 502: 78 Law Ed. 940 has not affected the correctness of the decisions in the — 'Wolff Packing Co. v. Court of Industrial Relations', (1923) 262 U. S. 522: 67 Law Ed. 1103 and — 'Wolff Packing Co. v. Court of Industrial Relations', (1925) 267 U. S. 552: 69 Law Ed. 785 which are cited without disapproval in the course of the judgment in that case. But the question is how far the principles laid down in these American decisions can be applied to the present case which must be decided on the provisions of our Constitution as interpreted by us. The relevant provision is Art. 19(1) (g) which says that every citizen has a right to practice any profession or to carry on any occupation, trade or business. Clause (6) of the same article confers power on the State to impose restrictions on this right. It would appear that so far as such restrictions are concerned, the only question to be determined under our Constitution is whether the restrictions are reasonable and in the interests of the general public. There is the further fact that our Constitution, unlike the Constitution of the United States, does not declare or recognise the freedom of contract. We therefore very much doubt if we can apply wholesale the American decisions to cases arising under our Constitution. For instance we find it difficult to hold that a legislation fixing minimum hours of work or regulating the wages is unconstitutional in this country.

(10) Obviously the right conferred by Art. 19 (1) (g) to carry on any business is not absolute. Undeniably, the State has got the right to regulate any business, and this right need not be confined to what we may call "public utility businesses" only. Businesses which are likely to prove dangerous to public safety or public health may be subjected to severe restrictive regulations, as for instance, the manufacture and sale of ammunition. Inasmuch as the general public would be interested even in a private business in the sense that the general public is the ultimate object of service and supply, the State may impose conditions in the interests of the general public subject to which only any business could be carried on. We think it is equally clear that in the interests of a large section of the public, namely, industrial workers, legislature may provide, whether directly or indirectly through administrative

bodies for the fixing of reasonable and adequate wages and generally regulate the conditions of service. The Industrial Disputes Act is evidently such a piece of legislation. We fail to see how the Act as such and 'in toto' can be held to be void as being inconsistent with the Constitution. In the absence of a guarantee of the freedom of contract, we do not think it unreasonable to presume that the freedom of contract can, to a certain extent, be curtailed if such curtailment is reasonable and in the general interests of the general public. This may be necessary in regard to the relationship between the employer and employees in a large industrial concern, where it is clear that the contracting parties, namely, the employer and the employee do not stand on the same level.

(11) In this case, however, we are concerned with a much narrower question, namely, whether an award made by the Industrial Tribunal appointed under the Industrial Disputes Act and published by the Government in accordance with the provisions of the Act can direct the management of an industry to continue to carry on any business against their will. If a citizen has got a right to carry on business, we think it follows that, he must be at liberty not to carry it on if he so chooses. A person can no more be compelled to carry on a business than a person can be compelled to acquire or hold property. A person with money can certainly dispose of it as he pleases. He may invest it or part of it in running a business, but he need not. He can invest it in other ways or he may keep the money idle. Mr. Bhashyam was really unable to convince us how any one can be compelled to carry on a business against his will and yet be said to enjoy a right to carry on a business.

(12) We do not wish to say anything regarding industries which come within the definition of "public utility services" in Sec. 2(n) of the Industrial Disputes Act. From the constitutional standpoint of view, it is arguable if a mere declaration by the legislature that a particular business or occupation is a public utility service would be conclusive on the question whether it can in law be brought under that category. We are also not dealing with businesses or industries which have been commenced with the special help rendered to them by the Government and which have received special benefit from the Government. It may be that in such cases the private owner may be compelled to continue the business unless he is willing to surrender the rights and privileges conferred on him by the Government and compensates the Government for the loss sustained by them by a stoppage of the business. We are here concerned with a business which is admittedly not a public utility service and which has not received any special consideration from the Government. Even assuming that indirectly the public have a sort of interest in this business, such interest would last only so long as a business is continued. On this point we follow with great respect the observations that fell from Chief Justice Taft in the — 'First Wolff Packing Co. v. Court of Industrial Relations', (1923) 262 U. S. 522: 67 Law Ed. 1103. Mr. Bhashyam who appeared for the workers was unable to support his contention by any authority. He relied more on the general features of the economic system which



throws the employee at the mercy of the employer. He referred to certain observations in — 'National Labour Relations Board v. Jones and Laughlin Steel Corporation', (1937) 301 U. S. 1: 81 Law Ed. 893. But the decision in that case has not even a remote bearing on the facts of the case before us. What Chief Justice Hughes says about the position of employees is unexceptionable. With great respect we agree with him—

"that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give labourers opportunity to deal on an equality with their employer."

This is true, but it does not follow, because several employees may be thrown out of employment, the employer can be compelled to carry on a business. We also agree with Mr. Bhashyam that the State has an undoubted power to regulate the carrying on of a business or the running of an industry; but regulation is one thing and compulsion to carry on a business is quite another. Logically, according to the argument of Mr. Bhashyam there is nothing to prevent the State compelling any person with money to commence a new business to provide employment for several unemployed persons.

(13) We hold therefore that the award in so far as it directs the petitioner to continue to carry on the business is void as it is inconsistent with the Constitution.

(14) In this view, it is not necessary to embark on an enquiry as to whether the petitioner had proper grounds for deciding to close down the factory temporarily. We do not think it is open to us to canvass the grounds which prompted the owner to discontinue the business. The ground may be actual loss or apprehended loss. It may equally be disinclination to run the risk of running the business. Mr. Bhashyam asserted that even if an employer 'bona fide' decides to close down the business, because he does not want to continue it, he cannot be permitted to do so. We cannot agree with him, and his contention is not supported by any authority.

(15) Apart from this constitutional aspect, we are also inclined to hold that the question whether an employer could or could not close down a business permanently or temporarily falls outside the purview of the Industrial Disputes Act. No doubt the term 'industrial dispute' has been very widely defined in S. 2 (k) of the Act; but it appears to be clear to us that the definition of an "industrial dispute" and the Act taken as a whole assume the continued existence of an industry. The Act does deal with lock-outs and strikes, but Mr. Bhashyam conceded that there has been no lock-out in this case, and he made the concession rightly. In the case of a lock-out, the industry as such is not closed down even temporarily; only particular workers are refused work. Closing down a business even temporarily is distinct and different from a lock-out, just as the discontinuance from service of an employee is not the same thing as a strike. While therefore the Industrial Tribunal has got

the jurisdiction to adjudicate on the question whether a particular lock-out was justified or not; it cannot decide the question whether an employer can close down his business temporarily for an indefinite period or permanently. There cannot be dispute strictly so-called between an employer and an employee as regards the continuance, of the business itself. This question was completely outside the Industrial Disputes Act, and we hold that the reference by the Government was without jurisdiction and consequently the award was bad.

(16) The application must be allowed and the award in so far as it directs the petitioner to continue to carry on the business and says that he had no right to close it must be quashed. There will be no order as to costs.

(17) We certify that the case involves a substantial question of law as to the interpretation of the Constitution and in particular Art. 19 (1) (g).

B/D.R.R.

Application allowed.

**A. I. R. 1953 MADRAS 102 (Vol. 40, C. N. 34)**  
**SUBBA RAO J.**

Dindigal Skin Merchants' Association and others, Petitioners v. The Industrial Tribunal, Madurai and others, Respondents.

Writ Petn. No. 779 of 1951, D/- 21-7-1952.

**(a) Industrial Disputes Act (1947) — Preamble — Act is not unconstitutional — (Constitution of India, Art. 19(1) (g) and Art. 19 (6)).**

In the present social set up it is impossible to hold that the legislation, intended to bring about harmonious relationship between the employers and the employees in the interests of industrial peace is an unreasonable restriction upon the fundamental right guaranteed under Art. 19(1) (g) of the Constitution. Indeed the Industrial Disputes Act by providing a machinery to smoothen out the disputes between the employers and employees enables the employer to carry out his trade or business more effectively than otherwise he could do. In the interests of general public, and particularly when the freedom of contract has not been guaranteed by the Constitution the provisions of the Act empowering the tribunals to decide a dispute between parties notwithstanding their prior agreement to the contrary cannot be held to be an unreasonable restriction on the fundamental right to carry on the trade. The act therefore is not unconstitutional on the ground that it affected the fundamental right guaranteed by Art. 19(1)(g). AIR 1951 Mad 974 and AIR 1953 Mad 98 Rel. on. (Para 3)

**(b) Industrial Disputes Act (1947) — Preamble — Writ of certiorari against Tribunal, on ground that there is no dispute — Maintainability — (Constitution of India, Art. 226).**

The Industrial Disputes Act is a self-contained Act providing for suitable machinery for deciding the disputes that arise between the employers and the employees. The Act provides for an appeal against the order of the Tribunal. The Tribunal would be in a position to decide the disputes more satisfactorily and effec-



tively than they could be done in a Writ of Certiorari. As the petitioner (employer) has an effective remedy writ will not issue on the ground that there is no dispute between the parties. (Para 6)

D. Narasaraju and T. T. Srinivasan, for Petitioners; V. V. Raghavan, for Govt. Pleader, for the State; V. Venkataraman, for Row and Reddy, for Respondent No. 4.

REFERENCES: Courtwar/Chronological/ Paras ('51) 1951-2 Mad LJ 382: (AIR 1951 Mad 974)

(52) 1952-1 Mad LJ 481: (AIR 1953 Mad 98) 3

ORDER: This is an application for issuing a Writ of Certiorari to call for the records and quash the notification of Government in G. O. No. 4605 (Development Department) dated 19-10-1951 or to issue an order in the nature of mandamus directing the Industrial Tribunal, Madurai, to forbear from proceeding with the reference made by the Government. The petitioner is the Dindigul Skin Merchants Association. That Association was formed to represent the employers of about nineteen tanneries. In regard to the employees working in those tanneries there are three associations, (1) the National Tanneries Workers Association Dindigul registered on 5-7-1948, (2) Tanneries Labour Union, Dindigul formed on 20-11-1950 and (3) the Tannery Workers Union, Dindigul, registered in the year 1942. It was banned by Government in September 1949. The ban was lifted in November 1950 and it began to function again from April 1951. The total number of members on the books in regard to the first union was 511 on 31st March 1951. The membership of the 3rd respondent was 194 on 31st March 1951. The fourth respondent had 420 members on 31st March 1947.

There were disputes between the employees and the employers and an agreement was entered into between the petitioner and the National Tannery Workers Association, settling their disputes on 1-2-1951. It is not clear from the record the total membership of that union on 12-2-1951. It is either because that union did not represent majority of the labourers or because that the other unions did not agree with them. There were subsequent disputes between the employers and the employees, and an attempt was made to get their disputes settled by a Conciliation officer. Respondents 3 and 4 made their demands and copies of them were sent to the petitioner. The Conciliation officer made an infructuous attempt to settle the disputes and finally recommended to the Government that the disputes might be referred for adjudication on the four issues relating to basic wages, dearness allowance, bonus and weekly holiday for all workers on Sundays in respect of eight tanneries about which he was able to gather particulars. The Commissioner of Labour also agreed with the Labour Officer and supported his recommendation and the Government after considering the reports referred the dispute in respect of the eight tanneries to the Industrial Tribunal, Madurai, for adjudication on the above four points by issuing G. O. No. 4605 (Development Department) dated 19-5-1951.

(2) Mr. Narasaraju, the learned counsel for the petitioner raised before me the following points:—

1. The Industrial Disputes Act of 1947 (Act XIV of 1947) is vitiated in so far as it affected

the fundamental right of the petitioner to carry on his trade and to enter into agreements for effectively carrying on the trade. He says that the Act which allows the employers or the employees to ignore contracts affects his fundamental right.

2. It has not been established that there is an industrial dispute between the employers and the employees of every tannery.

3. There was no demand by the employees before the Conciliation proceedings started.

(3) Learned counsel in support of his first contention relies upon Art. 19 (1) (g) of the Constitution of India which reads:

"All citizens shall have the right to practise any profession or to carry on any occupation, trade or business."

Art. 19 (6) says:

"Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause....."

The question therefore is whether the provision of Act XIV of 1947 compelling the parties to an industrial dispute to get their disputes settled through the bodies mentioned therein is a reasonable restriction on the aforesaid right. Uninfluenced by the decisions cited before me, I have no hesitation to hold that in the present social set up it is impossible to hold that the legislation, intended to bring about harmonious relationship between the employers and the employees in the interests of industrial peace is an unreasonable restriction upon the fundamental right guaranteed under Art. 19(1)(g) of the Constitution. Indeed the Industrial Disputes Act by providing a machinery to smoothen out the disputes between the employers and employees enables the employer to carry out his trade or business more effectively than otherwise he could do. A Bench of this court consisting of Rajamannar C. J. and Satyanarayana Rao J. in — '*Sree Meenakshi Mills Ltd. Madura v. State of Madras*', 1951-2 Mad L J 382 has accepted the famous passage of Julian Huxley on the "Economic Man and Social Man" wherein the learned author says:

"Many of our old ideas must be retranslated, so to speak, into a new language. The democratic idea of freedom, for instance, must lose its nineteenth century meaning of individual liberty in the economic sphere, and become adjusted to new conceptions of social duties and responsibilities. When a big employer talks about his democratic right to individual freedom, meaning thereby a claim to socially irresponsible control over a huge industrial concern and over the lives of tens of thousands of human beings whom it happens to employ, he is talking in a dying language."

Though the learned Judges did not express a final opinion in that case, a perusal of the judgment indicates the inclination of their mind to support the restrictions imposed in that case in the interests of society.

In another decision, the — '*Indian Metal and Metallurgical Corporation v. Industrial Tribunal, Madras*', 1952-1 Mad L J 481 the learned Chief Justice and Venkatarama Aiyar J. had an occasion to construe the scope of Art. 19 (1) (g) and the limitations on the right conferred



by that Article. The question there was whether the Industrial Tribunal has got the jurisdiction to adjudicate on the question whether a particular lock-out was justified or not and whether it can decide the question whether an employer can close down a business temporarily for an indefinite period or permanently. In dealing with the question whether the Industrial Disputes Act is void as being inconsistent with the Constitution, the learned Judges made the following relevant observations:

"We think it is equally clear that in the interests of a large section of the public, namely, industrial workers, Legislature may provide, whether directly or indirectly through administrative bodies for the fixing of reasonable and adequate wages and generally regulate the condition of service. The Industrial Disputes Act is evidently such a piece of legislation. We fail to see how the Act as such and in toto can be held to be void as being inconsistent with the Constitution. In the absence of a guarantee of the freedom of contract, we do not think it unreasonable to presume that the freedom of contract can, to a certain extent, be curtailed, if such curtailment is reasonable and in the general interests of the general public. This may be necessary in regard to the relationship between the employer and employees in a large Industrial concern where it is clear that the contracting parties, namely, the employer and the employee do not stand on the same level."

Apart from the fact that I am bound by this decision, I respectfully agree with the observations made. In this case also the attack on the constitutionality of the Act is based upon the sanctity of the contract. But, as the learned Judges point out, in the interests of general public, and particularly when the freedom of contract has not been guaranteed by the Constitution the provisions of the Act empowering the tribunals to decide a dispute between parties notwithstanding their prior agreement to the contrary cannot be held to be an unreasonable restriction on the fundamental right to carry on the trade.

(4) Learned counsel for the petitioner also has not been able to satisfy me on the material placed before me that there was no industrial dispute between the employers of any one of these eight tanneries and a substantial body of the employees of that tannery. Indeed the affidavits do not in any way disclose any details or particulars to substantiate the said argument. In the circumstances I do not think it is advisable to express my final opinion as any opinion that I may give may prejudice the enquiry before the tribunal. He may raise this point before the tribunal.

(5) The main argument of the learned counsel is that the Government has no jurisdiction to make a reference to the tribunal as, according to him, there is no industrial dispute between the employers and the employees. To put in other words, the learned counsel argues that the union does not represent the substantial body of the employees and that they have not made the demands on the petitioner before the matter was taken up by the Conciliation officer. But it is clear from the aforesaid facts that the 4th respondent made the demands on the petitioner before the Conciliation officer and also served a copy of it on the petitioner.

The said demands were made in a letter dated 6th May 1951. It was written by the President of the 4th respondent to the President of the petitioner's union. It contains eight demands and it ends with a final request that besides a fair understanding must be reached in respect of unreasonable dismissals, suspensions, fines, threats and exchange of angry words in the tanneries. This was a clear demand made by the 4th respondent on the petitioner who is a union representing the employers. The Government stated in their counter affidavit that the two unions mentioned above, i.e. respondents 3 and 4 raised certain demands relating to basic wages, dearness allowance, bonus and weekly holiday for all workers on Sundays, additional leave facilities and provident fund on behalf of the workers in nineteen tanneries in Dindigul and presented them to the Dindigul Skin Merchants Association but the association did not make any response to the Unions. They also stated that on the failure of direct negotiations the Labour Officer took up conciliation with representatives but could not bring about a settlement on account of the tanners' refusal to attend any joint talks with the unions. The counter affidavit further discloses that as the Labour Officer failed to settle the disputes he recommended to the Government that the disputes might be referred to adjudication on the four issues relating to basic wages, dearness allowance, bonus and weekly holiday for all workers on Sundays in respect of the tanneries about which he was able to gather full particulars. It is also found in the affidavit that the Commissioner of Labour agreed with the Labour officer, and the Government after careful consideration of the representations of the Labour Officer and the Commissioner of Labour referred the dispute in respect of eight tanneries to the Industrial Tribunal, Madurai. It is therefore clear from the allegation in the counter affidavit filed by the Government and also from the aforesaid letter that there were disputes between the fourth respondent—union and the petitioner in regard to the aforesaid four matters.

On the question whether the third and fourth respondents represented the tannery workers of Dindigul, in the counter affidavit it is stated that they were the representatives of the union and the National Tannery Workers Association is a management sponsored organisation and is non-representative of the workers. There is no material on record for me to say that the said allegations are untrue and are not supported by facts.

(6) Further the Industrial Disputes Act is a self contained Act providing for suitable machinery for deciding the disputes that arise between the employers and the employees. The Act provides for an appeal against the order of the Tribunal. The Tribunal would be in a position to decide the disputes more satisfactorily and effectively than they could be done in a Writ of Certiorari. As the petitioner has an effective remedy this writ will not issue.

(7) It should not be understood that I have expressed any final opinion on questions of fact and the tribunal will be at liberty to dispose of all the questions raised before it uninfluenced by any observations that I may have made in this order. This application therefore fails and is dismissed with costs.

A/R.G.D.

Application dismissed.



**A. I. R. 1953 MADRAS 105 (Vol. 40, C. N. 35)**

RAJAMANNAR C. J.

AND VENKATARAMA AYYAR J.

V. M. Syed Mohamed and Co. and another, Petitioners v. The State of Madras Represented by the Secretary to Government Revenue Department, Fort Saint George, Madras and another, Respondents.

W. P. Nos. 21 and 41 of 1952, D/- 29-8-1952.

(a) Constitution of India, Art. 226 (1) — Prosecution under S. 15 (b), Madras General Sales Tax Act — Accused taking out writ of 'certiorari' for quashing proceedings — Contentions which can be raised — (Sales Tax — Madras General Sales Tax Act (9 of 1939), S. 12A).

Where the petitioners who were being prosecuted under S. 15 (b) of the Madras General Sales Tax Act, took out a writ for quashing those proceedings on the ground that the Act and the Rules and the assessment made thereunder were void and that the prosecution was illegal.

Held that the petitioners were duly served with notice under the Act and had ample opportunity of putting forward before the Tribunals constituted under the Act all contentions based on the provisions of the Act or the Rules. Not having done so, they could not be permitted to put forward in these proceedings contentions which were available to them before the Tribunals. The only pleas that were open to them were those which could not have been urged before the Tribunals, such as the plea that the Act is 'ultra vires' which could not obviously be entertained by a Tribunal which owes its very existence to the Act. (Para 3)

Anno: C.P.C., Appendix III; Constitution of India, Art. 226 Notes 1 and 13.

(b) Sales Tax — Madras General Sales Tax Act (9 of 1939), S. 16A — Section is not opposed to natural justice.

Where the tax is determined after notice to the assessee, it is not repugnant to rules of natural justice to provide that the validity of assessment shall not be questioned at the stage of realisation of the tax. Section 16A is not, therefore, opposed to natural justice and void on that ground as under the Act the tax is determined after notice to the assessee. (Para 3)

(c) Sales Tax — Madras General Sales Tax Act (9 of 1939), Preamble and S. 3 (5) — Validity of Act — Act is not invalid because it imposes tax on purchasers — (Government of India Act (1935), Sch. VII, List 2, Entry 48).

The words "sales of goods" in Entry 48 import in their ordinary sense a transaction which results in change of ownership from one person to another. That must, by its very nature, be a bilateral transaction, with a seller on the one hand and a purchaser on the other. It is only when there is a contract to which both are parties that there can be a sale. A power to tax sale of goods is, therefore, in reality a power to tax the transaction and the power to tax the transaction carries with it the power to tax either party thereto. (Para 6)

The words "sale tax" are generally understood as importing a tax on the occasion of sale, it is immaterial whether it is collected in the first instance from the

sellers or the purchasers, for, eventually it would be passed on to the consumers, and in either case it would be a tax on sales. It is in this sense that the words 'tax on sales' would appear to have been used in Entry No. 48. (Para 9)

Entry No. 48 is of sufficient amplitude to authorise the levy of a tax on purchasers and therefore the Madras General Sales Tax Act which imposes a tax on the act of purchasing of goods is not 'ultra vires'. (Para 9)

(d) Sales Tax — Madras General Sales Tax Act (9 of 1939), Preamble and S. 5 (vi) — Validity of Act and Rules framed thereunder — Act and Rules are not open to challenge on ground of unconstitutional delegation — (Sales Tax — Madras Turnover and Assessment Rules (1939), Rr. 4 and 16) — (Constitution of India, Art. 265).

(1) The Legislature must normally discharge its primary legislative function itself and not through others. (2) Once it is established that it has sovereign powers within a certain sphere, it must follow as a corollary that it is free to legislate within the sphere in any way which appears to it to be the best way to give effect to its intention and policy in making a particular law, and that it may utilize any outside agency to any extent it finds necessary for doing things which it is unable to do itself or finds it inconvenient to do. In other words, it can do everything which is ancillary to and necessary for the full and effective exercise of its power of legislation. (3) It cannot abdicate its legislative functions, and therefore while entrusting power to an outside agency, it must see that such agency acts as a subordinate authority and does not become a parallel Legislature. (4) Therefore, there are only two main checks in this country on the power of the Legislature to delegate, these being its good sense and the principle that it should not cross the line beyond which delegation amounts to "abdication and self-effacement". AIR 1951 SC 332, Foll. (Para 18)

As regards the Madras General Sales Tax Act and the Rules framed thereunder what the Legislature has done is merely to authorise the rule-making authorities to carry out the policies enunciated in the statute and to fill up the details. The Rules themselves are to come into operation only after they are approved by a resolution of the House. Far from effecting self-effacement, the Legislature has retained complete control over the legislation and in fact it has exerted that control by introducing amendments of the Act from time to time. It must, therefore, be held that the Madras Act and the Rules are not open to challenge on the ground of unconstitutional delegation. (Para 21)

In America, the law is well settled that (1) the enunciation of policy is a matter exclusively within the competence of the Legislature and incapable of delegation to other bodies and that (2) it is not unconstitutional to entrust to special bodies the carrying out of the policies declared by the Act and for that purpose to clothe them with authority to frame regulations within the framework of the Act. Therefore, even according to the principles established in American decisions, the power entrusted to



the rule-making authorities under the Madras Act cannot be held to be unconstitutional delegation. (Paras 14 and 17)

(e) Sales Tax — Madras General Sales Tax Act (9 of 1939), Preamble — Act and Rules framed thereunder do not offend Art. 14 of Constitution — (Constitution of India, Art. 14) — (Sales Tax — Madras Turnover and Assessment Rules (1939) ).

The following principles may be taken to be well-established: (1) The guarantee of equal protection of laws does not require that the same law should be made applicable to all persons or that the law should have the same operation on all persons. It prohibits only an application of different laws to persons who are in similar circumstances. (2) The requirements as to equal protection of laws do not forbid legislative classifications, provided such classifications rest on some difference germane to the purpose of the statute. (3) A classification cannot be upheld on purely fanciful grounds. (4) With reference to taxing statutes the Legislature has considerable latitude in making classifications. It can select such persons or things as it chooses for purposes of taxation. (5) Taxing statutes must also satisfy the test of equal protection and are liable to be struck down, if they do not. (6) There is a strong presumption in favour of the validity of legislative classification and it is for those who challenge it as arbitrary and unconstitutional to establish it beyond all doubt. (7) The power to make classification could be exercised not only by the Legislature but also by administrative bodies acting under the Act. Case law discussed.

(Paras 22 and 26)

Applying the above principles to the Madras General Sales Tax Act and the Rules which impose sales tax in some cases on the purchaser, while laying it on the sellers in other cases, cannot be held to offend Art. 14 of the Constitution. (Para 29)

(f) Sales Tax — Madras Turnover and Assessment Rules (1939), R. 16 (5) — Validity — (Sales Tax — Madras General Sales Tax Act (9 of 1939), S. 5 (vi) ).

Rule 16 (5) is repugnant to S. 5 (vi) of the Act and must therefore be held to be 'ultra vires'. (Para 32)

(g) Sales Tax — Madras General Sales Tax Act (1939), R. 15 — Forms prescribed under — Form A-4 — Form does not infringe S. 5 (vi) of Madras Act 9 of 1939 — (Sales Tax — Madras General Sales Tax Act (9 of 1939), S. 5 (vi) ). (Para 33)

(h) Sales Tax — Madras Turnover and Assessment Rules (1939), R. 15 (2) — Rule is not unconstitutional — 'Obiter'.

Obiter: Advance payment of tax is a well-recognised feature in the mode of realising tax and the provision in R. 15(2) is in accordance with the practice generally obtaining in this branch of the law. The Rule is accordingly not unconstitutional.

(Para 34)

(i) Sales Tax — Madras Turnover and Assessment Rules (1939), R. 16 (2) — Classification — Repugnancy to Art. 14 of Constitution — (Constitution of India, Art. 14).

The classification of merchants into those who take out licences and those who do not, made by R. 16 (2) is one resting on a

rational basis and is not repugnant to Art. 14 of the Constitution. (Para 35)

K. V. Venkatasubramania Ayyar, K. Rajah Ayyar & C. Venugopalachari, for Petitioners; The Advocate General and V. V. Raghavan, for Government Pleader, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras

('45) 1945 FLJ 1: (AIR 1945 PC 48: 46 Cri LJ 589 PC)	18
('49) 1949 FLJ 225: (AIR 1949 FC 175: 50 Cri LJ 897)	18
('51) 1951 SCJ 29: (AIR 1951 SC 41)	22, 23
('51) 1951 SCJ 478: (AIR 1951 SC 318: 52 Cri L J 1361 SC)	22
('51) 1951 SCJ 527: (AIR 1951 SC 332)	18, 20
('52) 1952 SCJ 55: (AIR 1952 SC 75: 1952 Cri LJ 510 SC)	22, 29
('52) 1952 SCR 435: (AIR 1952 SC 123: 1952 Cri LJ 805 SC)	22, 29
('42) 1942 FLJ 61: 1942-2 Mad LJ 327: (AIR 1942 FC 33)	6
('79) 4 Cal 172: (5 Ind App 178 PC)	18, 19
(1885) 10 AC 282: (54 LJPC 7)	12
(1935) AC 500: (AIR 1935 PC 158)	9
(1936) AC 578: (105 LJPC 115)	9
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(1825) 23 US 43: 6 Law Ed 253	14
(1876) 92 US 575: 23 Law Ed 663	3
(1881) 102 US 586: 26 Law Ed 253	3
(1888) 128 US 174: 32 Law Ed 377	17
(1897) 165 US 150: 41 Law Ed 666	22
(1910) 216 US 400: 54 Law Ed 536	22
227 US 477: 57 Law Ed 603	26
230 US 525: 57 Law Ed 1604	16
(1914) 233 US 304: 58 Law Ed 974	22
(1919) 248 US 152: 63 Law Ed 527	22
(1920) 253 US 412: 64 Law Ed 989	22
(1920) 254 US 64: 65 Law Ed 134	3
(1923) 263 US 234: 68 Law Ed 282	3
(1925) 268 US 137: 69 Law Ed 884	22, 25
(1927) 273 US 407: 71 Law Ed 709	25
(1928) 276 US 394: 72 Law Ed 624	17
(1928) 276 US 567: 72 Law Ed 703	3
(1928) 277 US 32: 72 Law Ed 770	22
(1929) 278 US 515: 73 Law Ed 483	22
(1931) 283 US 527: 75 Law Ed 1248	22
(1934) 292 US 535: 78 Law Ed 1411	22, 27, 34
(1934) 291 US 457: 78 Law Ed 909	17
(1934) 292 US 86: 78 Law Ed 1141	34
(1935) 294 US 580: 79 Law Ed 1070	22, 23, 25
(1935) 294 US 550: 79 Law Ed 1054	22
(1936) 297 US 266: 80 Law Ed 675	22
(1937) 301 US 459: 81 Law Ed 1223	22
(1938) 303 US 573: 82 Law Ed 1024	22, 26
(1940) 309 US 83: 84 Law Ed 590	28

VENKATARAMA AYYAR J. These writs raise the question of the validity of the Madras General Sales Tax Act, IX of 1939, and of the Turnover and Assessment Rules, 1939 framed thereunder hereinafter called the Rules. The petitioners in Writ Petition No. 21 of 1952 are doing business as tanners in Eluru. The course of business is that they purchase raw hides & skins & tan them in their own tannery. They hold a licence as tanners under the Act. Under Rule 15, they were submitting monthly returns of hides and skins purchased by them for the purpose of tanning, in form No. A-4 and an order was passed on 23-2-1951 on the basis of these returns determining the tax payable at Rs. 10,180-7-3.

Payments amounting to Rs. 4,790-13-0 had been made by the petitioners towards the amount of the tax and for the balance Rs. 5,389-10-3 remaining payable, a demand was duly made by notice under



Rule 15 (4). No appeal was taken against the order of assessment and it has become final. Nor was any action instituted to contest its validity. The tax not having been paid, the Commercial Tax Officer instituted proceedings under Section 15 (b) of the Act for the recovery of the amount. The Section so far as it is material runs as follows:

"Any person who fails to pay within the time allowed any tax assessed on him, or any fee due from him, under this Act shall, on conviction by a Presidency Magistrate or a Magistrate of the first class, be liable to a fine which may extend to one thousand rupees, and in the case of a conviction under clause (b), the Magistrate shall specify in the order the tax, fee or other amount, which the person convicted has failed or evaded to pay or has wrongfully collected, and the tax, fee or amount so specified shall be recoverable as if it were a fine."

These proceedings are now pending before the Honorary Special First Class Magistrate, Eluru, as C. C. No. 88 of 1951. The petitioners have taken out this writ for quashing these proceedings on the ground that the Act and the Rules and the assessment made thereunder are void and that the prosecution is illegal.

(2) In Writ Petition No. 41 of 1952, the facts are similar. The petitioner is a licenced tanner of hides and skins doing business at Eluru. He sent monthly returns of hides and skins purchased for tanning in form No. A-4 and on the basis of these returns, an order was passed on 23-2-51 determining the tax payable by him at Rs. 4,407-7-0. After deducting Rs. 1,805-3-4 which had been paid by the petitioner towards the amount of the tax, there was a balance of Rs. 2,602-3-8 remaining payable by him and a notice of demand for this amount under Rule 15 (4) was duly served on him.

The order of assessment was not taken in appeal and has become final. Nor was any action filed contesting its validity. Default having been made in the payment of the tax, proceedings were taken for its recovery under Section 15 (b) of the Act. These proceedings are now pending before the Honorary First Class Magistrate, Eluru as C. C. No. 90 of 1951. The present writ has been filed for quashing those proceedings on the ground that the Act and the Rules and the assessment made thereunder are all void and that the prosecution is, therefore, illegal.

(3) It is necessary, to begin with, to define what contentions are open to the petitioners in these proceedings. The Madras General Sales Tax Act which creates the liability to pay tax on sales also constitutes Tribunals for determining the amount payable under the Act and such determination has to be made after notice to the assessee and it is open to appeal and further to a revision. The petitioners were duly served with notice under the Act and had ample opportunity of putting forward before the Tribunals all contentions based on the provisions of the Act or the Rules.

Not having done so, they cannot be permitted to put forward in these proceedings contentions which were available to them before the Tribunals. The only pleas that are now open to them are those which could not have been urged before the Tribunals. Such, for example, would be the plea that the Act is ultra vires: such a plea could not obviously be entertained by a Tribunal which owes its very existence to the Act. Mr. K. V. Venkatasubramania Ayyar, the learned Advocate who appeared for the petitioners, did not contest this position. But he argued that even on this basis Section 16-A should be declared void. It runs as follows:

"The validity of the assessment of any tax, or of the levy of any fee or other amount made under this Act, or the liability of any person to pay any tax, fee or other amount so assessed or levied shall not be questioned in any Criminal Court in any prosecution or other proceeding, whether under this Act or otherwise".

The contention is that the Section prevents the petitioners from showing that they are not liable to be taxed under the Act and is, therefore opposed to rules of natural justice. There would have been substance in this objection, if the petitioners had been denied an opportunity of contesting the claim before an order of assessment was made. But where, as here, the tax is determined after notice to the assessee, it is not repugnant to rules of natural justice to provide that the validity of assessment shall not be questioned at the stage of realisation of the tax. The provision is analogous to the rule which precludes judgment-debtors from putting forward at the stage of execution of a decree defences that were open to them, in the suit itself. The law on the subject is thus summed up by Rotshaefer in his work on Constitutional Law at page 686:

"The general rule is that due process requires that the tax-payer be accorded an opportunity to be heard at some stage in the proceedings before his liability is irrevocably fixed with respect to all matters the ascertainment of which involves the exercise of such administrative or quasi-judicial functions, so far as those matters affect the existence or extent of his liability". — *Vide Turner v. Wade*, (1920) 254 U. S. 64:65 Law Ed. 134; and again:

"A tax payer who fails to take advantage of the opportunity to be heard accorded him, loses his right to object to an assessment made against him" — (*Vide*) — *Chicago, M., St. P. & P. R. Co. v. Risty*, (1928) 276 U. S. 567: 72 Law Ed. 703.

and — *McGregor v. Hogan*, (1923) 263 U. S. 234: 68 Law Ed. 282. It is also well-settled in America that where the assessment is not otherwise open to objection, laws which provide for their recovery in a speedy and summary manner are not liable to be assailed as unconstitutional. In — *State Railroad Tax Cases*, (1876) 92 U. S. 575: 23 Law Ed. 663 the Court observed;

"It is a wise policy. It is founded in the simple philosophy derived from the experience of ages that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment and to do this successfully other instrumentalities and often (sic. other) modes of procedure are necessary than those which belong to Courts of Justice".

In — *Springer v. United States*, (1881) 102 U. S. 586: 26 Law Ed. 253 the Court stated:

"The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of the Government. The idea that every tax-payer is entitled to the delays of litigation is unreasonable. If the laws here in question involve any wrong or unnecessary harshness it was for Congress or the people who make the Congresses to see the evil was corrected. The remedy does not lie with the judicial branch of the Government."

The contention that S. 16-A is opposed to natural justice must, therefore, be rejected.

(4) Mr. K. V. Venkatasubramania Ayyar urged that the Madras General Sales Tax Act was void on the following grounds:



(1) The Provincial Legislature had no power under the Government of India Act of 1935 to enact a law imposing a tax on purchasers.

(2) The liability to pay a tax on sales is thrown on the purchaser not by the statute but by the Rules. This is an unconstitutional delegation by the Legislature of its functions to the executive & the imposition of the tax is accordingly illegal.

(3) The Act has become void under Art. 14 of the Constitution, as it singles out for taxation purchasers in some trades and is, therefore, discriminatory.

(4) The Rules framed under the Act are inconsistent with the provisions enacted in the body of the Act and are void. Before dealing with these contentions, it will be convenient to set out the relevant provisions of the Act. The preamble to the Act declares that the object of the enactment is "to provide for the levy of a general tax on the sale of goods in the Province of Madras". S. 2 (b) defines a "Dealer" as a person who carries on the business of buying or selling goods. 'Sale' is defined in S. 2 (b) as meaning every transfer of the property in goods by one person to another in the course of trade or business. S. 2 (i) defines 'turnover' as the aggregate amount for which goods are either bought or sold by a dealer. S. 3 which is the charging Section runs as follows:

S. 3 (1) "Subject to the provisions of this Act, (a) every dealer shall pay for each year a tax on his total turnover for such year and (b) the tax shall be calculated at the rate of three pies for every rupee in such turnover".

Sub-Cls. (4) and (5) run as follows:

"(4) For the purposes of this section and the other provisions of this Act, turnover shall be determined in accordance with such rules as may be prescribed: Provided that no such rules shall come into force unless they are approved by a resolution of the Legislative Assembly.

(5) The taxes under Sub-Ss. (1) and (2) shall be assessed, levied and collected in such manner and in such instalments, if any, as may be prescribed: Provided that—(i) in respect of the same transaction of sale, the buyer or the seller, but not both as determined by such rules as may be prescribed, shall be taxed; (ii) where a dealer has been taxed in respect of the purchases of any goods in accordance with the rules referred to in Cl. (i) of this proviso, he shall not be taxed again in respect of any sale of such goods effected by him".

S. 5 (vi) is as follows:

"Subject to such restrictions and conditions as may be prescribed, including conditions as to licences and licence fees, the sale of hides and skins, whether tanned or untanned, shall be liable to tax under S. 3, sub-s. (1), only at such single point in the series of sales by successive dealers as may be prescribed".

(5) Now to take up the first contention, the argument of the petitioners is that under the Government of India Act of 1935 which was the Constitution Act in force when the Madras General Sales Tax Act was enacted, the Provincial Legislature was not competent to impose a tax on purchasers. The power to legislate on this subject was conferred by Entry 48 in the Provincial List which runs as follows: "Taxes on the sale of goods and on advertisements". The argument on behalf of the petitioners is that the words 'taxes on the sale of goods' in this Entry should be construed as meaning tax on the act of selling of goods and on that construction, the Legislature had no power to impose a tax on the act of purchasing of goods.

Support for this contention is sought in the change in language in Entry 54 in the State List of the Constitution of India 1950 which corresponds

to Entry 48 of the Provincial List of the Government of India Act 1935. Entry 54 is in these terms: "Taxes on the sale or purchase of goods other than newspapers". It is argued that the change in the language proceeds on a recognition that 'sale' in Entry 48 does not include 'purchase' and that therefore a tax on purchasers was beyond the legislative competence of the Provincial Legislature.

(6) The words 'sale of goods' import in their ordinary sense a transaction which results in change of ownership from one person to another. That must, by its very nature, be a bilateral transaction, with a seller on the one hand and a purchaser on the other. It is only when there is a contract to which both are parties that there can be a sale. A power to tax sale of goods is, therefore, in reality a power to tax the transaction and the power to tax the transaction carries with it the power to tax either party thereto. In —'Madras Province v. Boddu Paidannas & Sons', 1942 FLJ 61: 1942-2 Mad L. J. 327 (F.C.) in discussing the scope of Entry 48 Gwyer, C. J. observed as follows: "The tax on the sale of goods which the Act assigns exclusively to the Provincial Legislature is a tax levied on the occasion of the sale of goods".

(7) This construction accords with the views generally held by textwriters on the subject who treat taxes imposed on purchasers as sales tax and express the view that though the tax might in the first instance be levied on the seller or purchaser, that might not be its ultimate incidence. Thus, Dalton observes: A tax on sales or on turnover is only a tax on the commodities sold or turned over (vide Principles of Public Finance, 15th Edition, page 40); and again "It makes no essential difference whether the tax is legally imposed on buyers or sellers, though this may affect the length of time which will elapse before the process of shifting the direct money burden, or part of it, from one side to the other is completed. Every tax tends for a time; to 'stick to where it falls'. Nicks on Public Finance has the following:

"The other big group of taxes which we have to consider is that consisting of the so-called gross income taxes, turnover taxes and general sales taxes ..... The British War-time purchases tax, however belongs essentially to the same class of tax..... Whatever that may be called and whatever the differences of detail, these taxes are essentially similar in effect. They are regarded by purchasers as additions to costs and are added to selling prices".

(8) In the Encyclopaedia of the Social Sciences by Messrs. Saligman and Johnson, Vol. 13 at p. 517 the nature and scope of the sales tax are thus described:

"Sales taxes may be imposed upon total receipts with deductions for returns, allowances and possible other items; upon the individual transaction; upon the privilege of conducting business, which is supposedly measured by sales; upon sales in general or upon specified types of sale. Not only different jurisdictions but also the same jurisdiction may employ varying basis of taxation. Taxes may be collected from vendors in general or from a certain class or classes of vendors. Customarily the vendor rather than the vendee is liable for taxation, although both may be held responsible for proper payment of the tax".

(9) Findlay Shirras in his work on the Science of Public Finance (Volume 2 page 612) observes that in France, Doctors, Lawyers, and other professional men are exempted from sales tax for the reason that the tax was always shifted to the consumer and therefore, it was impolitic to tax pro-



professional men with businessmen. Vide also Ratner on American Taxation, page 404, where it is stated that there was agreement among economists "that the sale tax under normal conditions would be shifted to the consumers". These passages clearly show that the words 'sales tax' are generally understood as importing a tax on the occasion of sale, that it is immaterial whether it is collected in the first instance from the sellers or the purchasers, for, eventually it would be passed on to the consumers, and that in either case it would be a tax on sales. It is in this sense that the words 'tax on sales' would appear to have been used in Entry No. 48.

It is to be particularly remembered that it is a Constitution Act that has to be interpreted and "in interpreting a constituent or organic statute, that construction most beneficial to the widest amplitude of its powers must be adopted". Vide — *British Coal Corporation v. The King*, (1935) AC 500 at p. 513 and "that a Constitution must not be construed in any narrow and pedantic sense". Vide — *James v. Commonwealth of Australia* No. 2, (1936) A. C. 578 at p. 614. It would be in accordance with these principles to hold that Entry No. 48 in the Provincial List is of sufficient amplitude to authorise the levy of a tax on purchasers and that the Madras Act IX of 1939 is 'intra vires' of the powers of the Madras Legislature.

(10) (2) It is next contended that even if the Legislature had under Entry 48 the power to tax either the seller or the purchaser, the decision to tax either the one or the other is a legislative act and that must be taken only by the Legislature and cannot be delegated to the Administration. It will be remembered that with reference to hides and skins, Section 5 (vi) did not itself impose a tax on the purchaser, but it left it to the Rules to determine on which point in the series of sales by successive dealers the tax should be levied. It is under Rules 4 and 16 that the liability to pay the tax is thrown on the purchaser. Rule 4 is as follows:

Rule 4. (1) Save as provided in sub rule (2) the gross turnover of a dealer for the purposes of these rules shall be the amount for which goods are sold by him.

(2) In the case of the undermentioned goods the gross turnover of dealer for the purposes of these rules shall be the amount for which the goods are bought by him.

(a) groundnut,

(b) cashew,

(c) untanned hides and skins bought by a licensed tanner in the Province, and

(d) untanned hides and skins exported outside the Province by a licensed dealer in hides or skins.

Rule 16 runs thus:

"Rule 16 (1) In the case of hides and skins the tax payable under section 3 (1) shall be levied in accordance with the provisions of this rule.

(2) No tax shall be levied on the sale of untanned hides or skins by a licensed dealer in hides or skins except at the stage at which such hides or skins are sold to a tanner in the Province or are sold for export outside the Province.

(i) In the case of all untanned hides or skins sold to a tanner in the Province, the tax shall be levied from the tanner on the amount for which the hides or skins are bought by him.

(ii) In the case of all untanned hides or skins which are not sold to a tanner in the Province but are exported outside the Province, the tax shall be levied from the dealer who

was the last dealer not exempt from taxation under Sec. 3 (3) who buys them in the Province, on the amount for which they were bought by him.

(3) Sales by licensed dealers of hides or skins which have been tanned within the Province shall be exempt from taxation provided that the hides or skins have been tanned in a tannery which has paid the tax leviable under the Act. If such hides or skins have been tanned in a tannery which is exempt from taxation under Sec. 3 (3), the sale of such hides or skins shall be liable to taxation as under the next sub rule below dealing with hides or skins tanned outside the province.

(4) Sales by licensed dealers in hides or skins which have been tanned outside the Province shall be exempt from taxation except at the stage of sale by the dealer who is the first dealer not exempt from taxation under Sec. 3 (3) who sells them within the province. The tax shall be levied from such dealer on the amount for which he sells such hides or skins.

(5) Sale of hides or skins by dealers other than licensed dealers in hides or skins shall, subject to the provisions of section 3, be liable to taxation on each occasion of sale".

(11) It is argued on behalf of the petitioners that under Art. 265 "No tax shall be levied or collected except by authority of law", that it was the Legislature alone that was competent to impose a tax and the delegation of this function to the Administration was unconstitutional. Reliance was placed upon the decision of the Court of Appeal in — *Attorney General v. Wilts United Dairies, Limited*, (1921) 37 T. L. R. 884. In that case the facts were that a Food Controller, acting under the Defence of Realm Acts and Regulations imposed a tax of two pence per gallon of milk as a condition for the issue of a licence to purchase milk in a certain area. The Regulation conferred a power on the Controller to issue orders for regulating the production, manufacture, distribution, supply, sale, etc., of milk and milk products. But no power was granted for imposing any charges. In holding that the impost was illegal, the Court of appeal observed that no tax could be levied, unless it is authorised by the Parliament and there being no such authority in the Defence of Realm Acts and Regulations, the levy was illegal. The following observations of Atkin, L. J. may be quoted:

"In these circumstances, if an officer of the Executive seeks to justify a charge upon the subject made for the use of the Crown (which includes all the purposes of the public revenue) he must show, in clear terms, that Parliament has authorised the particular charge. The intention of the Legislature is to be inferred from the language used and the grant of powers may, though not expressed, have to be implied as necessarily arising from the words of a statute ..... I am clearly of opinion that no such powers, & indeed no powers at all, of imposing any such charge are given to the Minister of Food by the statutory provisions on which he relies".

(12) This decision was affirmed on appeal by the House of Lords (vide — *Attorney General v. Wilts United Dairies Ltd*, (1922) 38 T. L. R. 781. It will be seen that the question discussed here was not the validity of delegated legislation but the existence of any legislation, direct or delegated, authorising the imposition of a tax. Neither the decision nor the observations quoted above are, therefore, of much assistance in the present case, there being clear and express imposition of tax under



the Madras Act IX of 1939. On the other hand, there is an observation in the judgment of Bankes, L. J. bearing more directly on the point now under consideration. He stated:

"It is conceivable that Parliament which may pass legislation requiring the subject to pay money to the Crown may also delegate its powers of imposing such payments to the executive".

A direct decision on the point is the one reported in — *Powell v. Apollo Candle Co. Ltd.*, (1885) 10 A. C. 282. Under Section 133 of the Customs Regulation Act of 1879, the Legislature of New South Wales had conferred a power on the Governor to impose a tax on certain articles of import. On a question as to whether the delegation of the powers of taxation to the Governor by the Legislature was legal, the Privy Council observed as follows:

"It is argued that the tax in question has been imposed by the Governor and not by the Legislature who alone had power to impose it. But the duties levied under the Order-in-Council are really levied by the authority of the Act under which the Order is issued. The Legislature has not parted with its perfect control over the Governor, and has the power, of course, at any moment, of withdrawing or altering the power which they have entrusted to him. In these circumstances, their Lordships are of opinion that the judgment of the Supreme Court was wrong in declaring Section 133 of the Customs Regulation Act of 1879 to be beyond the power of the Legislature".

We may now turn to the American authorities cited by the petitioners. In — *Panama Refining Co. v. Ryan*, (1935) 79 Law. Ed. 446 at P. 459 a Congressional Legislation conferred on the President power to prohibit the transportation of 'hot oil' in inter-state and foreign commerce. The Act contained no definition of the circumstances or conditions under which this power could be exercised. In striking down the Legislation as unconstitutional delegation, Hughes, C. J., observed as follows:

"The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functioning with which it is thus vested. Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national Legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility. But the constituent recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of that, cannot be allowed to obscure the limitations of the authority to delegate if our constitutional system is to be maintained".

(13) In — *Schechter v. United States*, (1935) 79 Law. Ed. 1570: 295 U. S. 495 a Congress Legislation provided that certain trade groups should have the power to frame "a code of fair competition" and that on approval by the President, it should have the force of law. This was held to be an unconstitutional delegation because the Act contained no definition of 'fair competition' and in the words of Justice Cardozo:

"the delegated power of legislation which has found expression in this Code is not canalized within banks that keeps it from overflowing. It is unconfined and vagrant".

(14) It is unnecessary to examine other American authorities bearing on the subject. The law is well-settled and may be summed up in two propositions: (1) the enunciation of policy is a matter exclusively within the competence of the Legislature and incapable of delegation to other bodies. (2) It is not unconstitutional to entrust to special bodies the carrying out of the policies declared by the Act and for that purpose to clothe them with authority to frame regulations within the framework of the Act. Simple as are these propositions as statements of law, in their practical application they present complicated problems. It was observed by Marshal, C. J. in — *Wayman v. Southard*, (1825) 23 U. S. 43: 6 Law. Ed. 253 at p. 263. that "the line has not been exactly drawn which separates those important subjects which must be entirely regulated by the Legislature itself from those of less interest in which a general provision may be made and power given to those who are to act under such general provisions to fill up the details".

(15) And the course of decisions has been to limit the region of the legislative policies within the narrowest bounds and enlarge the area which can be left to be administered by other bodies. Willis in his work on Constitutional Law at pp. 136-137 remarks:

"It is a dogma (in harmony with our definition) that legislative power cannot be delegated either to other branches of the Government or to independent boards or commissions or even back to the people; but the rule of the dogma has so many exceptions that it is difficult to decide whether the dogma or the exceptions state the true rule".

(16) One of those exceptions is legislation entrusting to outside bodies the power to fix rates. Authority in America is uniform that such legislation is not invalid as constituting delegation of legislative power. In — *Oregon R. and Nav. Co. v. Campbell*, 230 U. S. 525: 57 Law Ed. 1604, the question was whether a provision under the statute conferring upon a commission the power to fix the rates was valid. In upholding the enactment, the Court observed:

"The Legislature has delegated to the commission the duty of fixing rates, which it does in aid of legislative action, or as an auxiliary to the exercise of the legislative functions. This the authorities all sanction as falling within the legislative power. There can exist no valid objection to conferring such authority upon an administrative board."

(17) Vide also — *Georgia R. & Bkg. Co. v. Smith*, (1888) 128 U. S. 174: 32 Law Ed. 377 and — *United States v. Illinois Central Railroad Co.*, (1934) 291 U. S. 457: 78 Law Ed. 909. In — *J. W. Hampton, JR. & Co. v. United States*, (1928) 276 U. S. 394: 72 Law Ed. 624 a Congress Legislation had authorised the President to impose on articles of import such duty as he might determine with the aid of advisers. This provision was impugned as unconstitutional delegation. This contention was repelled and it was held that it was within the competence of the Legislature to assign the work of fixing rates to administrative bodies. Thus, even according to the principles established in American decisions, the power entrusted to the rule-making authorities under the Madras Act cannot be held to be unconstitutional delegation.

(18) The question how far the Indian Legislature was competent to delegate its powers to other



bodies was considered by the Privy Council in — 'Queen v. Burah', 4 Cal 172 (P.C.) and in — 'Emperor v. Benoari Lal Sarma', 1945 F. L. J. 1. and the decision was that such delegation was valid. In — 'Jatindra Nath Gupta v. The Province of Bihar', 1949 F. L. J. 225 a majority of judges held that the Proviso to section 1(3) of the Bihar Maintenance of Public Order Act was ultra vires the powers of the Bihar Legislature as amounting to unconstitutional delegation of power. The question was again considered in 'Ref. Under Article 143 of the Constitution of India', In re, 1951 S. C. J. 527, and the decision of the majority was that the laws in question were not bad on the grounds that there was delegation of legislative powers. Fazl Ali, J. summed up the conclusions as follows:

- "(1) The Legislature must normally discharge its primary legislative function itself and not through others.
- (2) Once it is established that it has sovereign powers within a certain sphere, it must follow as a corollary that it is free to legislate within that sphere in any way which appears to it to be the best way to give effect to its intention and policy in making a particular law, and that it may utilize any outside agency to any extent it finds necessary for doing things which it is unable to do itself or finds it inconvenient to do. In other words, it can do everything which is ancillary to and necessary for the full and effective exercise of its power of legislation.
- (3) It cannot abdicate its legislative functions, and therefore while entrusting power to an outside agency, it must see that such agency acts as a subordinate authority and does not become a parallel Legislature.
- (4) Therefore, there are only two main checks in this country on the power of the Legislature to delegate, these being its good sense and the principle that it should not cross the line beyond which delegation amounts to "abdication and self-effacement".

Patanjali Sastri J., as he then was expressed the view that the Legislature had the power to delegate even legislative functions, unless such a delegation was prohibited by the Constitution and that

"the Courts in this country cannot strike down an Act of Parliament as unconstitutional merely because Parliament decides in a particular instance to entrust its legislative power to another in whom it has confidence, or, in other words, to exercise such power through its appointed instrumentality, however repugnant such entrustment may to the democratic process. What may be regarded as politically undesirable is constitutionally competent".

Mukherjea J. observed:

"Provided the legislative policy is enunciated with sufficient clearness or a standard laid down the Courts cannot and should not interfere with the discretion that undoubtedly rests with the Legislature itself in determining the extent of delegation necessary in a particular case".

Das J. stated the position as follows:

"If what the Legislature does is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited, then it is not for the Court to enquire further or to enlarge constructively those conditions or restrictions; that while the Legislature is acting within its prescribed sphere there is, except as hereinafter stated, no degree of or limit to its power of delegation of its legislative power, it being for the Legislature to determine how far it should seek the aid of subordinate

agencies and how long it shall continue them and it is not for the Court to prescribe any limit to the Legislature's power of delegation, and that the power of delegation is, however, subject only to the qualification that the Legislature may not abdicate or efface itself, that is to say, may not, without preserving its own capacity intact, create and endow with its own capacity a new legislative power not created or authorised by the Act to which it owes its own existence".

(19) Bose J. held that the principles laid down in — 'Queen v. Burah', 4 Cal 172 (P.C.) as to the limits of valid delegation of legislative power were applicable to delegation of powers under the Constitution.

(20) Applying these principles it is impossible to hold that there is any abdication by the Madras Legislature of its functions in favour of the rule-making authority. In fact under section 3 (4) the Rules were required to be placed before the Legislative Assembly and they were to come into force only after they were approved by a resolution of the Assembly. In accordance with this provision the Rules were first published on 18-7-1939 for eliciting public opinion. On 3-8-1939 they were laid before the Assembly and the proceedings of the House show that there was considerable debate over the provisions. After they were approved the Rule were again published on 12-9-1939 and actually came into force on 1-10-1939.

Mr. K. V. Venkatasubramanaia Ayyar argued that the resolutions of Legislative Assemblies have not the force of laws and that therefore, the Rules must be judged on their own merits. That undoubtedly is so. Vide Dicey on Law of the Constitutions, 9th Edition, page 55 and the authorities cited there. But the question now is not whether the Rules have independent force as a piece of legislation, but whether the Legislature has, in leaving the matter to be determined by the rule-making authority, abdicated its functions. The fact that the Rules are to come up for consideration before the House and that they are to come into force only after they are approved by a Resolution of the House are sufficient to repel the contention that there has been abdication by the Legislature. The following observations occurring in the judgment of Fazl Ali, J. in 'Ref. under Article 143 of the Constitution of India', 1951 S. C. J. 527 (at P. 581) may be quoted

"It may also be stated that in England 'delegated legislation' often requires the regulations or provisions made by the delegate authority to be laid before the Parliament either in draft form or with the condition that they are not to operate till approved by Parliament or with no further direction. The Acts before us are certainly open to the comment that this valuable safeguard has not been observed, but it seems to me that however desirable the adoption of the safeguard and other safeguards which have been suggested from time to time may be, the validity of the Acts, which has to be determined on purely legal considerations cannot be affected by their absence".

In Re George Edwin Gray 57 S. C. P (Canada) 150, there was a war-time legislation conferring on the Governor wide powers of issuing Orders-in-Council. By virtue of this power, the Governor issued certain Orders-in-Council and they were approved by a resolution of the House. In dealing with the effect of this resolution the Chief justice observed:

"There are obvious objections of a political character to the practice of executive legislation in this country because of local conditions. But these objections should have been urged when the regulations were submitted to parliament



for its approval, or better still when the "War Measures Act" was being discussed. Parliament was the delegating authority, and it was for that body to put any limitations on the power conferred upon the executive. I am not aware that the authority to pass these regulations was questioned by a vote in either house."

Anglin, J. observed as follows:—

"The fact that in the present case a resolution was adopted by both Houses of Parliament approving of the orders-in-council, while it does not add anything to their legal force as enactments, makes it abundantly clear that no attempt was made in this instance to take advantage of the powers conferred by section 6 of the "War Measures Act" to pass legislation without the concurrence and approval of parliament".

(21) In the present case, what the Legislature has done is merely to authorise the rule-making authorities to carry out the policies enunciated in the statute and to fill up the details. The Rules themselves are to come into operation only after they are approved by a resolution of the House. Far from effecting self-effacement, the Legislature has retained complete control over the legislation and in fact it has exerted that control by introducing amendments of the Act from time to time. It must, therefore, be held that the Madras Act IX of 1939 and the Rules are not open to challenge on the ground of unconstitutional delegation.

(22) (3) It is next contended on behalf of the petitioners that the provisions of the Madras General Sales Tax Act and the Rules framed thereunder are discriminatory, in that they impose sales tax in some cases on the purchaser, while laying it on the sellers in other cases; that there is no rational basis for this differentiation and that it is repugnant to Article 14 of the Constitution and therefore, void. This Article is substantially based on Section (i) of the 14th Amendment to the American Constitution which runs as follows:

"No State shall ..... deny to any person within its jurisdiction the equal protection of the laws".

Mr. K. V. Venkatasubramania Ayyar quoted a number of American Authorities and contended that on the principles enunciated therein the classification made in the Madras General Sales Tax Act and the Rules must be held to be arbitrary and unconstitutional. There is no need to examine them in any great detail in view of the decisions of the Supreme Court in — 'Charanjit Lal Chowdhury v. Union of India', 1951 S.C.J. 29, 'State of Bombay v. F. N. Balsara', 1951 SCJ 478 — 'State of West Bengal v. Anwar Ali Sarkar', (1952) S.C.J. 55 and — 'Kathi Raning Rawat v. State of Sowerashtra', 1952 S.C.R. 435. The following principles may be taken to be well-established: (1) The guarantee of equal protection of laws does not require that the same law should be made applicable to all persons or that the law should have the same operation on all persons. It prohibits only an application of different laws to persons who are in similar circumstances.

"The guaranty of the 14th Amendment of the equal protection of the laws is not a guaranty of equality of operation or application of a state legislation upon all citizens of state".

— 'Stebbins v. Riley', (1925) 268 US 137: 69 Law Ed 384 at p. 888.

"The purpose of the clause in respect of equal protection of the laws is to rest the rights of all persons upon the same rule under similar circumstances."

— 'Frost v. Corporation Commission', (1929) 278 US 515:73 Law Ed 483 at p. 488,

"It must be admitted that the guarantee against the denial of equal protection of laws does not mean that identically the same rules of law should be made applicable to all persons within the territory of India in spite of differences of circumstances and conditions ..... In other words, there should be no discrimination between one person and another, if as regards the subject-matter of the legislation their position is the same....."

Per Mukherjea, J. in — 'Charanjit Lal Chowdhury v. Union of India', 1951 S. C. J. 29 at p. 53.

"The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position and the varying needs of different classes of persons often requires separate treatment ..... If a law deals equally with members of a well-defined class, it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons".

Per Fazl Ali J. in — 'State of Bombay v. F. N. Balsara 1951 S.C.J. 478 at p. 492.

(2) The requirements as to equal protection of laws do not forbid legislative classifications, provided such classifications rest on some difference germane to the purpose of the statute.

"It must appear not only that a classification has been made but also that it is one based upon reasonable ground, some difference which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection".

— 'Gulf. C. & S. F. R. Co. v. Ellis', (1897) 165 U. S. 150: 41 Law Ed. 666 at p. 672.

"It is unnecessary to say that the equal protection of the laws required by the 14th Amendment does not prevent the States from resorting to classification for the purpose of legislation. Numerous and familiar decisions of this Court establish that they have a wide range of discretion in that regard. But the classification must be reasonable and not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike."

— 'Royster Guano Co. v. Virginia', (1920) 253 U.S. 412: 64 Law Ed. 989 at pp. 990-991.

"The principle of equal protection does not take away from the State the power of classifying persons for legitimate purpose. .... While reasonable classification is permissible such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the object sought to be attained and the classification cannot be made arbitrarily and without any substantial basis."

Per Fazl Ali, J. in — 'State of Bombay v. F. N. Balsara', 1951 S.C.J. 478. (3) A classification cannot be upheld on purely fanciful grounds. "We have no right to conjure up possible situations which might justify discrimination" — 'Mayflower Farms v. Ten Eyek', (1936) 297 U. S. 266: 80 Law Ed. 675. "Discriminations are not to be supported by mere fanciful conjecture". — 'Hartford S. B. I & INS CO. v. Harrison', (1937) 301 US 459: 81 Law Ed. 1223 (4). With reference to taxing statutes the Legislature has considerable latitude in making classifications. It can select such persons or things as it chooses for purposes of taxation.

"In such matters the states necessarily enjoy a wide range of discretion and it would require a



clear case to justify the court in striking down a law that is uniformly applicable to all persons pursuing a given occupation on the ground that persons engaged in other occupations more or less like it ought to be similarly taxed."

—*"Singer Sewing Machine Co. v. Brickell"*, (1914) 233 US 304: 58 Law Ed 974. "The power of the state to classify for purposes of taxation is of wide range and flexibility". —*"Louisville Gas & E. Co. v. Coleman"*, (1928) 277 U.S. 32: 72 L. Ed. 770' (at p. 774).

"The power of taxation is fundamental to the very existence of the Government of the states. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of equal taxation in order to prevent variety or differences in taxation or discretion in the selection of subjects or the classification for taxation of properties, businesses, trades, callings or occupations".

—*"State Board v. Jackson"*, (1931) 233 US 527: 75 Law Ed. 1248 at pp. 1255-56".

"The power to make distinctions exists with full vigour in the field of taxation where 'no iron rule' of equality has ever been enforced by the statutes".

—*"New York Rapid Transit Corporation v. City of New York"* (1938) 303 U.S. 573: 82 Law Ed. 1024".

(5) Taxing statutes must also satisfy the test of equal protection and are liable to be struck down, if they do not. —*"Vide Southern Railway v. Greene"* (1910) 216 U.S. 400: 54 Law Ed. 536".

"Every taxing law must pass the constitutional test applied by the Courts to the method of imposition."

—*"Stewart Dry Goods Co. v. Lewis"* (1935) 294 U. S. 550: 79 Law Ed. 1054". (6) There is a strong presumption in favour of the validity of legislative classification and it is for those who challenge it as arbitrary and unconstitutional to establish it beyond all doubt.

"It must be presumed that a Legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by expedience and that its discriminations are based upon adequate grounds".

—*"Middleton v. Texas Power and L. Co."* (1919) 248 U.S. 152: 63 Law Ed. 527".

"By reason of the presumption of validity which attends legislative and official action one who alleges unreasonable discrimination must carry the burden of showing it."

—*"Concordia Fire Insurance Co. v. Illinois"* (1934) 292 U. S. 535: 78 Law Ed. 1411".

"It is a salutary principle of judicial decision long emphasised and followed by this Court that the burden of establishing the unconstitutionality of a statute rests on him who assails it..... A statutory discrimination will not be set aside as denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it".

—*"Metropolitan Casualty Insurance Co. v. Brownell"* (1935) 294 U.S. 580: 79 Law Ed. 1070. Willis in his work on Constitutional Law at page 579 states:

"If any state of facts can reasonably be conceived to sustain a classification, the existence of that state of facts must be assumed. One who assails a classification must carry the burden of showing that it does not rest upon any reasonable basis".

To the same effect are the observations of Fazl Ali J. at page 34 and of Mukerjea J. at page 54 in —*"Charanjit Lal Choudhury v. Union of India"*, 1951 S. C. J. 29.

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(23) Such being the principles, the question is whether there is anything in the Madras General Sales Tax Act and in the Rules which offends Article 14. The contention of the petitioners is that the singling out of purchasers of untanned hides and skins for taxation, while imposing tax on the sellers in most of the other businesses cannot be justified on any ground pertinent to the purpose of the Act, and that it is naked discrimination which is repugnant to Art. 14. The burden of establishing that the impugned provisions offend Art. 14 being on the petitioners, what are the materials which they have placed for discharging that burden? None. They merely argue that on the face of the Act, it does not appear that there is any difference between trade in untanned hides and skins, and other trades in which purchasers are not taxed. That however is not sufficient. In —*"Metropolitan Casualty Insurance Co. v. Brownell"*, (1935) 294 U. S. 580: 79 Law Ed. 1070 at p. 1073 a statute of Indiana enacted that agreements made by foreign insurance companies limiting the period within which claims could be made against them were to that extent, unenforceable. In repelling the contention that this was discrimination, the Court observed:

"There is no showing that the situation of foreign Corporations writing casualty insurance contracts in Indiana is so similar to that of domestic Corporations as to preclude any rational distinction between them as regards the time required for negotiating settlement of claims..... Where the record is silent we cannot presume to declare that there is such similarity, or to say that a state is prohibited from making any distinction in the length of time within which suit must be brought".

In —*"Charanjit Lal Chowdhury v. The Union of India"*, 1951 S.C.J. 29, Fazl Ali J. observed:

"Now the petitioner has made no attempt to discharge the burden of proof to which I have referred and we are merely asked to presume that there must be other companies also which would be open to the charge of mismanagement and negligence".

and Mukerjea, J. stated:

"Throwing out of vague hints that there may be other instances of a similar nature is not enough for this purpose. We have not even before us any statement on oath by the petitioner that what has been alleged against this company may be said against other companies as well".

(24) The petitioners before us have not shown that the conditions in other trades are similar to those in the hides and skins business and in the absence of such showing it cannot be presumed in their favour that no such differences exist as would justify a differentiation. Conditions differ from trade to trade and therefore, 'prima facie' what applies to one trade may not necessarily apply to another. Indeed the records show that the trade in untanned hides and skins has certain special features peculiar to it. In the affidavits filed in support of these petitions, it is stated that the South Indian hides and skins command great popularity in the world markets being popularly known as "East India Kips" and that there is considerable demand for them in foreign countries. The untanned hides and skins would either be tanned in this State or exported for tanning to foreign countries.

As Sec. 5 (vi) provides for a tax being imposed on untanned hides and skins only at a single point in the successive series of sales, Rules 4 and 16 provide that this should be done at the stage of their being tanned or exported. It is intelligible that if the article which is to be taxed is liable to be converted into another kind of article by process of



manufacture, the proper stage for imposing the tax should be when it is transformed into a different article. On this reasoning, the tax will fall on him who tans the hides and skins and there is, therefore, reason for making the person who purchases untanned hides and skins for the purpose of tanning liable for the tax. In like manner, when the articles are exported to foreign countries for tanning they might be taken to lose their character as untanned hides and skins in the hands of the exporter and in reason, the dealer who purchases them for export should be treated on the same footing as a tanner who purchases them for tanning and tax imposed on him on the amount which he purchased them.

It is not without significance that the two other articles in respect of which the sales tax is levied on the purchaser under Rule 4, viz. groundnut and cashew, are also articles which are much in demand in foreign markets for being manufactured into other products. It would, therefore, appear that the trades in these articles have distinctive features which mark them off from others and it is impossible to hold that the differentiation in the matter of taxation has no relation to the nature of the trade. The learned Advocate for the petitioners has been unable to suggest any reason why the Legislature should have capriciously taxed the purchasers in some cases and the sellers in others. Even though the grounds of distinction are not manifest on the face of the statute, this is a fit case for invoking the presumption which the law raises in favour of legislative classification.

(25) It was next urged that the presumption in favour of the validity of classification would arise only when it is made by the Legislature and that such a presumption would not extend to a classification made by rule-making authorities & reliance was placed for this proposition on certain observations occurring in — ‘Stebbins v. Riley’, (1925) 268 U.S. 137: 69 Law Ed. 884 at pp. 888, 889 and — ‘Metropolitan Casualty Insurance Co. v. Brownell’, (1935) 294 U.S. 580: 79 Law Ed. 1070. In — ‘Stebbins v. Riley’, (1925) 268 U.S. 137: 69 Law Ed. 884, at pp. 888, 889 it was observed, that the basis of classification was

“not open to objection unless it precludes the assumption that the classification was made in the exercise of legislative judgment and discretion”;

and this passage was adopted in — ‘Swiss Oil Corporation v. Shanks’, (1927) 273 U.S. 407: 71 Law Ed. 709 at p. 714. In — ‘Metropolitan Casualty Insurance Co. v. Brownell’, (1935) 294 U.S. 580: 79 Law Ed. 1070, it was observed:

“That Courts may not declare a legislative discrimination invalid, unless viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators”.

(26) It is argued on the basis of these observations that the presumption in favour of the validity of legislative classification could be made only when the Legislature applies its mind to it and that such presumption is precluded when the classification is proved to have been made by the rule making authority. But the point in controversy in these cases was not the validity of classification made by the Administration in contradistinction to one made by the Legislature. The question actually under consideration was how far classification made by a statute could be impugned as denying equal protection, without any differentiation between classification made in the statute itself and classification made by the Administration acting under statutory powers.

The legislative knowledge and experience referred to in these observations would include in the context not merely the knowledge and experience of the legislators but also of the members of the administrative body functioning under the legislation. It is worthy of note that in all the three decisions cited above, the validity of classification was upheld. It is well-settled in America that the power to make classification could be exercised not only by the Legislature but also by administrative bodies acting under the Act. In — ‘Bradley v. Richmond’, 227 U.S. 477: 57 Law Ed. 603 an Ordinance imposed a tax on the conduct of various businesses and a power of classifying them was granted to a committee which imposed different rates on different classes of bankers. It was held that the classification did not offend the provision of equal protection of the laws. In — ‘New York Rapid Transit Corporation v. City of New York’, (1938) 303 U.S. 573: 82 Law Ed. 1024. Reed, J. observed as follows:

“No question is or could be made by the Corporation as to the right of a state or a municipality with properly delegated powers to enact laws or Ordinance passed on reasonable classification of the objects of the legislation or the persons whom it affects”.

(27) In — ‘Concordia Fire Insurance Co. v. Illinois’, (1934) 292 U.S. 535: 78 Law Ed. 1411, the presumption of validity of classification was stated to be applicable not merely to legislative but also official action. In the present case, there is the additional circumstance already referred to that under Section 3 (4) the Rules had to be, and were in fact, approved by a resolution of the Legislative Assembly and the classification can, therefore, be properly described as made with the knowledge and experience of the legislators.

(28) And above all, there is the fact that the Madras General Sales Tax Act is a measure of taxation and in respect of taxing statutes, the Legislature enjoys wide powers of classification. It has the power to determine which class of persons or properties shall be taxed and such determination is not open to question on the ground that the tax is not levied on all persons or on all properties.

A State does not have to tax everything in order to tax something. It is allowed to pick and choose districts, objects, persons, methods and even rates for taxation, if it does so reasonably”.

(Willis on Constitutional Law, page 587.)

If it is competent to the Legislature to select some commodities and impose tax on them, such imposition is not open to attack on the ground that it is not made on all commodities. A law imposing a tax only on the sale of hides and skins and making the purchaser liable therefor, could not be challenged under Article 14 on the ground that purchasers of other commodities were not also taxed. If among the purchasers of hides and skins a differentiation was made without a rational basis therefor, different considerations would arise. Here, there is one law of taxation made applicable to all purchasers in the same trade and such a measure is not open to attack under Article 14. At any rate as observed in — ‘Madden v. Kentucky’, (1940) 309 U.S. 83: 84 Law Ed. 590 (593):

“In taxation even more than in other fields Legislatures possess the greatest freedom in classification. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it”.

and that burden has not been discharged by the petitioners.

(29) Considerable reliance was placed for the petitioners on the decision of the Supreme Court in — ‘State of West Bengal v. Anwar Ali Sarkar’, (1952 S. C. J. 55) in which it was decided by a ma-



majority that Section 5 (1) of the West Bengal Special Courts Act X of 1950 was void as being repugnant to Article 14. Under that section, power was conferred on the Government to constitute special Courts and to direct such offences or classes of offences or cases or classes of cases as the Government might order in writing, to be tried by such Courts. The procedure prescribed for the trial of cases before the Special Courts was different from that which is prescribed by the Criminal Procedure Code. The question was whether the power conferred on the Government under Section 5 (1) was discriminatory and opposed to Article 14. It was held that it was.

A reading of the judgments shows that the controversy was not so much about the principles applicable as to the application of the principles to the facts of the case. This would be clear from the judgments of the Supreme Court in — *Kathi Raning Rawat v. State of Saurashtra*, 1952 S. C. R. 435. The statute that was in question in that case was the Saurashtra State Public Safety Ordinance, LXVI of 1949. Sections 9, 10 and 11 of the Ordinance proceeded very much on the lines of the W. Bengal Special Courts Act; it empowered the Government to establish Special Courts and to direct offence to be tried by that Court according to a special procedure prescribed by the Act.

But there was one fundamental difference between the West Bengal Special Courts Act and the Saurashtra State Public Safety Ordinance. Under the latter, the Government had the power to direct only classes of offences or classes of cases to be tried by the Special Court, whereas in the former the power could be exercised with reference to individual cases. The Court held by a majority that the Saurashtra State Public Safety Ordinance was valid because the power to transfer cases to the Special Court could be exercised only with reference to classes of cases and that therefore there was classification such as would take the statute out of the operation of Article 14. Applying these principles to the provisions of the Madras General Sales Tax Act and the Rules, we are unable to agree with the petitioners that they offend Article 14 of the Constitution.

(30) (4) It is finally contended that the Rules framed under the Act do not properly carry out the policy laid down therein and they are even inconsistent therewith and they are therefore void. To appreciate the true position, it is necessary to examine the scheme of taxation which has been adopted in the rules with reference to untanned hides and skins. As already mentioned, these articles are much in demand in foreign markets and their export forms one of the main items in the foreign trade of this State. It also appears that this State enjoys considerable natural advantages for carrying on the business of tanning because the 'avaram bark' which is specially suited for tanning grows in plenty in this State. The course of business appears to be that untanned hides and skins are acquired locally or by import from other states and are either tanned here or exported to foreign countries for tanning.

In broad outline, the scheme of taxation adopted by the Rules is to levy the tax at the stage when the articles are tanned in the State or exported to foreign countries for tanning. Thus under R. 4 (2) (c) when a licensed tanner purchases untanned hides and skins for tanning, the amount for which he purchases the goods is to be included in his turnover and he is taxed thereon; and under R. 4 (2) (d) when a licensed dealer purchases untanned hides and skins for export the amount for which he purchases would be included in his turnover and he would be taxed thereon. Then comes

R. 16 which has come in for considerable criticism. R. 16 (2) fixes in accordance with R. 4 the points of taxation at the stage of tanning or at the stage of export. But then, it limits the operation of this rule to sales by licensed dealers. It is this limitation that furnishes the ground for attack on the rules. To understand the objection it will be useful to analyse the possible cases which might arise on the application of R. 16 (2).

Taking first the case of hides and skins which are tanned within the State, four possible situations might arise. There might be a sale by a licensed dealer either to a licensed tanner or to an unlicensed tanner; or there might be a sale by an unlicensed dealer either to a licensed tanner or to an unlicensed tanner. When the sale is by a licensed dealer, R. 16 (2) (i) provides for a tax being levied on the tanner whether he is licensed or unlicensed. But where the sale is by an unlicensed dealer, there is a difference in the incidence of taxation. If the sale is to a licensed tanner, then under R. 4 (2) (c) the purchaser has to pay the tax. But where the sale is to an unlicensed tanner R. 4 (1) will apply and the tax will fall on the seller. R. 16 (5) provides that sale by dealers other than licensed dealers will be "liable to taxation on each occasion of sale". Under this Sub-clause when there are successive sales by unlicensed dealers the tax will be leviable on such occasion of sale and that will be inconsistent with S. 5 (vi) which provides for taxation at a single point.

(31) Likewise when untanned hides and skins are exported, the last purchaser will be liable under R. 16 (2) (ii) whether he is a licensed dealer or unlicensed dealer, if he purchases from a licensed dealer. But if he purchases from an unlicensed dealer, but is himself a licensed dealer, he will be liable to pay the tax under R. 4 (2) (d). If there is a sale by an unlicensed dealer to an unlicensed dealer who exports the goods on whom does the tax fall? Under R. 4 (1) it is to be borne by the seller. Such a case will fall within the mischief of R. 16 (5), if there are successive sales.

(32) Now the contention of the petitioners is that where there are sales by unlicensed dealers to unlicensed tanners or unlicensed dealers, there is the possibility of multiple taxation and that would be in violation of S. 5 (vi). It is not disputed on behalf of the Government that R. 16 (5) is repugnant to S. 5 (vi). It must therefore be held to be 'ultra vires'. But this can bring no relief to the petitioners, as they are all licensed tanners and are in no manner hurt by the operation of R. 16 (5). This was conceded by the learned Advocate for the petitioners.

(33) Another contention against the validity of the rules was founded on the language of the forms which are prescribed under the Rules for making returns as provided in R. 15. Form A-4 is prescribed for tanners and it is intended to apply to the imposition of tax at the stage of tanning. Form A-5 is prescribed for dealers and is intended to apply for imposition of tax at the stage of export. In Form A-4, the third column is headed "amount for which hides and skins were purchased for tanning by the assessee". The criticism of the petitioners is based on the words "purchased for tanning". Their contention is that after purchasing hides and skins for tanning, the tanner might change his mind and sell them to a dealer and after successive sales those goods might be exported in which case the last purchaser will also be liable to pay the sales tax. The goods are thus taxed in the first instance when they are exported without having been tanned.

This, it is argued, is multiple taxation & opposed to S. 5 (vi). But when the matter is closely examined



it will be found that there is no substance in this objection. When a tanner purchases the goods, he himself makes a return stating the amount for which he purchased hides and skins for tanning. If the goods are actually tanned, then no further liability for tax will arise. But if the tanner instead of tanning the goods sells them to the dealer, he is entitled under R. 15 (5) to deduct the purchase price paid for those goods in the return for the next month or to get a refund of the excess. Thus though there was initially a purchase by a tanner, when once he sells his untanned goods, he occupies the position of a dealer and he will not be liable under R. 16 (2)(i) and the matter will be governed by R. 16(2) (ii). Thus there is no infringement of S. 5 (vi) which provides for taxation on a single point.

(34) It is also contended that it is wrong on principle that a tax should be levied before it is finally determined; that under S. 3 (2) of the Act the assessment should be only on the annual turnover and that therefore, R. 15 (2) which provides for advance payments of tax every month before the liability to pay arises, which is only when the goods are actually tanned or exported is unconstitutional and that the position is not altered by R. 15 (5) which provides for deduction of the amounts which turn out in the events not to have been payable in the returns for subsequent months. But advance payment of tax is a well-recognised feature in the mode of realising tax and the provision in R. 15 (2) is in accordance with the practice generally obtaining in this branch of the law. In discussing the validity of a somewhat similar provision in a taxing statute of Southern Iowa, the Court observed:

"It is of course true that as the Report is required on the twentieth of the calendar month for transact one of the preceding months, there may at times be gasoline received in the month covered by the report which has not been exported by the twentieth of the succeeding month; but the distributor is entitled to a credit for such exportation in his report made in the next month, and the mere fact that he cannot claim an anticipatory credit for gasoline not yet exported, but intended so to be, seems to us to be too slight a burden to be of any moment, or to raise a substantial constitutional question".

—*Monomotor Oil Co. v. Johnson*, (1934) 292 U. S. 86; 78 Law Ed. 1141 (1148). The attack on R. 15 (2) must accordingly fail. It may be added that this contention is of academic interest so far as the petitioners are concerned, as it is admitted by them that they tanned all the goods purchased by them for tanning.

(35) Lastly, it was argued that the rules make a distinction between licensed dealers and unlicensed dealers and that is an arbitrary distinction repugnant to Art. 14. A classification of merchants into those who take out licences and those who do not is one resting on a rational basis and must be upheld. Moreover, if it is a discrimination, it is one in favour of those who take out licences and against those who do not and it is difficult to see how the petitioners who are licence holders can make a complaint of it.

(36) In the result it must be held that the provisions of the Madras General Sales Tax Act and the Rules except R. 16 (5) are intra vires and valid and not obnoxious to Art. 14. These petitions must accordingly be dismissed with costs.

(37) Before concluding, we think it desirable to observe that some of the difficulties and anomalies which have been shown to exist in the working of the Act could be avoided by making it compulsory that all tanners and dealers should take out

licences and this is a matter which should engage the attention of the Government.

(38) RAJAMANNAR C. J.: I agree and have nothing to add.

A/V.R.B.

Petitions dismissed.

**\*\*A.I.R. 1953 MADRAS 116 (Vol. 40, C. N. 36)**

RAJAMANNAR C. J. AND VENKATARAMA AYYAR J.

C. Govindarajulu Naidu & Co., Petitioners v. State of Madras, represented by the Revenue Secretary and another, Respondents.

Writ Petn. No. 227 of 1952, D/- 9-9-1952.

**\*\* (a) Constitution of India, Art. 286(1)(b) and (2) — "In the course of export" — Meaning of — Sales or purchases having no direct connection with goods exported — Power of States to impose tax thereon.**

The decisions on the export and import clause in the American Constitution do not support the contention that an export must be construed as including purchases prior to the transaction under which the goods are exported. Similarly, the authorities on the commerce clause so far from supporting the contention that export should be deemed to include the chain of transactions preceding it clearly establish that immunity from taxation under the commerce clause should be narrowly construed so as to limit it to the period between the actual commencement and termination of inter-state commerce. American case law considered. (Paras 15 & 19)

The words "in the course of export" in Art. 286 cannot bear the same meaning as "for the purpose of export." In their natural meaning the words "in the course of export" would have a more restricted operation than the words "for the purpose of export." Quite obviously the words "in the course of" have been suggested by the decisions of the American Courts on the commerce clause. The object of Art. 286(2) is clearly to prevent States from interfering with the free flow of commerce in the country by erecting barriers of taxation. That was precisely the object of the commerce clause in America. Whether the goods are in the course of transit is the paramount question to be decided under the commerce clause. It is this conception that appears to have been adopted in the words "sale of goods where it takes place in the course of inter-state trade." These words limit the prohibition on the power of the State to impose tax on sales only where they are the subject-matter of inter-state commerce. The power of the State to tax sales before the inter-state commerce commences and after it ends is left untouched. In this view, the power of the States to impose tax under Art. 286(2) would be of the same character and extent as the power of the States in America in relation to the commerce clause. (Para 20)

It would be in accordance with sound rules of construction to put the same meaning on the words "in the course of" occurring both in Article 286(1)(b) and in Art. 286(2). Thus understood the prohibition under Article 286(1)(b) will begin to operate only from the time when the goods exported begin their international journey



and it will cease when that journey ceases. In other words, the prohibition is limited to the period covered by the actual exportation or importation of the goods. The power of the State to impose tax at any stage before or after is not affected.

(Para 21)

In American law, the commerce clause and the export and import clause operate differently on the power of the State to impose tax. While under the commerce clause the States have plenary powers of taxation subject only to the powers of the Congress to regular inter-state commerce, in the case of the export and import clause, it is a total want of jurisdiction. It would appear that the intention of the framers of the Constitution of India was to discard this distinction and enact one law for both foreign and inter-state trade and that they chose to adopt the law relating to inter-state commerce in America as furnishing a basis for reconciling the competing demands of both the union to control and regulate commerce, inter-state and foreign, in the best interest of the country, and of the States, to raise revenue on transactions, which are rendered possible by the protection afforded by the States.

(Para 22)

It must accordingly be held that both in Arts. 286(1)(b) and 286(2) the power of the State to impose a tax on export or import or inter-state trade or commerce is taken away only in respect of sales or purchases made directly in relation to the goods which are the subject-matter of transportation either in inter-state or international commerce, whether such sales take place prior to the commencement of the transport or during its progress. The prohibition does not extend to sales or purchases which have no direct connection with the goods which are exported.

(Para 24)

**(b) Constitution of India, Art. 286(1)(b) — Purchase of goods in Pakistan — Transport of goods in Madras — Liability of purchaser to be taxed under Madras General Sales Tax Act — (Sales Tax — Madras General Sales Tax Act (9 of 1939) S. 3).**

Unless the goods are in transit under a contract between two persons in two different countries, entered into either at the commencement of the transport or during its progress, there can be no question of a sale or purchase in the course of import.

(Para 26)

The representatives of the petitioners used to go to Dacca, make the purchases there, pay the price, and consign the goods from there to Madras. The contracts of purchases were completed in Dacca, before the goods were put in transit; and what the petitioners did was merely to transport their own goods from Dacca to Madras. The petitioners having been assessed to sales tax under the Madras General Sales Tax Act,

Held that the transport by the petitioners of their own goods after purchase in Pakistan could not be brought under Art. 286(1)(b) as a purchase in the course of import, but that as the purchases were completed in Dacca, that would be outside the operation of the Madras General Sales Tax Act as that authorises a levy of tax

only on sales or purchases within the Province of Madras; and as the tax was imposed on the petitioners as purchasers, it must be held to be unauthorised.

(Para 26)

**\*\* (c) Constitution of India, Arts. 245(1), 246, 286(1) and Explanation and Sch. 7, List II Entries 92, and 54 — Power of State to tax, intra-state and inter-state sales — Contract of sale concluded in another State — Goods delivered in Madras — Liability for taxation under Madras General Sales Tax Act — (Sales Tax — Madras General Sales Tax Act (9 of 1939) Ss. 3 and 22).**

The power of a State to impose taxes is not conditioned on the subject-matter being wholly within its jurisdiction. The exercise of the power will be valid, if there is sufficient territorial connection with reference to the subject-matter. AIR 1948 PC 118 Foll.

(Para 27)

The effect of the Explanation to Art. 286(1) is to remove the limitation imposed by Art. 245 and Art. 286(1) on the power of a State to enact extra-territorial legislation and permit the State to levy sales tax on an extra-state sale, provided goods thereunder are delivered within the State. The Explanation should accordingly be construed as not taking away the positive powers of taxation conferred under Art. 246 and Entry No. 54 but as enlarging those powers in cases falling within the Explanation.

(Para 9)

Under the Constitution the States enjoy both a power under Entry 54 to tax sale and purchase of goods and a power under Entry 52 to tax goods on their entry into a local area, subject only to the limitation contained in Art. 286. There is no conflict between the power of States to tax sales under Entry 54 and the power to impose taxes on the use of goods to which the Explanation relates.

(Para 29)

The words "actual delivery" in the Explanation to Art. 286(1) can mean only physical delivery and not constructive delivery such as by transfer of documents of title to the goods. The whole object of the Explanation is to give a power of taxation in respect of goods actually entering the State for the purpose of use therein and it will defeat such a purpose if notional delivery of goods as by transfer of document of title to the goods within the State is held to give the State a power to tax, when the goods are actually delivered in another State.

(Para 30)

The result may be thus summed up: (1) The State has plenary powers of taxation over intra-State sales. (2) The State has no power to impose a tax on extra-state sales. (3) In respect of inter-state sales, the State in which the contract is concluded is the only State which has the power to impose a tax. (4) Where goods are delivered for consumption in a particular State, that State has the power to impose a use tax or a purchase tax thereon notwithstanding that the transaction of sale is extra-state.

(Para 31)

Thus where purchases are made in another State by a person living in Madras and the documents of title are received by post in Madras, or the price is paid to the banks in Madras against delivery of documents of title and the contracts in respect



of the sales are concluded in the former State, they will be extra-State sales not liable for taxation under the Madras General Sales Tax Act. If however, the goods are actually delivered in Madras, that will confer on the State of Madras a power to tax the goods under the Explanation to Art. 286(1)(a) which has become incorporated in the Madras General Sales Tax Act by the Adaptation of Laws (Fourth Amendment) Order, 1952.

(Para 32)

(d) Constitution of India, Art. 286(1), Explanation — "Consumption" — Meaning of.

The word "consumption" in the Explanation cannot be understood in the limited sense of eating but in the wider sense of using.

(Para 33)

K. Rajah Iyer and C. Venugopalachari, for Petitioners; V. K. Thiruvengkatachari, Advocate-General and V. V. Raghavan, for Govt. Pleader with him, for the State of Madras.

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VENKATARAMA AYYAR J.: This petition raises substantial questions as to the interpretation of Article 286 of the Constitution. The petitioners are merchants carrying on business in the City of Madras as tanners and exporters of tanned hides and skins. This petition arises out of proceedings taken by the State of Madras under the Madras General Sales Tax Act for assessing the tax payable by the petitioners in respect of their dealings for the year 1950-51. The facts as stated before us by agreement of both the parties are that during this period

the petitioners purchased 12,123 pieces of hides and skins from Messrs. Abdul Gani & Company, Dacca for a price of Rs. 1,04,595-4-6; 74,000 pieces from merchants in Calcutta and Cawnpore for a price of Rs. 7,18,042-2-9; and 3,694 pieces locally for a price of Rs. 43,575-0-10, in all 89,817 pieces for a price of Rs. 8,66,212-8-1.

During the same period the petitioners themselves directly exported to foreign countries 7,250 pieces on C.I.F. contracts for a price of Rs. 1,67,515-15-1; sold to dealers in Madras 60,627½ pieces for a price of Rs. 8,55,396-1-0; and sold locally 22,807 pieces for a price of Rs. 2,76,099-4-11, in all 90,684 pieces for a price of Rs. 12,99,011-5-0. It must be stated that with reference to the sale of 60,627½ pieces to local dealers, the petitioners claimed that the goods covered by these sales had in fact been exported to foreign countries, while the respondent stated that it could not be definitely ascertained whether those pieces were ultimately exported or not.

(2) On these facts the point in dispute before the taxing authorities was whether the petitioners were liable to pay sales tax on Rs. 8,66,212-8-1 under Rule 16 (2) (i) and (ii) of the Madras Turnover and Assessment Rules as purchasers of rawhides and skins which were either tanned or exported by them. The petitioners claimed that the goods which they had purchased were all exported to foreign countries either directly or through other dealers and that they must in consequence be regarded as export exempt from taxation under Art. 286 (1) (b). The Deputy Commercial Tax Officer, Moore Market Division rejected this contention by his order dated 14th August, 1951, and stated that

"the dealers are not found eligible for any relief under Article 286 of the Indian Constitution as they pay tax on the purchase value of untanned hides and skins bought for tanning, and that all the tanned goods tanned by them and got from others were sold to other dealers in the State, which stages are not one in the course of export outside the Indian Territory."

On this basis, the tax payable was assessed at Rs. 14,936-2-8 and after deducting advance payments amounting to Rs. 6,702-7-9, a demand was made for the balance of Rs. 8,233-10-11. The petitioners preferred an appeal against this order to the Commercial Tax Officer, Madras North, and in the memorandum of appeal they stated their ground of exemption as follows:

"We have to appeal to you that we have sold goods to the exporters at Madras who have ultimately exported the goods outside India which fact could be verified from their records. For many of the items we have clear proof of the goods being exported by documents and bills which clearly proves that our goods were exported."

In a further statement filed by them on 29th September, 1951, they again stated that "out of the total, we have sold to exporting houses for the purpose of export outside India Rs. 10,22,912-0-1." On 23rd February, 1952, the Commercial Tax Officer, North Madras, dismissed the appeal on the ground that "the appellants sold to exporters or themselves exported through commission agents hides and skins tanned by them." That is to say, it was held that the petitioners did not directly export the goods themselves, but only sold them to dealers who exported them; or that they tanned the



rawhides and skins and exported them as tanned goods and therefore, they were liable as purchasers of raw hides and skins and not as exporters of tanned goods.

It should be stated that under the Madras Act VI of 1951 which came into force on 20th April, 1951, the petitioners had a right to prefer an appeal against the order of the Commercial Tax Officer dated 23rd February, 1952, to the Sales Tax Tribunal and in fact on 17th March, 1952, they wrote to the Deputy Commercial Tax Officer to stay the collection on the ground that they were appealing to the Tribunal. But no such appeal was preferred and instead, the present writ has been filed challenging the validity and correctness of the order of assessment. In this petition the following questions were raised for our determination:

- (1) Is the Madras General Sales Tax Act 'ultra vires' of the powers of the Madras Legislature on the ground that Entry No. 48 in the Provincial List in the 7th schedule to the Government of India Act of 1935 authorised tax only on sales and not on purchases?
- (2) Is the imposition of tax on the purchaser by the Turnover and Assessment Rules void on the ground that the Legislature had unconstitutionally delegated its functions to the executive?
- (3) Is the Madras General Sales Tax Act void as repugnant to Article 14 of the Constitution on the ground that it discriminated against purchasers in some trades while taxing sellers generally?
- (4) Are the Turnover and Assessment Rules framed under the Madras General Sales Tax Act void on the ground that they are repugnant to the parent Act?
- (5) Whether the imposition of tax is in contravention of Article 286 of the Constitution and, therefore, illegal?

(3) We have held in Writ Petn. Nos. 21 and 41 of 1952 that this Court would not entertain in proceedings by way of writ such objections to the assessment of the sales tax as could have been urged before the Tribunals constituted under the Act and that only objections relating to the validity of the Act would be open to the petitioners. In this view, the petitioners would be entitled to urge objections (1) to (4) aforesaid. As for objection No. (5), we should decline to entertain it in accordance with our judgment in Writ Petition Nos. 21 and 41 of 1952. But, Mr. K. Rajah Ayyar pressed upon us that it would be inconvenient that some questions should be decided in writ and others before the Sales Tax Tribunal and that it would be more satisfactory that the entire question should be disposed of by us. The learned Advocate-General also invited us to decide the issues raised with reference to Article 286 as they go to the root of the matter and a decision thereon would settle all the controversies. We accordingly proceed to deal with the various contentions.

(4) This petition was heard along with Writ Petn. Nos. 21 and 41 of 1952 in which questions (1) to (4) herein were the sole points for determination and after hearing counsel in all these petitions on those questions, we held therein that the Madras Act IX of 1939 was 'intra vires' of the powers of the Provincial Legislature, that it was not open to the objection that it was an unconstitutional delegation

by the Legislature of its functions to the executive, that it was not repugnant to Article 14 of the Constitution as being discriminative and that the Rules framed thereunder were valid excepting only Rule 16 (5). That Judgment will govern this petition also and the questions (1) to (4) herein must accordingly be answered against the petitioners.

(5) The substantial question that remains for determination is whether the imposition of tax in this case is in contravention of Article 286 of the Constitution.

(6) Article 286 of the Constitution so far as is material is as follows:

"286 (1). No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place (a) outside the State; or (b) in the course of the import of the goods into, or export of the goods out of, the territory of India.

EXPLANATION: For the purpose of sub-clause (a), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

(2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce:

Provided that President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of this Constitution shall, notwithstanding that the imposition of such tax is contrary to the provisions of this clause, continue to be levied until the thirtyfirst day of March 1951."

(7) It will be seen that Article 286 deals with three classes of cases: (1) Where the sale or purchase takes place outside the State which must mean the State imposing the tax, and according to the explanation, sale or purchase must be deemed to take place in that State where as a direct result of the sale the goods are delivered for the purpose of consumption in that State; Article 286 (1) (a) and Explanation: (2) Where the sale or purchase takes place in the course of the import of goods into or export of goods out of India; Article 286 (1) (b); and (3) Where the sale or purchase takes place in the course of inter-State trade or commerce with a proviso that the operation of this Rule might be suspended by the President until 31st March, 1951; Article 286 (2). In the three cases aforesaid, the power of the State to impose a tax is taken away. The third category mentioned above might be left out of account as the assessment in question relates to the period 1950-51 and by virtue of the Adaptation of Laws (Fourth Amendment) Order, 1952, Article 286 is to come into operation in Madras only after 31st March, 1951.

(8) The questions that have been argued before us are:

(1) The purchase of hides and skins by the petitioners in Dacca in Pakistan and in the States of West Bengal and Uttar Pradesh as



also locally was all for the purpose of export to foreign countries and that, therefore, they are exempt from taxation on the ground that it was made in the course of export and that Article 286 (1) (b) gives to such purchases immunity from State taxation;

(2) If the above contention fails, the purchase of 12,123 pieces from Dacca for a price of Rs. 1,04,595-4-6 must be considered as purchase in the course of import into India and that it is, therefore, exempt from taxation under Article 286 (1) (b).

(3) The purchases in Calcutta and Cawnpore were outside the State of Madras and therefore not liable for taxation in view of Article 286 (1) (a). And

(4) lastly, it was argued that the Turnover and Assessment Rules framed as they were in 1939 mixed up indiscriminately sales which are liable to be taxed under the Constitution and sales which are not, and that, therefore, they must be rejected in their entirety.

#### QUESTIONS 1 AND 2:

(9) It will be convenient to consider these two questions together as their determination depends on the meaning to be given to the words "sales or purchases in the course of export or import." The learned Advocate-General contends that those words must be limited to the sales or purchases under which the goods are actually exported or imported, whereas Mr. Rajah Ayyar contends that those words must be given an extended significance as including not merely the particular transaction under which the export or import of goods takes place, but all the chain of transactions which are entered into either with the object of exporting or importing the goods or with the knowledge that they would be exported or imported. He argues that for this purpose, we must have regard to the nature of the goods which are exported or imported, the usual course of business and the exigencies of the trade in those goods and on a consideration of all the circumstances it must be decided whether the transactions in respect of which immunity is claimed under the Article are so intimately connected with the actual export or import as properly to be considered as forming part of it.

It is stated that the rawhides and skins of South India enjoy considerable popularity in world markets under the name of East India Kips, that there is considerable demand for it in foreign countries, that the export of hides and skins is one of the main items of the foreign trade of this State, that they are generally purchased with the object of being exported and that it would therefore be legitimate to treat the chain of sales culminating in the export as forming one transaction. It is accordingly contended that all the purchases of raw hides and skins wherever made were all made in the course of export and therefore, not liable for taxation. Authority for this extended construction was sought in American decisions, in Article 1, section 8 (3), section 9 (5), and section 10 (2).

(10) Section 8 (3) is as follows:

"The Congress shall have power to regulate commerce..... among the several States." This is familiarly known as the 'commerce clause.'

(11) Section 9 (5) is as follows:

"No tax or duty shall be laid on articles exported from any State."

(12) This is a restriction on the power of the Congress. Section 10 (2) is in these terms:

"No State shall, without the consent of the Congress, lay any imposts and duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

These two provisions are generally referred to as the export and import clause and as it is on the authorities on this clause that the petitioners mainly rely in support of their position; they will be examined first. In — '*Brown v. The State of Maryland*', (1827) 12 U S 419: 6 Law Ed. 678 a statute of Maryland provided that all importers of foreign articles should obtain a licence on payment of a prescribed fee before they sold the goods and the appellant was convicted under the Act for selling imported goods without taking out a licence. The Court held that this was in substance a tax on imports and therefore, opposed to section 10 (2). In answer to a contention that as soon as the goods entered the State they ceased to be imports and were therefore liable to be taxed by the State like other goods within its jurisdiction, the Court observed:

"While we admit that there must be a point of time when the prohibition ceases and the power of the State to tax commences, we cannot admit that this point of time is the instant that the articles enter the country... It is sufficient for the present to say generally that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has perhaps lost its distinctive character as an import and has become subject to the taxing power of the State; but while remaining the property of the importer in his ware-house in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."

In — '*Anglo-Chilean Nitrate Sales Corporation v. Alabama*', (1933) 288 US 218: 77 Law Ed 710, the appellant was a Corporation carrying on the business of importing nitrate from Chile and selling it to purchasers in its original packages. In holding that a tax by the State of Alabama on these sales was obnoxious to section 10 (2) as amounting to a tax on imports the Court observed:

"The right to import the nitrate included the right to sell it in the original bags while it remained the property of appellant and before it lost its distinctive character as an import. State prohibition of such sales would take from the appellant the very rights in respect of importation that are conferred by the Constitution and laws of the United States."

It is argued on the basis of these two decisions that if import does not cease on the entry of the goods into the country but extends to the stage of their first sale, export should likewise be held to begin not when the goods leave the country, but when they are purchased with the object of being exported and that therefore the purchase made by the petitioners with the object of export must be held to be purchase which "takes place in the course of export." It is conceded by the petitioners that no authority on the export and import clause has laid down such a proposition.

The cases cited by them with reference to export. — '*Fair Bank v. United States*', (1901) 181 U S 283: 45 Law Ed. 862, — '*United States*



v. Hvoslef', (1915) 237 U S 1: 59 Law Ed. 813, and — 'Thames and Mersey Marine Insurance Co. v. United States', (1915) 237 U S 19: 59 Law Ed. 821, do not bear on this point. They merely decided that to levy a stamp duty on documents which are considered according to mercantile usage as forming part of the documents of title relating to the exported goods, would in substance be to tax the goods themselves and that would be in contravention of section 9 (5). In — 'Fair Bank v. United States', the duty was levied on foreign bills of lading; in — 'United States v. Hvoslef', it was imposed upon charter-parties which were exclusively engaged in the carriage of cargo to foreign ports, and in — 'Thames and Mersey Marine Insurance Co. v. United States', it was upon policies insuring cargo against marine risks during the voyage to foreign ports.

(13) On the other hand, the decisions in — 'Turpin v. Burgess', (1886) 117 U S 504: 29 Law Ed. 988, — 'Spalding v. Edwards', (1923) 262 U S 66: 67 Law Ed. 865 and — 'Empresa Siderurgica, S. A. v. Merced', (1949) 337 U S 154: 93 Law Ed. 1276, point to a contrary conclusion.

(14) In — 'Turpin v. Burgess', (1886) 117 US 504: 29 Law Ed. 988, the tax was levied on manufactured tobacco which was intended for export. At the time of the imposition, the goods were in the factory. It was held that the tax was not on exports because it was laid before the goods had left the factory. In — 'Spalding v. Edwards', (1923) 262 U S 66: 67 Law Ed. 865, the appellants had sold goods to a firm in Venezuela through commission agents in New York. The appellants entrusted the goods to a common carrier, the consignment being made deliverable to the firm at Venezuela. But the sale documents were drawn up in the name of the commission agents who paid the price after the appellants had entrusted the goods to the common carrier. In form the transaction was one of sale by the appellants to the commission agents and not to the Venezuela firm.

The State of New York claimed the right to impose a tax on the sale on the footing that the sale was to the commission agent and that at that stage the export had not begun and that therefore section 10 (2) did not apply. It was held that notwithstanding that on the documents the transaction was one of sale between the appellants and the Commission agents in substance the export had begun when the goods had been entrusted to the common carrier and that section 10 (2) would therefore operate on such goods and the document of sale between the appellants and the commission agents did not affect the matter. If the contention of the petitioners is well-founded, a simple answer to the claim of the State would have been to hold that even on the basis that the sale was by the appellants to the commission agents, that was impressed with the character of export on the principle laid down in — 'Brown v. The State of Maryland', (1827) 12 U S 419: 6 Law Ed. 678, and that therefore the sale could not be taxed having regard to section 10 (2).

'Empresa Siderurgica, S. A. v. Merced', (1949) 337 U S 154: 93 Law Ed. 1276, is a recent decision in which the scope of the export and the import clause came up again for consideration. A corporation in Columbia purchased a cement plant in California with a view to export it to Columbia. The factory was being gradually dismantled and the materials trans-

ported to Columbia. During the years of assessment, a portion had been dismantled and the rest was in the process of being dismantled. A tax having been levied on the property at that stage, the question arose whether it could be considered as export for purposes of section 10 (2). Douglas, J., observed:

"It is not enough that there is an intent to export, or a plan which contemplates exportation, or an integrated series of events which will end with it. The tax immunity runs to the process of exportation and the transactions and documents embraced in it..... It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use. Nothing less will suffice."

It was accordingly held that though there was the intention to transport the materials to Columbia and that was in the process of being carried out, nevertheless as the foreign journey had not actually begun, there was no export within the meaning of section 10 (2). This decision is direct authority against the contention of the petitioners that a purchase preceding the actual export is part of it. Though the purchase was for the purpose of export, it was held that that was not sufficient to give immunity from taxation and that section 10 (2) would not come into operation until the goods were put in transit.

(15) Apart from authorities, an examination of the grounds on which the decisions in — 'Brown v. The State of Maryland', (1827) 12 U S 419: 6 Law Ed. 678 and — 'Anglo Chilean Nitrate Sales Corporation v. Alabama', (1933) 288 U S 213: 77 Law Ed. 710 rest also show that they are incapable of application to sales preceding exports as contended by the petitioners. One ground for holding that import of goods extends to the first sale is that the object of importing them is to sell them in the country of import and that therefore the import must be held to continue until they reach the hands of the purchaser. In the — 'Licence cases', (1847) 12 Law Ed 287 at p. 288. Taney, C. J., stated that while imported articles

"are in the hands of the importer for sale... they may be regarded as merely 'in transitu' and on their way to the distant cities, villages and country for which they are destined and where they are expected to be used and consumed and for the supply of which they were in truth imported."

Black J., observed in — 'Hooven v. Evatt', (1944) 324 U S 652: 89 Law Ed. 1252:

"The Court in — 'Brown v. Maryland', was in reality treating goods in the hands of an importer for sale as though they were still in transit until the first sale had been made."

This reasoning will not apply to a transaction which takes place before the transit begins. Another reason assigned for this rule is thus stated by Marshall, C. J., in — 'Brown v. The State of Maryland':

"The counsel for the plaintiffs in error contended that the importer purchases, by payment of the duty to the United States, a right to dispose of his merchandise, as well as to bring it into the country, and certainly the argument is supported by strong reason, as well as by the practice of nations, including



our own. The object of importation is sale; it constitutes the motive for paying the duties; and if the United States possess the power of conferring the right to sell, as the consideration for which the duty is paid, every principle of fair dealing requires that they should be understood to confer it."

That is to say, when an importer pays to the United States customs duties on the goods imported he thereby purchases a right to sell the goods free from any further taxation and that therefore the States cannot impose a tax on those goods. This reasoning again will be inapplicable to a purchase preceding the export and apart from that, there is also high judicial authority in India for holding that this doctrine is inapplicable to the law of this country. In the — '*Province of Madras v. Paidanna and Sons*', 1942-5 F L J 61: 1942-2 Mad L J 327 at p. 336, Sir Maurice Gwyer, C. J., observed as follows:

"It does not appear to us that it would necessarily follow from the principle of the Maryland decision that in India the payment of customs duty on goods imported from abroad or the payment of an excise duty on goods manufactured or produced in India can be regarded as conferring some kind of licence or title on the importer or manufacturer to sell his goods to any purchaser without incurring a further liability to tax."

He also expressed himself strongly against the introduction of the doctrine of original packages into Indian law and observed:

"I should much regret if any contribution of mine to the elucidation of the problems which come before this Court were thought to have included the introduction of some kind of 'original package' doctrine and all the refinements and complications which that doctrine has brought in its train in the Courts of America."

Thus the decisions on the export and import clause do not support the contention of the petitioners that an export must be construed as including purchases prior to the transaction under which the goods are exported.

(16) We may now examine the authorities on the commerce clause. Section 8 (3) confers on the Congress the power to regulate inter-state commerce and as the Congress is supreme in respect of the powers delegated to it under the Constitution, any State legislation which encroaches on that field would be void. On the other hand, the States possess, subject to the powers delegated to the Congress and subject to such other limitations as are imposed by the Constitution, sovereign powers and the power of taxation is one of such powers which could be exercised, subject only to the limitations aforesaid. When, therefore, the validity of a taxing statute of a State is called in question as infringing section 8 (3), the point that arises for determination is, whether the impugned statute trespasses into the area of inter-state commerce and that in turn depends on where the region of inter-state commerce begins and where it ends. If the State legislation cuts in between those two points it will be struck down as unconstitutional. But subject to this, it will have full operation.

Thus, the discussion in the authorities on this subject is directed to ascertaining the points of commencement and of termination of the inter-state commerce. A number of authorities

has been cited before us on the question. It will be sufficient to refer to the more important among them. In — '*Coe v. Errol*', (1886) 116 U S 517: 29 Law Ed. 715 at pp. 718-719, timber standing in a forest in the State of New Hampshire was cut down with the object of exporting them to the State of Maine and the logs had in furtherance of this object been deposited on the riverside for the purpose of being floated down. The State of New Hampshire imposed a tax on the logs of wood and the question was, whether it was in contravention of section 8 (3). In negating this contention, Bradley, J., observed:

"Are the products of a State, although intended for exportation to another State and partially prepared for that purpose by being deposited at a place or port of shipment within the State, liable to be taxed like other property within the State? Do the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation? This is the precise question for solution..... There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination."

When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an 'entrepot' for that particular region, whether on a river or a line of railroad such products are not yet exports nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination or have started on their ultimate passage to that State. Such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another State or have been started upon such transportation in a continuous route or journey."

This authority lays down that the power of the State to tax properties within its jurisdiction is not taken away until the inter-state journey begins; and that the fact that the goods are intended for inter-state commerce, is not enough to deprive States of their powers of taxation. This is a principle that has been uniformly followed in the subsequent decisions. In — '*Mcgoldrick v. Berwind-White Coal Mining Co.*', (1940) 309 U S 33: 84 Law Ed 565 at pp. 572 & 575, the respondent which was a Corporation in Pennsylvania engaged in the production of coal challenged the validity of a New York legislation imposing a tax on the sales effected by it in New York. The respondent maintained an office in New York, obtained orders and for carrying them out imported goods and the local agent at New York distributed them to the purchasers. On these facts it was contended that the tax was illegal as levied on inter-state commerce. In negating this contention the Court observed that after the goods had come to rest in the State of New



York they were liable to be taxed like every other property within the State and that

"its only relation to the commerce arises from the fact that immediately preceding transfer of possession to the purchaser within the State, which is the taxable event regardless of the time and place of passing title, the merchandise has been transported in inter-state commerce and brought to its journey's end. Such a tax has no different effect upon inter-state commerce than a tax on the "use" of property which has just been moved in inter-state commerce..... or the familiar property tax on goods by the state of destination at the conclusion of their inter-state journey. — 'Brown v. Houston', (1885) 114 U S 622: 29 Law Ed. 257, — 'American Steel and Wire Co., v. Speed', (1904) 192 U S 500: 48 Law Ed. 538.

This Court has uniformly sustained a tax imposed by the State of the buyer upon a sale of goods, in several instances in the 'original packages,' effected by delivery to the purchaser upon arrival at destination after an inter-state journey, both when the local seller has purchased the goods extra-state for the purpose of resale and when the extra-state seller has shipped them into the taxing state for sale there. Respondent, pointing to the course of its business and to its contracts which contemplate the shipment of the coal inter-state upon orders of the New York customers, insists that a distinction is to be taken between a tax laid on sales made, without previous contract, after the merchandise has crossed the state boundary, and sales, the contracts for which when made contemplate or require the transportation of merchandise inter-state to the taxing state... But we think this distinction is without the support of reason or authority."

In the result, the taxation was held to be legal. The principle established in this case that the doctrine of original packages has no application to inter-state commerce had been already laid down in — 'Woodruff v. Parham', (1869) 75 US 123: 19 Law Ed. 382, and — 'Hinson v. Lott', (1869) 75 U S 148: 19 Law Ed. 387; and it has never been questioned.

(17) Considerable reliance was placed on behalf of the petitioners on the following decisions: — 'Robbins v. Taxing District of Shelby County', (1887) 120 U S 489: 30 Law Ed 694, — 'Dahnke-Walker Milling Co. v. Bondurant', (1921) 257 U S 282: 66 Law Ed 239, — 'Lemke v. Farmers' Grain Co.', (1922) 258 US 50: 66 Law Ed 458, — 'Shafer v. Farmers' Grain Co.', (1925) 268 U S 189: 69 Law Ed 909, — 'Real Silk Hosiery Mills v. Portland', (1925) 268 U S 325: 69 Law Ed 982, and — 'Currin v. Wallace', (1939) 306 U S 1: 83 Law Ed. 441. In — 'Robbins v. Taxing District of Shelby County', the appellant was carrying on within the State of Tennessee the business of soliciting orders for the sale of goods of the firm of Rose, Robbins and Company, of Cincinnati, in the State of Ohio, by exhibiting samples, a business known as that of a drummer. Under a law of Tennessee, drummers were required to take out before carrying on their business a licence on payment of the fees prescribed thereunder. The validity of this imposition was impugned on the ground that the drummer was engaged in the carrying on of inter-state commerce and that the State had no power to

burden it by any measure of taxation. This contention was upheld.

In — 'Dahnke-Walker Milling Co. v. Bondurant', the question was about the validity of a statute of Kentucky which prescribed various conditions under which Corporations of other States could do business in the State. As the business out of which the dispute arose was purchase of grain for inter-state commerce, it was held that the provisions of the Act amounted to an interference with that commerce, and were therefore void. In — 'Lemke v. Farmers' Grain Co.', North Dakota enacted a legislation requiring that the purchases of grains intended for transport to markets in Minnesota should be made only by persons holding a licence and imposed various restrictions in the matter of carrying on of that business. It was held that this was unconstitutional interference with the carrying on of inter-state commerce and was illegal. The decision in — 'Shafer v. Farmers' Grain Co.', is again on the validity of a North Dakota statute which introduced a compulsory system of licence and regulation with reference to the purchase of grains intended to be exported to other States. The Act was held to be unconstitutional.

In — 'Real Silk Hosiery Mills v. Portland', a statute of Oregon required licence to be taken from persons engaged in inter-state trade as a condition of their carrying on business. Following the decision in — 'Robbins v. Taxing District of Shelby County', the Court held that this was an unconstitutional interference with inter-state commerce. It will be noticed that in all the above cases the point for determination was whether the States could impose restrictions on the carrying on of inter-state commerce by requiring that a licence should be taken and imposing restrictive conditions.

These authorities do not bear directly on the question as to when transactions assume the character of inter-state commerce so as to be immune from taxation. The principle on which these decisions rest is that a State Law will be invalid, if it, to any extent, burdens inter-state commerce. Vide — 'Spector Motor Service v. O'Connor', (1951) 340 U.S. 602: 95 Law Ed. 573. In — 'Currin v. Wallace', the question was about the validity of a federal legislation providing for the regulation of the tobacco trade. The contention was that it related purely to intra-state commerce and was therefore unconstitutional. It was held that the purchase of goods in one State for transportation into another constituted inter-state commerce and was, therefore, within the regulatory jurisdiction of the Congress under section 8 (3).

(18) Our attention was also invited to decisions in which the question discussed was how far interruptions in the course of transport of goods could be regarded as terminating the journey so as to enable the States to impose a tax on the goods at that stage. Thus, in — 'General Oil Co. v. Crain', (1908) 209 U S 211: 52 Law Ed 754 oil which was shipped from Pennsylvania and destined ultimately for points in the States of Arkansas, Louisiana, and Mississippi was held not to be inter-state commerce when in the course of transit it was unloaded into tanks and barrels for the purpose of distribution at the places of destination. A tax laid on it was upheld as not being in violation of section 8 (3).



In — *Becon v. Illinois*, 227 U S 504: 57 Law Ed 615 at p. 620 it was decided that grain which was shipped from the Western States for delivery in the Eastern States ceased to be in transit, when it was stopped at Chicago and removed to the owner's grain elevator for inspection, weighment and assortment before being despatched to their destination. It was observed that the owner had "established a local facility in Chicago for his own benefit, & while through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the state in an assessment for taxation which was made in the usual way, without discrimination."

In — *Susquehanna Coal Company v. South Amboy*, 228 US 665: 57 Law Ed 1015 coal shipped from the State of Pennsylvania and landed at New Jersey and dumped into a coal depot was held liable for State taxation, although destined ultimately for ports in other States as there was something more than an incidental interruption of the continuity of the transportation through the State and there was "a business purpose and advantage in the delay." These authorities are relevant only as showing that the period during which the State loses its power to tax on the ground of inter-state commerce should be confined to the time when there is a continuous course of transit. In — *Minnesota v. Blasius*, (1933) 290 US 1: 78 Law Ed 131 the law relating to the power of the State to impose tax in relation to the commerce clause was thus summed up:

"Thus, the State cannot tax inter-state commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it. Similarly, the States may not tax property in transit in inter-state commerce ..... If the inter-state movement has not begun, the mere fact that such a movement is contemplated does not withdraw the property from the State's power to tax it. If the inter-state movement has begun, it may be regarded as continuing, so as to maintain the immunity of the property from State taxation, despite temporary interruptions due to the necessities of the journey or for the purpose of safety and convenience in the course of the movement ..... When property has come to rest within a State, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the State, or for shipment elsewhere, as his interest dictates, it is deemed to be a part of the general mass of property within the State and is thus subject to its taxing power."

(19) The above authorities on the commerce clause, far from supporting the contention of the petitioners that export should be deemed to include the chain of transactions preceding it clearly establish that immunity from taxation under the commerce clause should be narrowly construed so as to limit it to the period between the actual commencement and termination of inter-state commerce.

(20) Turning now to Article 286, the question is what is the exact import of the words "sale of goods where it takes place in the course of export or import" or "in the course

of inter-state trade." Mr. K. Rajah Ayyar argues that the words "in the course of export" are equivalent to "for the purpose of export" & that construction would take in not merely the last transaction under which the goods are actually exported but also the prior sales which were effected for the purpose of export or even with the knowledge that the goods will be exported. But when dealing with extra-state transactions, the Explanation to Article 286 (1) (a) enacts that the delivery must be "for the purpose of consumption."

And when two different expressions are used in the same context, the reasonable inference is that they refer to two different matters, and therefore, the words "in the course of export" cannot bear the same meaning as "for the purpose of export." In their natural meaning the words "in the course of export" would have a more restricted operation than the words "for the purpose of export." Quite obviously the words "in the course of" have been suggested by the decisions of the American Courts on the commerce clause. The object of Article 286 (2) is clearly to prevent States from interfering with the free flow of commerce in the country by erecting barriers of taxation. That was precisely the object of the commerce clause in America and, interpreting that clause, the decisions have established as already seen that the States enjoy full powers of taxation so long as they do not trespass into the region of inter-state commerce and that that region begins when the goods commence their inter-state journey and ends when they reach their destination.

Whether the goods are in the course of transit is the paramount question to be decided under the commerce clause. It is this conception that appears to have been adopted in the words "sale of goods where it takes place in the course of inter-state trade." These words limit the prohibition on the power of the State to impose tax on sales only where they are the subject-matter of inter-state commerce. The power of the State to tax sales before the inter-state commerce commences and after it ends is left untouched. In this view, the power of the States to impose tax under Article 286 (2) would be of the same character and extent as the power of the States in America in relation to the commerce clause.

(21) It has next to be noted that under Article 286 (1) (b) the prohibition on the power of the State to tax exports & imports is stated in precisely the same terms as in relation to inter-state commerce under Article 286 (2); and that is only in respect of sales or purchases which take place in the course of the import or the export of the goods. It would be in accordance with sound rules of construction to put the same meaning on the words "in the course of" occurring both in Article 286 (1) (b) and in Article 286 (2). Thus understood the prohibition under Article 286 (1) (b) will begin to operate only from the time when the goods exported begin their international journey and it will cease when that journey ceases. In other words, the prohibition is limited to the period covered by the actual exportation or importation of the goods. The power of the State to impose tax at any stage before or after is not affected.

(22) It may also be observed that in American law, the commerce clause and the export



and import clause operate differently on the power of the State to impose tax. While under the commerce clause the States have, as already mentioned, plenary powers of taxation subject only to the powers of the Congress to regulate inter-state commerce, in the case of the export and import clause, it is a total want of jurisdiction. The distinction between the two was thus stated in — *Richfield Oil Corporation v. State Board*, (1946) 329 U S 69: 91 Law Ed 80:

"The two constitutional provisions, while related, are not co-terminous. To be sure, a State tax has at times been held unconstitutional both under the Import-Export Clause and under the Commerce Clause. But there are important differences between the two. The invalidity of one derives from the prohibition of taxation on the import or export; the validity of the other turns nowise on whether the article was, or had ever been, an import or export. Moreover, the Commerce Clause is cast, not in terms of a prohibition against taxes, but in terms of a power on the part of Congress to regulate commerce..... As recently stated in — *McGoldrick v. Berwind-White Coal Mining Co.*, (1910) 309 US 33: 84 Law Ed 565, the law under the Commerce Clause has been fashioned by the Court in an effort 'to reconcile competing constitutional demands, that commerce between the States shall not be unduly impeded by State action, and that the power to lay taxes for the support of State Government shall not be unduly curtailed.'"

It would appear that the intention of the framers of the Constitution was to discard this distinction and enact one law for both foreign and inter-state trade and that they chose to adopt the law relating to inter-state commerce in America as furnishing a basis for reconciling the competing demands of both the union to control and regulate commerce, inter-state and foreign, in the best interest of the country, and of the States, to raise revenue on transactions, which are rendered possible by the protection afforded by the States.

(23) If that is the true meaning of Article 286, why asks Mr. Rajah Ayyar, should not the Legislature have simply enacted that the State shall not lay tax on exports or imports. But then that would have brought in the doctrine of original packages and it was clearly with a view, to avoid it and assimilate the law on the subject of the exports and imports to that on inter-state commerce that the language used in the American authorities on the construction of the commerce clause was adopted. Even so, argues Mr. Rajah Ayyar, the language used in Article 286 suggests a wider operation of the prohibition on the powers of the State to tax than would result on the construction adopted here. The language is, it must be conceded, somewhat involved but it is due to the fact that two different classes of transactions were clubbed together in one Article. If A in Madras sells goods to B in Calcutta and in performance of the contract consigns them to a common carrier, then from that stage the goods are in transit in inter-state commerce and the State loses its power of taxing the sale. That is a plain case under the inter-state commerce clause.

But not seldom does it happen that even before a contract is entered into with reference to goods A might consign them to his own

order or control in Calcutta and while the goods are actually in transit a transaction of sale might be concluded and completed by transfer of the relative documents of title. That transaction might be concluded at Madras. But nevertheless, the State of Madras will have no power to tax the sale as the sale takes place while the goods are in the course of inter-state commerce. It is the lumping up of these two kinds of transactions in a single provision that has resulted in a tangle in expression.

(24) It must accordingly be held that both in Articles 285 (1) (b) and 286 (2) the power of the State to impose a tax on export or import or inter-state trade or commerce is taken away only in respect of sales or purchases made directly in relation to the goods which are the subject-matter of transportation either in inter-state or international commerce, whether such sales take place prior to the commencement of the transport or during its progress. The prohibition does not extend to sales or purchases which have no direct connection with the goods which are exported.

(25) In the light of this conclusion we may examine the facts relating to the first question. 7,250 pieces of hides and skins were exported directly by the petitioners under C.I.F. contracts. That would clearly be exports not liable for taxation. The Commercial Tax Officer held that the goods which had been purchased as raw hides and skins were tanned by the petitioners in their own tannery and exported as tanned hides and skins. The petitioners contend that what they did was not tanning but merely curing the hides and skins so as to preserve them from decay and putrefaction so that they may be in a fit condition for export. If that is so — and that is not seriously disputed — the ground on which the tax was imposed in the present case must be rejected as untenable. But the substance of the matter is that the petitioners are not taxed as exporters, but as the last purchasers who exported the goods and the tax is imposed on the sum of Rs. 8,66,212-8-1 which is the price which they paid to their sellers in Dacca, Calcutta, Cawnpore and locally. Therefore, if the contention of the petitioners that all their purchases form part of the process of export fails, then they can escape taxation only by establishing that the purchases by them are not liable to be taxed, and that is the point raised in questions 2 and 3.

(26) On the second question relating to the purchase of 12,123 pieces of raw hides and skins in Dacca, the argument of the petitioners is that they are imports from Pakistan and exempt from taxation in view of Article 285 (1) (b). The facts established are that the representatives of the petitioners used to go to Dacca, make the purchases there, pay the price, and consign the goods from there to Madras. The contracts of purchase were completed in Dacca, before the goods were put in transit; and what the petitioners did was merely to transport their own goods from Dacca to Madras.

Dealing with inter-state commerce, Willis remarks that "whenever there is traffic or commercial intercourse between a person in one state and a person in another state there is inter-state commerce." Vide Willis on Constitutional Law, page 289. On the same principle, unless the goods are in transit under a contract between two persons in two different



countries, entered into either at the commencement of the transport or during its progress, there can be no question of a sale or purchase in the course of import. It should therefore be held that the transport by the petitioners of their own goods after purchase in Pakistan cannot be brought under Article 286 (1) (b) as a purchase in the course of import.

But the claim of the petitioners to exemption in respect of these purchases must be upheld on a different ground. If, the purchases were completed in Dacca, that would be outside the operation of the Madras General Sales Tax Act as that authorises a levy of tax only on sales or purchases within the Province of Madras; and as the tax has been imposed on the petitioners as purchasers, it must be held to be unauthorised. It may be that the petitioners are liable to be taxed under the Act in respect of any subsequent dealings by them with reference to these goods within the State of Madras, if that is authorised by the Act. But the assessment of tax has been made on them only as purchasers of hides and skins, and that is clearly illegal.

(27) The third contention relates to the purchase of 74,000 pieces of hides and skins in Calcutta and Cawnpore for a price of Rs. 7,18,042-2-9 and it raises a rather difficult question on the interpretation of Article 286 (1) (a) and the Explanation thereto. For a proper appreciation of these provisions, it will be useful if we first ascertain the powers of taxation which States possess apart from Article 286, and then examine how far those powers have been abridged or modified by the provisions of that Article. The power to impose taxes on sales was conferred on the States by Entry No. 48 in the Provincial List in the Government of India Act, 1935, and under the Constitution that power is granted by Entry No. 54 in the State List in the Seventh Schedule. Article 245 (1) enacts that "The Legislature of a State may make laws for the whole or any part of the State."

On these provisions three possible cases can be conceived. There may be a sale which is wholly intra-state; a sale which is wholly extra state and a sale which may be described as inter-state by which is meant a sale in which the essential ingredients such as conclusion of the contract, delivery of the goods, payment of price and the passing of title take place partly in one State and partly in another or others. The first two categories do not present any difficulties; taxation of an intra-state sale will be 'intra vires' and the taxation of an extra-state sale 'ultra vires' of the powers of the State Legislature. The problem arises only with reference to inter-state sales. One question is whether having regard to the limitations prescribed in Article 245 (1), the State Legislature has competence to impose a tax on such sales. It is well-settled that the power of a State to impose taxes is not conditioned on the subject-matter being wholly within its jurisdiction. The exercise of the power will be valid, if there is sufficient territorial connection with reference to the subject-matter. That was clearly laid down by the Privy Council in — *Wallace Brothers and Co. v. Commissioner of Income-tax, Bombay*, 1948 FLJ 32 at page 36, where it was observed:

"Given a sufficient territorial connection between the person sought to be charged and the country seeking to tax him, income-tax

may properly extend to that person in respect of his foreign income."

We had occasion recently to consider this question in Criminal Appeal No. 129 of 1952 (Mad) and we held that sales tax could be levied on sales which are of an inter-state character, provided they were substantially effected within the State and that a law imposing such a tax is not 'ultra vires' of the powers of the Legislature. It is unnecessary to cover the same ground once again. It may be added that a different conclusion would lead to the startling result that inter-state sales could not be the subject of taxation by any State.

(28) A more difficult question is which among the States in which inter-state sales take place has the power to tax such sales? One possible view is that as there is a sale only when property in the goods passes, it is only that State in which property passes that the competence to impose tax on the sale. This was the substantial question which was considered by us in Criminal Appeal No. 129 of 1952 (Mad) to which reference has already been made. There, the assessee who were carrying on business in the City of Madras claimed exemption from sales tax in respect of certain sales in which the property passed to the purchasers in Calcutta. But the contracts themselves had been concluded in Madras. The goods were consigned to the common carrier in Madras and the assessee had also their Head Office in Madras. On these facts, we held that for purposes of sales tax the sale must be held to take place where the bargain was concluded and the transaction substantially effected and that passing of property in goods was not a decisive factor.

This conclusion was reached on a consideration of — *Norfolk and W. R. Co. v. Sims*, (1903) 191 U S 441: 48 Law Ed 254 and — *American Express Co. v. State of Iowa*, (1905) 196 U S 133: 49 Law Ed 417. These authorities lay down that when there is a sale of goods, the material element for the purpose of taxation is the agreement of sale under which the right of the parties get finally fixed; that the passing of property, delivery of goods and payment of price are matters on which the parties are free to settle their own terms; that the power of the State to impose taxes cannot depend on the terms of the bargains which the parties might make; and that where there is a consummated sale, the venue of the sale for purposes of taxation is the place where the agreement was concluded, the rest of the transaction being treated merely as a process of execution of the agreement.

Reliance was also placed on the observations of Black J., in — *Richfield Oil Corporation v. State Board of Equalisation*, (1946) 329 U S 69: 91 Law Ed 80. Reference may also be made to the following observations of Stone J., in — *McGoldrick v. Berwind-White Coal Mining Co.*, (1940) 309 U S 33: 84 Law Ed 565 at page 581: "The place where the title passes has not been regarded as the test of inter-state character of sale." How far the later decision in — *McLeod v. Dilworth Co.*, (1944) 322 US 327: 88 Law Ed 1304, can be reconciled with the decision in — *McGoldrick v. Berwind-White Coal Mining Co.*, is not material for the present discussion as Frankfurter, J., who delivered the judgment of the majority accepts the authority of — *McGoldrick v. Berwind-*



White Coal Mining Co.', and proceeds to distinguish it. Nor is it material to consider how far the decision in — 'McLeod v. Dilworth Co.', could be reconciled with the decision of the same learned Judge in — 'General Trading Co. v. State Tax Commission', (1944) 322 U S 335: 88 Law Ed 1309. The point is that it is generally agreed that it is not the passing of property in goods that determines the right of the states to impose tax. The position is thus stated by a learned American Writer. Vide 57 Harvard Law Review, page 1091.

"Furthermore, the question whether title passes in the state of origin of the goods or in the state of destination has not hitherto been thought determining under the commerce clause. — 'Caldwell v. North Carolina', (1903) 187 U S 622: 47 Law Ed 336; — 'Norfolk and W. R. Co. v. Sims'; — 'Rearick v. Pennsylvania', (1906) 203 U S 507: 51 Law Ed 295. In this last case, Mr. Justice Holmes said: 'Commerce among the several States is a practical conception, not drawn from the 'witty diversities' of the law of sales.'"

Under the Indian Sale of Goods Act the provisions as to passing of title are subject to a contract to the contrary 'vide' section 19. If the power of a State to impose sales tax is to depend on the passing of property in the goods, it will follow that it is in the power of the parties to determine by their bargain the extent of that power and it would be possible for them to deprive a State of its power to tax a transaction which takes place within its limits by adopting artificial terms as to the passing of title. While such terms will be binding on the parties themselves in determining their mutual rights and obligations as to when the risk commences and the like, there is no reason why the State which has sovereign power of taxation within the limits prescribed by the Constitution should, in the exercise of such power, be controlled by the contracts of the parties. The correct view, therefore, to take of the matter, is to hold that the right to impose a tax arises in India, as in America, when the contract is concluded, provided of course the contract is completed by the passing of property.

(29) In — Criminal Appeal No. 129 of 1952 (Mad) we had not to consider the effect of Art. 286 of the Constitution on the powers of a State to impose sales tax, as the assessment under consideration there related to the period between 1st April 1947 and 31st December 1947. The point for determination now is how far the power which the States otherwise possess of imposing sales tax is affected by Art. 286 (1) (a) and that depends on the interpretation to be given to the Explanation. Is the power of taxation conferred by the Explanation in addition to the power possessed by the State? Or, is it in substitution of it?

To take an illustration, if a contract is concluded in Madras and to bring out the problem in relief, let us assume that under the agreement of parties the property in the goods also passed in Madras, but the goods are actually delivered in Bombay, would the State of Madras have the power to tax the sale? But for the Explanation, it would have had. Has the Explanation the effect of taking away the right? It is undoubted that under the Explanation, the State of Bombay will have the power to impose tax. If the Explanation has to be

interpreted as conferring an additional power, then both the States will have the power to tax, the State of Madras acting under Entry No. 54 and under the Madras General Sales Tax Act and the State of Bombay by virtue of the Explanation.

What can be put against this construction is that it results in double taxation of the same transaction. But if we adopt the view that the Explanation has the effect of superseding powers of the State Legislature in cases falling under the Explanation, that will have the effect of depriving the States of revenue in respect of transactions which are substantially effected there. Looking at the cast of the statute, the conferment of the power of taxation on States is under Article 246 of the Constitution and Entry 54 in the State List which correspond to section 100 and Entry 48 in the Seventh Schedule in the Government of India Act of 1935. Then comes Article 286 (1) (a) which prohibits the imposition of tax on extra-state sales — a prohibition which is already to be found enacted in Article 245. While Article 245 is positive in its terms, Article 286 (1) is negative.

The Explanation then steps in and provides that for the purpose of Article 286 (1) (a) a sale must be considered to take place in that State in which the goods are actually delivered for consumption. The effect of this Explanation is to remove the limitation imposed by Article 245 and Article 286 (1) on the power of a State to enact extra-territorial legislation and permit the State to levy sales tax on an extra-state sale, provided goods thereunder are delivered within the State. The Explanation should accordingly be construed as not taking away the positive powers of taxation conferred under Article 246 and Entry No. 54 but as enlarging those powers in cases falling within the Explanation. This conclusion is reinforced by a reference to the circumstance under which the Explanation came to be incorporated in the Article. It was not originally in the Bill and it came to be inserted at the last stage out of deference to the representations made on behalf of certain States that the Law as it stood would prevent them from taxing commodities which would be used in the State and that a power to tax such transactions should be conferred on them. Read in the light of this background, the language of the Explanation is also significant. It applies only when the goods have been delivered for the purpose of consumption in that State. It is really what is termed in American Legislation as 'use tax' which though functionally allied to sales tax, is different in its operation. In — 'McLeod v. Dilworth Co.', (1944) 322 U S 327: 88 Law Ed 1304 at pages 1306-1307, the difference between the two kinds of tax was thus explained:

"A sales tax and a use tax in many instances may bring about the same result. But they are different in conception, are assessments upon different transactions, and in the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds. A sales tax is a tax on the freedom of purchase. A use tax is a tax on the enjoyment of that which was purchased."

We are not concerned with the constitutional problem as it presented itself for solution in that case; because under the Constitution the States enjoy both a power under Entry 54 to



tax sale and purchase of goods and a power under Entry 52 to tax goods on their entry into a local area, subject only to the limitations contained in Article 286. But the observations quoted above are sufficient to show that there is no conflict between the power of States to tax sales under Entry 54 and the power to impose taxes on the use of goods to which the Explanation relates.

(30) This interpretation further gives a clue to the correct meaning of the words "actual delivery" in the Explanation. In the context it can mean only physical delivery and not constructive delivery such as by transfer of documents of title to the goods. The whole object of the Explanation is to give a power of taxation in respect of goods actually entering the State for the purpose of use therein and it will defeat such a purpose if notional delivery of goods as by transfer of documents of title to the goods within the State is held to give the state a power to tax, when the goods are actually delivered in another State.

(31) The result may be thus summed up:

1. The State has plenary powers of taxation over intra-state sales.
2. The State has no power to impose a tax on extra-state sales.
3. In respect of inter-state sales, the State in which the contract is concluded is the only State which has the power to impose a tax.
4. Where goods are delivered for consumption in a particular State, that State has the power to impose a use tax or a purchase tax thereon notwithstanding that the transaction of sale is extra-state.

(32) In the light of the above discussion it is necessary to examine whether on the facts established in the present case the petitioners are entitled to exemption from tax in respect of hides and skins purchased in Calcutta and Cawnpore. The affidavit in support of the petition does not give particulars as to where the contract was concluded or where the delivery was made. In a statement filed on behalf of the respondent it is stated that in respect of the purchases made in Calcutta the documents of title were received by post in Madras. In the view taken by us that would not be sufficient to confer on the State a power to tax the sales. If the contracts in respect of these sales were concluded in Calcutta, they will be extra-state sales not liable for taxation under the Madras General Sales Tax Act.

It would appear, however, that the goods were actually delivered in Madras and if so, that will confer on the State of Madras a power to tax the goods under the Explanation to Article 286 (1) (a) which has become incorporated in the Madras General Sales Tax Act by the Adaptation of Laws (Fourth Amendment) Order, 1952, which by virtue of section 1 (2) shall be deemed to have come into force on the 26th January, 1950. With reference to the purchases made in Cawnpore also it is stated on behalf of the respondent that the prices were paid to the banks in Madras against delivery of documents of title. This circumstance would not be sufficient to clothe the State of Madras with authority to impose a tax on these sales, though property in the goods might pass in Madras, as in the view expressed by us, the locus of the contract is not where the property passes, but where the

agreement is concluded. But if the goods were delivered in Madras, as appears from the statement on behalf of the respondent, the Madras State would have jurisdiction to impose tax under the Explanation to Article 286 (1) (a).

(33) We must mention that on the construction of the Explanation to Article 286 (1) (a) Mr. K. Rajah Ayyar argued that the word 'consumption' occurring therein should be understood in the limited sense of eating and not in the wider sense of using. He relied on the language of Entry 52 in schedule 2 where both 'consumption' and 'use' are used disjunctively. But Entry 53 speaks of taxes on the consumption or sale of electricity; and obviously consumption here can mean only use. Reference was made to the Dictionary meaning of the word 'consumption'. But that gives both a popular sense and an economic sense. It is the latter that we are concerned with, and that is given in Webster's New International Dictionary, Vol I, page 483, as follows:

"Consumption.—(3) Economics.—The use of (economic) goods resulting in the diminution or destruction of their utilities; opposed to production. Consumption may consist in the active use of goods in such a manner as to accomplish their direct and immediate destruction, as in eating food, wearing clothes or burning fuel; or it may consist in the mere keeping, and enjoying the presence or prospect of, a thing, which is destroyed only by the gradual processes of natural decay, as in the maintenance of a picture gallery. Generally, it may be said that consumption means using things, and production means adapting them for use."

In the Oxford New English Dictionary, Vol. II, page 888, consumption is defined as: "(1) The action or fact of consuming or destroying; destruction..... (7) Pol. Econ. The destructive employment or utilisation of the products of industry." There is no substance in this contention.

(34) (4) The fourth contention of the petitioners is that the power of the State to impose sales tax has undergone a material change by the operation of Article 286, that taxes which would be lawful prior to the Constitution have now been rendered illegal; that the Turnover and Assessment Rules which were framed before the Constitution have mixed up what would not now be taxable with what is taxable; and that therefore they should be declared void in their entirety as the turnover under the Act is one and indivisible. We are unable to agree with this contention. As already mentioned, Article 286 is now part of the Madras General Sales Tax Act, by virtue of the Adaptation of Laws (Fourth Amendment) Order, 1952; and if the assessment is to any extent not authorised by the Statute the assessee is entitled to be relieved from the imposition to that extent. They cannot claim further that they should be freed altogether from liability even to the extent that they are liable under the Act. As was observed by Holmes, J., in — 'New York Ex. Rel. Hatch v. Edward Reardon', (1907) 204 U S 152: 51 Law Ed 415,

"with regard to taxes, especially perhaps it might be assumed that the Legislature meant them to be valid to whatever extent they could be sustained."

(35) The result of the findings is that the sum of Rs. 1,04,595-4-6 representing the price paid by the petitioners for the hides and skins



purchased in Dacca, should be excluded from their assessable turnover; and that in respect of the purchases made in Calcutta, Cawnpore and locally amounting to Rs. 7,61,617-3-7 they are liable for sales tax.

(36) The learned Advocate-General agrees that the taxing authorities will revise the assessments in accordance with the conclusions expressed herein.

(37) There will be no order as to costs.

(38) RAJAMANNAR C. J.: I agree.

A/V.R.B.

Order accordingly.

**A.I.R. 1953 MADRAS 129 (Vol. 40, C. N. 37)**

RAJAMANNAR C. J. AND VENKATA-  
RAMA AIYAR J.

Kama Umi Isa Ammal, Petitioner v. Rama Kudumban and others, Respondents.

Civil Misc. Petn. No. 13514 of 1950, D/- 6-8-1952.

**Tenancy Laws — Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948) S. 67 — Rules framed under — Rules relating to procedure for being followed by Tribunals appointed under S. 8 of Act — Validity — Orders passed by two members sitting as tribunal is without jurisdiction — (Constitution of India, (1950) Art. 226).**

The Tribunal, according to the definition means a Tribunal constituted under S. 8 and under S. 8 (2) it is expressly provided that each Tribunal shall consist of three members. When the substantive provision in the Act clearly lays down that the Tribunal shall consist of three members it is not open for the Government to provide by a rule that a Tribunal may consist of less than three members. AIR 1951 SC 230 Rel. on. (Para 4)

Presumably, the legislature prescribed in S. 8 different qualifications for the three members deliberately and on purpose made the officer of the status of the District Judge the Chairman of the Tribunal. The intention of the legislature appears to be obvious that they wanted the tribunal to consist of members possessing legal qualifications as well as an officer having knowledge of revenue matters. The rule which allows two members of the tribunal to function as a tribunal would be inconsistent with the express intention of the legislature contained in S. 8 (2), if, for example, in one contingency the two judicial members alone sit without the assistance of the revenue member. Equally inconsistent would be the result when the Tribunal should sit and dispose of appeals without the chairman, a person who is more highly qualified than the other two members. (Para 5)

Therefore, the rules empowering two members of the tribunal to sit and dispose of matters which have to be decided by the Tribunal under various provisions of the Act are ultra vires and invalid. Consequently orders passed by two members only sitting as the tribunal is without jurisdiction and must be quashed. (Para 8)

Anno: Civ. P. C., App. III, Const. of India, Art. 226 N. 13.

1953 Mad/17 & 18

R. Kesava Aiyangar and K. Parasaran, for Petitioner; Advocate General, assisted by V. V. Raghavan for Govt. Pleader, for the State.

REFERENCE..... /Para  
(51) 1951 SCR 380: (AIR 1951 SC 230) 5

**ORDER:** This is an application for the issue of a writ of certiorari to quash the proceedings and the decision of the Estates Abolition Tribunal at Madurai dated 22nd May 1950 in Revenue appeal No. 54 of 1950. The only ground on which the writ is sought is that only two members of the Tribunal heard and disposed of the appeal filed by the petitioner under S. 9 (4) of Madras Act XXVI of 1948 when the tribunal as constituted by the Government consisted of three members. The petitioner is a mortgagee of a village in Ramnad taluk. The Settlement Officer Ramnad, acting under S. 9 of Madras Act XXVI of 1948 held an enquiry and declared the village not to be an inam estate as defined in S. 2 (7) of the said Act. Against his decision there was an appeal to the Estates Abolition Tribunal at Madurai by a ryot of the village. Two members of the Tribunal set and heard the appeal and by their judgment dated 22nd May 1950 reversed the decision of the Settlement Officer and declared the village to be an inam village.

(2) The following are the provisions of Madras Act XXVI of 1948 material for disposal of the contention raised in this case. Section 2 (14) defines Tribunal as "a tribunal constituted under S. 8 and having jurisdiction". Section 8 provides for the constitution of tribunals for certain of the purposes of the Act, and runs thus:

- "1. The Government shall constitute as many tribunals as may be necessary for the purposes of this Act.
2. Each Tribunal shall consist of three members; one of them (who shall be its chairman) shall be a District Judge or an officer eligible to be appointed as a District Judge, another shall be a Subordinate Judge or an officer eligible to be appointed as a Subordinate Judge, and the third shall be a revenue Divisional Officer or an officer eligible to be appointed as a Revenue Divisional Officer.
3. Each Tribunal shall have such jurisdiction, and over such estates or parts thereof, as the Government may, by notification from time to time, determine.
4. Every Tribunal shall have all the powers of a civil court to compel the attendance of witnesses and the production of documents."

(3) Under S. 9 (4) (a) any person deeming himself aggrieved by a decision of the settlement Officer under sub-sec. (3) may appeal to the Tribunal. Where any such appeal is preferred the Tribunal after notice to the interested parties, and after giving them a reasonable opportunity of being heard, shall give its decision. (Section 9 (4) (b)). Besides the jurisdiction to decide appeals from the decision of the Settlement Officer under S. 9, the Tribunal is also entrusted with several important duties and for carrying them out large powers have been conferred on the Tribunals. Sec. 67 empowers the Government to make rules to carry out the purposes of the Act, and in particular such rules may provide for, inter alia,



"(b) the procedure to be followed by the Tribunals, special Tribunal, authorities and officers appointed, or having jurisdiction, under this Act."

Purporting to act in exercise of this power the following rules have been made and published by the Government in the following notification:

"In exercise of the powers conferred by Sec. 67 (1) and (2) (b) of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, Madras Act XXVI of 1948, His Excellency the Governor of Madras hereby makes the following rules in regard to the procedure to be followed by the Tribunals constituted under S. 8 of that Act:

#### RULES

1. Not less than two members shall be necessary to constitute a sitting of a Tribunal.

2. All questions arising for the decision of a Tribunal, in any matter before it, shall be decided according to the opinion of the majority of the members. If any matter has been heard by only two of the members and the members are divided in opinion as to the decision to be given the matter shall be referred to the third member and decided according to the opinion which along with his constitute the opinion of the majority.

3. When the Chairman of a Tribunal is ill or absent for any other reason the Second Judicial Member of the Tribunal shall act as the Chairman."

(4) It was contended on behalf of the petitioner that the above rules, in so far as they purport to authorise two members of a Tribunal to sit and dispose of matters arising for the decision of the Tribunal are invalid as being ultra vires the provisions of the Act. In our opinion on a plain reading of the language of the material sections this contention must prevail. Under S. 9 (4) (b) it is the "Tribunal" which must hear and give its decision in an appeal preferred to it under S. 9 (4) (a). The Tribunal, according to the definition, means a Tribunal constituted under S. 8 and under S. 8 (2) it is expressly provided that each Tribunal shall consist of three members. When the substantive provision in the Act clearly lays down that the Tribunal shall consist of three members it is not open for the Government to provide by a rule that a Tribunal may consist of less than three members.

(5) We find support for this view in the observations which occur in the recent decision of the Supreme Court in — 'the United Commercial Bank Ltd. v. Their Workmen', 1951 SCR 380. That case dealt with the validity of an award made by an Industrial Tribunal under the Industrial Disputes Act, 1947. The Central Government constituted an Industrial Tribunal consisting of A, B and C, for deciding certain disputes and the Tribunal commenced its sittings in September 1949. On 23rd November 1949 the services of C one of the members of the Tribunal were required for some other purpose and he accordingly ceased to take part in the sittings of the Tribunal. The remaining members continued to sit and hear the disputes. In February 1950 C returned and began to sit again with the other two members and hear the further proceedings in the case. Some awards were made by A and B before C returned and some awards were made after his return by all the three together. It was held by a majority of their Lordships, that all the

awards were void. It was held that the two remaining members were not a duly constituted Tribunal and the duty to work and decide was the joint responsibility of all the three members who originally constituted the Tribunal and the matter was one of complete absence of jurisdiction. Section 7 of the Industrial Disputes Act provides inter alia that the Government may constitute one or more Industrial Tribunals for the adjudication of industrial disputes and that a Tribunal shall consist of such number of members as the appropriate Government thought fit, and where the Tribunal consists of two or more members one of them shall be appointed as the Chairman. S. 8 (1) runs thus:

"If the services of the Chairman of a Board or the Chairman or other member of a court or Tribunal cease to be available at any time, the appropriate Government shall in the case of a Chairman, and may in the case of any other member, appoint another independent person to fill the vacancy, and the proceedings shall be continued before the Board, Court or Tribunal so reconstituted."

Their Lordships held that there was no appointment as contemplated by S. 8 (1) and, therefore, the Tribunal was not a duly constituted one after C left the Tribunal and even after he joined again.

Kania C. J. in dealing with the effect of the relevant provisions said at page 390:

"Section 15 of the Act provides that when an Industrial dispute has been referred to a Tribunal for adjudication, it shall hold its proceedings expeditiously and as soon as practicable and at the conclusion thereof submit its award to the appropriate Government. It is thus clear and indeed it is not disputed that the Tribunal as a body should sit together and the award has to be the result of the joint deliberations of all members of the Tribunal acting in a joint capacity."

Mukherjea J., though his Lordship was in the minority, observed as follows:

"Having regard to the language of S. 7 which admittedly contemplates that the members of a Tribunal must act all together, it would, in my opinion, be a perfectly legitimate view to take that if the Legislature did intend to make an exception to this rule, it would have done so in clear terms instead of leaving it to be gathered inferentially from the provision of another section which itself is not couched in unambiguous language."

"I am not impressed by the argument of Mr. De that a Tribunal is to be conceived of as an entity different from the members of which it is composed and whatever changes might occur in the composition of the Tribunal, the identity of the Tribunal remains intact. A distinction undoubtedly exists between the court and the Judge who presides over it, but if the constitution of the Court requires that it is to be composed of a certain number of Judges, obviously a lesser number could not perform the functions of the Court,"

and again,

"It is quite true that a quasi-judicial tribunal enjoys greater flexibility and freedom from the strict rules of law and procedure than an ordinary court of law, but however much



informality and celerity, might be considered to be desirable in regard to the proceedings of an industrial tribunal, it is absolutely necessary that the Tribunal must be properly constituted in accordance with requirements of law before it is allowed to function at all."

The objection appears to us to be not merely technical. The three members of the Tribunal do not have the same qualifications. One is a superior Judicial Officer of the status of a District Judge, the other of the status of a Subordinate Judge, whereas the third member is an officer of the Revenue Department of the Government. Presumably, the legislature prescribed these different qualifications for the three members deliberately and on purpose made the officer of the status of the District Judge the Chairman of the Tribunal. The intention of the Legislature appears to be obvious that they wanted the Tribunal to consist of members possessing legal qualifications as well as an officer having knowledge of revenue matters. The rule which allows two members of the tribunal to function as a tribunal would be inconsistent with the express intention of the legislature contained in S. 8 (2), if, for example, in one contingency the two Judicial members alone sit without the assistance of the revenue member. Equally inconsistent, it appears to us, would be the result when the Tribunal should sit and dispose of appeals without the Chairman, a person who is more highly qualified than the other two members.

(6) If analogy can be of some assistance, reference can be made to S. 51 (1) of the Act which provides for a special Tribunal. It says that any person deeming himself aggrieved by any decision of the Tribunal under Ss. 43 to 50 may appeal to a special Tribunal consisting of two Judges of the High Court nominated from time to time by the Chief Justice in that behalf. Now, can the Government make a rule providing that one of the two Judges of the High Court so nominated may sit alone and dispose of an appeal as the Special Tribunal? Obviously not.

(7) It is no doubt true that when there is a right of appeal to the High Court all the Judges of the High Court do not sit and dispose of the appeal. But that is because of a special provision in the Letters Patent under which the High Courts were constituted, namely, clause 36 which declared that any function directed to be performed by the High Court in the exercise of its original or appellate jurisdiction may be performed by any Judge or by any Division court appointed or constituted for such purpose.

(8) We have no hesitation in holding that the rules empowering two members of the Tribunal to sit and dispose of matters which have to be decided by the Tribunal under various provisions of the Act are ultra vires and invalid. The impugned order was therefore passed without jurisdiction and must therefore be quashed. The appeal, of course, will have to be reheard by the Tribunal as constituted consisting of three members.

(9) This ruling of ours will have the effect of rendering not only the order in question in this application invalid, but every similar order passed by two members of the Tribunal. We think it unnecessary that there should be similar orders in each one of such cases. Those orders may all be treated as passed without

jurisdiction and therefore void, and instructions may be issued for the reposting of the appeals disposed of by two members for fresh disposal according to law.

B/M.K.S.

Petition allowed.

# **A.I.R. 1953 MADRAS 131 (Vol. 40, C. N. 38)**

**RAJAMANNAR C. J. AND VENKATARAMA AIYAR J.**

M. J. Jamal Mohideen Saheb and Co., Petitioners v. The State of Madras represented by the Commercial Tax Officer, Madras, Respondent.

Writ Petn. No. 264 of 1952, D/- 9-9-1952.

**Constitution of India, Arts. 226 and 286 — Petitioner assessed to tax under Madras General Sales Tax Act — Appeal — Notice of demand — Petition under Art. 226 — Maintainability — (Sales Tax — Madras General Sales Tax Act (9 of 1939 S. 12-A)).**

Where, under the provisions of the Madras General Sales Tax Act, the Deputy Commercial Tax Officer determined the taxable turnover of the petitioner and assessed the tax payable thereon and the petitioner preferred an appeal against the orders of such officer and on receiving notice calling upon him to pay the tax the petitioner took out the writ challenging the validity of the Act and disputing the correctness of the assessment under Art. 286 of the Constitution,

Held that it was open to the petitioner to raise all questions as to the extent of his liability under the Act and under Art. 286 before the Appellate Officer and therefore the High Court would decline to entertain the petition. (Para 2)

Anno: C. P. C., Appendix III, Constitution of India, Art. 226 Notes 8 and 13.

C. Venugopalachari, T. T. Srinivasan and A. N. Rangaswamy, for Petitioners; V. K. Thiruvengkatachari, Advocate-General and V. V. Raghavan, for Govt. Pleader with him, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras ('52) Writ Petns. Nos. 21 and 41 of 1952:

(AIR 1953 Mad 105)

2

('52) Writ Petn. No. 227 of 1952:

(AIR 1953 Mad 116)

2

**VENKATARAMA AIYAR J.:** The petitioners are a firm of merchants carrying on business as tanners in the City of Madras. The Deputy Commercial Tax Officer, Esplanade Division, by his order dated 28th February, 1952, determined the taxable turnover of the petitioners for the period 1st April, 1950, to 31st March, 1951, at Rs. 14,97,726-12-11 and the tax payable thereon was assessed at Rs. 23,401-15-8. After deducting a sum of Rs. 2,303-5-6 paid as advance tax, the balance payable by the petitioners was Rs. 21,098-10-2. Notice was issued to the petitioners in Form No. B-1 calling upon them to pay the tax and stating that in case it was not paid within the time limited, it would be recovered as though it was an arrear of land revenue and that further the assessee would be also liable to be proceeded against under Section 15 of the Madras General Sales Tax Act. The petitioners have replied by taking out this writ challenging the validity of the Madras General Sales Tax Act and further disputing the correctness of



the assessment under Article 286 of the Constitution.

(2) Under the Act an appeal is provided against the orders of the Deputy Commercial Tax Officer and the petitioners have in fact preferred such an appeal. It is open to them to raise all questions as to the extent of their liability under the Act and under Article 286 of the Constitution before the Appellate Officer. We should therefore decline to entertain this petition. We may add that in writ petns. Nos. 21, 41 and 227 of 1952 (Mad), we have decided the points raised by the petitioners with reference to the validity of the Madras General Sales Tax Act and the scope and the operation of Article 286. Under the circumstances, the petition is dismissed.

(3) There will be no order as to costs.

(4) RAJAMANNAR C. J.: I agree.

A/V.R.B.

Petition dismissed.

\*A.I.R. 1953 MADRAS 132 (Vol. 40, C. N. 39)  
CHANDRA REDDI AND RAMASWAMI JJ.

Thirumaleshwara Bhatta being minor by next friend Shanker Bhatta, Appellant v. Kashmutt Ganapayya and others, Respondents.

Second Appeals Nos. 1823 and 2212 of 1947, D/- 24-1-1952.

**\*(a) Hindu Law — Adoption — Adoptive father having wife living at time of adoption — Nomination or designation of deceased wife as adoptive mother.**

Where the adoptive father has remarried before adoption and has a wife living at the time of the adoption, the deceased wife of the adoptive father cannot be nominated or designated as the adoptive mother of the adopted son. AIR 1933 Mad 550 (FB) Criticised. Case law discussed. (Para 29)

**†(b) Hindu Law — Adoption — Adopter's wife dying before adoption — Right of adopted son to inherit property belonging to her.**

Adopted son of a Hindu, whose only wife had died before the adoption, becomes the son of that deceased wife, so as to inherit the properties that belonged to her, and that the adoption would take effect as if the adoption had been made in the life time of the wife herself and, in the absence of any special custom, the adopted son will be entitled to divest all intermediate estates which had vested before his adoption subsequent to the death of the adoptive mother, either by inheritance or by the application of the custom of reverter. (Para 16)

K. Bhashyam and M. L. Nayak, for Appellant; K. Srinivasa Rao, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras  
(1900) 23 Mad 1: (26 Ind App 246 PC) 20, 21  
(88) 12 Bom 329 20  
(91) 18 Cal 69 21  
(1864-65) 2 Mad HCR 367 20  
(68-69) 4 Mad HCR 270 20  
(95) 18 Mad 277: (5 Mad LJ 121) 20, 21  
(26) 49 Mad 941: (AIR 1926 Mad 1203) 20, 21, 28  
(29) 52 Mad 373: (AIR 1929 Mad 11) 21  
(33) 56 Mad 759: (AIR 1933 Mad 550 FB) 20, 24, 25, 26, 27, 28, 28a  
(37) 1937-1 Mad LJ 60: 59 Mad 1064: (AIR 1936 Mad 642) 28  
(45) 1945-2 Mad LJ 228: (AIR 1945 Mad 487) 16

(46) 1946 Mad WN 447: (AIR 1946 Mad 187) 16

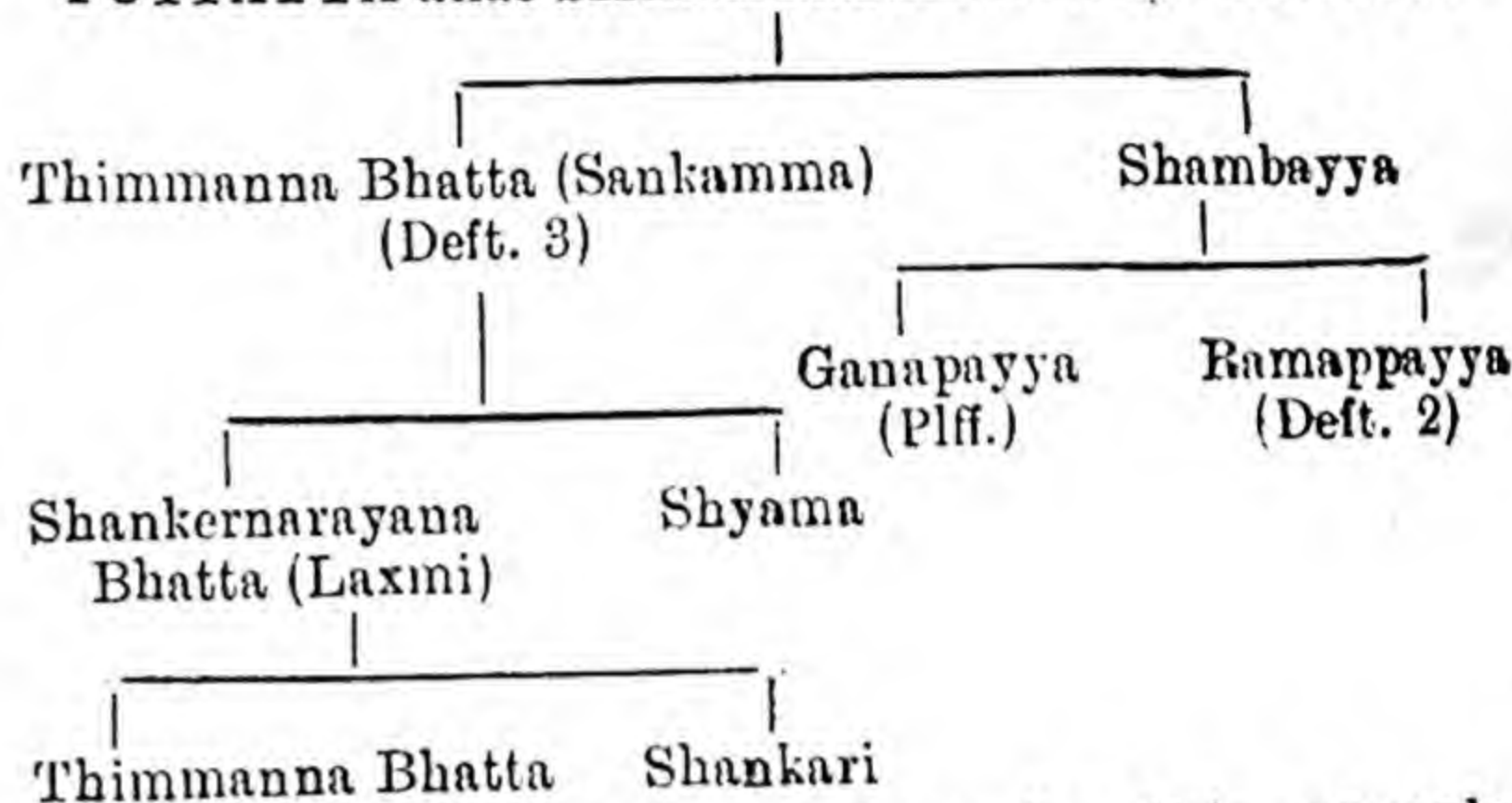
(47) A. S. No. 83 of 1947 (FB) (Mad) 24  
(1853) 4 HLC 1: (23 LJ Ch 348) 28  
2 Stra HL 91 21

RAMASWAMI J.: S. A. Nos. 1823 and 2212 of 1947:—

(2) These are two connected appeals preferred against the decree and judgment of the learned District Judge of South Kanara in A.S. No. 216 of 1945 arising from O. S. No. 76 of 1943 on the file of the Subordinate Judge's Court, South Kanara.

(3) The facts of this case can be easily followed if we take on hand the genealogical tree appended below:

PUTTAYYA alias SHANKERNARAYANA BHATTA



(4) The information given by this genealogical tree has to be completed by bearing in mind the following facts: Shankernarayana Bhatta died in 1927 and his widow Laxmi died in 1941. Shankernarayana Bhatta's son Thimmanna Bhatta had died unmarried during his father's lifetime and his daughter Shankari who was the first wife of the first defendant Shanker Bhatta died on 9-8-1943. Sankamma, the paternal grandmother of Shankari died after the disposal of the first appeal on 20th May 1949.

(5) It is unnecessary to re-set the multifarious controversies between the parties set out in the judgments of the lower courts because the contest has resolved itself now into a single question of fact and law regarding the two adoptions which are said to have been made in the case of the appellant in S. A. No. 1823 of 1947, namely, Tirumaleshwara Bhatta, minor by next friend Shanker Bhatta.

(6) The controversy before us is simple, namely, if either the alleged adoption of Tirumaleshwara Bhatta in the first instance on 12-7-1943 is believed or the second adoption dated 29-10-1944 is accepted as having been validly made with the adoptive mother as the then deceased Shankari, then this Tirumaleshwara Bhatta would be entitled to succeed and his opponents, the next reversioners of the deceased Shankernarayana Bhatta or the now deceased Sankamma, would not be entitled to succeed to the considerable landed properties situated in four villages and which are the root cause of all this trouble between the parties.

(7) There is no dispute before us that the next reversioners, namely, the plaintiff in the suit O. S. No. 76 of 1943 and the second defendant therein would be entitled to take all these properties on the death of Shankari and Sankamma but for the intervention which is set up by the husband of that Shankari, namely, that Tirumaleshwara Bhatta had been adopted by him (Shanker Bhatta) while his wife Shan-



kari was alive, namely, on 12th July 1943, because Shankari died on 9th August 1943.

(8) In regard to this alleged adoption of Tirumaleshwara Bhatta on 12th July 1943, if it is believed as a fact no further point of law is involved because he would have been adopted to this Shanker Bhatta with Shankari as the adoptive mother. On the evidence, however, it has been found by both the courts below that this adoption set up as having taken place on 12th July 1943 is false. In these second appeals the learned advocate for Tirumaleshwara Bhatta once more pressed this point. He has not been able to convince us that the conclusion of the lower courts is incorrect. On the other hand, the lower courts have come to this conclusion on ample and satisfactory evidence which may be briefly recapitulated as follows. This Shanker Bhatta, the alleged adopted father, sought to prove this adoption on 12th July 1943 by means of oral, documentary and circumstantial evidence. (His Lordship recapitulated the evidence and concluded:)

(9-13) Therefore, the first adoption set up, as having taken place on 12th July 1943 during the lifetime of Shankeri, is false.

(14) This Shanker Bhatta sets up a second adoption of the same boy on 29th October 1944 and wanted to nominate or designate the deceased Shankeri as the boy's adoptive mother, though by this time this Shanker Bhatta had married and his second wife was living and apparently could have been present even at the time of this adoption. In regard to this adoption two questions arise, namely, did such an adoption take place and secondly, could this Shanker Bhatta nominate or designate his deceased wife Shankeri as the adoptive mother in preference to his living wife?

(15) Both the lower courts have found that an adoption took place on 29th October 1944 as alleged and that this is made out by the oral evidence of D. Ws. 4 to 8 and by the printed invitation cards Exs. D. 8 and D. 8a and the adoption deed Ex. D. 5. Therefore, the learned Subordinate Judge found as follows:

"I find that the adoption of the 6th defendant on 29th October 1944 has been satisfactorily proved."

In appeal the learned District Judge has observed:

"The learned Subordinate Judge has upon the evidence held that there was an adoption on 29th October 1944, and I concur with him, that as a matter of fact this adoption did take place."

Therefore, as a fact this adoption of 1944 can be taken as having been established and it was not challenged before us.

(16) On a point of law, however, the learned Subordinate Judge held that this adoption was invalid on two grounds. Firstly, that it was a 'Sagotra' adoption and that as the mother of the adopted boy in her maiden state could not have lawfully married the adoptive father, the adoption was invalid, and secondly, that this adoption cannot serve to divest the estate, which on the death of Shankeri had already become vested in other persons (be it the next reversioners of Sankamma). The learned District Judge rightly declined to uphold both these contentions. Firstly, in so far as Saghotra point was concerned, it was found as a fact

that the 'Sagotram', namely, Gouthama 'Gothram', was not proved and secondly, it has been held in — 'Simhadri Raju v. Satyanarayana Pantulu', 1945-2 Mad L J 228, that custom sanctions the practice of 'Sagotra' adoption.

It was laid down that the prohibition contained in the rule of the texts that there can be no valid adoption unless a legal marriage is possible between the person for whom the adoption is made and the mother of the boy who is adopted, in her maiden state, is overridden by custom in the Madras Presidency. Secondly, the learned District Judge held, and we agree with him, that if the adoption is valid it can divest the estate which had already become vested in other persons on the death of the previous owner. The case to our mind in point is a Bench decision, by which we are bound unless we are prepared to refer the matter to a Full Bench which is not necessary in the circumstances of this case viz., in — 'Subramanian v. Muthiah Chettair', 1946 Mad W N 447.

It is laid down in this decision that an adopted son of a Hindu, whose only wife had died before the adoption, becomes the son of that deceased wife, so as to inherit the properties that belonged to her, and that the adoption would take effect as if the adoption had been made in the life time of the wife herself and, in the absence of any special custom, the adopted son will be entitled to divest all intermediate estates which had vested before his adoption subsequent to the death of the adoptive mother, either by inheritance or by the application of the custom of reverter. Therefore, if the adoption of the 6th defendant was a valid adoption in the sense that the 6th defendant would become the adopted son of the deceased Shankeri, it will, without the slightest doubt, serve to divest the estate which had become vested in the heirs of the last maleholder, be it limited as in the case of Sankamma or absolute as in the case of the reversioners.

(17) The question however is whether the adoption on 29th October 1944 was an adoption in the sense that the sixth defendant would become the adopted son of the deceased Shankeri in spite of the fact that the adoptive father, the first defendant, had re-married before the adoption took place and had a living wife on the date of adoption. For, there can be no dispute that if the adoptive mother cannot be held to be Shankeri, the adopted boy cannot succeed to the estate of Shankeri's father and vice versa.

(18) The learned District Judge came to the conclusion that the adoptive father had no right to name a non-existent wife as the mother of the adopted boy in preference to the one that was in existence and that therefore, though the adoption was valid it cannot be held that the adoptive mother was Shankeri. The resultant consequence was that the adopted son could not succeed to the estate of Shanker's father.

(19) This conclusion is attacked by the learned advocate for Tirumaleshwara Bhatta, Mr. Bhashyam and his case is that on the case-law developments that have taken place in regard to the theory of adoption, which is of a fictitious nature, the right to name a non-existent deceased wife in preference to the existing living wife is the logical extension. This is



buttressed up by the following two lines of citations.

(20) FIRST LINE: The case law has gone to the extent of holding that a bachelor can adopt: — 'Gopal Anant v. Narayan Ganesh', 12 Bom 329; that a widower can adopt: — 'Nagappa Udapa v. Subba Sastry', 2 Mad HCR 367; — 'Chandrasekharudu v. Brahmanna', 4 Mad H C R 270; — 'Sundaramma v. Venkatasubbier', 49 Mad 941 and — 'Sowntharapandian v. Periaveeru Thevan', 56 Mad 759 F.B.; that a man with a plurality of wives can adopt even in opposition to his wife's wishes and foist an adopted son on one or more of them: — 'Annapurni Nachiar v. Collector of Tinnelvely', 18 Mad 277; — 'Annapurni Nachiar v. Forbes', 23 Mad 1 (PC); — 'Sundaramma v. Venkatasubba Aiyar', 49 Mad 941 and — 'Sowntharapandian v. Periaveeru Thevan', 56 Mad 759 F.B.; that a wife has no place in the ceremonies connected therewith though ultimately she will participate in the spiritual welfare assured to the husband by 'Tilothaka' and 'Pinda' offered by the adopted boy after her demise. The adoption is to the husband and not to the wife but in consequence of the superiority of the husband, by his mere act of adoption, the filiation of the adopted as the son of the wife, is complete in the same manner as her property in any other thing accepted by the husband: Vide *Dat. Mima I*, 22 cited on page 244 of *Mayne on Hindu Law and Usage*, 11th Edn. The principle deduced from these citations is that the adoption by the husband is to himself and he could filiate as he likes that son to his wife and make that son succeed to her properties.

(21) SECOND LINE: Having deduced these absolute powers of the husband to filiate or foist a son on his barren wife, the case law has gone to the extent in the second line of decisions of his being able to nominate or designate the adoptive mother for that boy. If he was a monogamist and the wife had died at the time of adoption, the deceased wife would be construed to be the adoptive mother on the principle that a boy cut off from his natural family should be found a mother whenever possible — 'Sundaramma v. Venkatasubba Aiyar', 49 Mad 941. If the adoptive father has two or more wives, that person whom he associates in the function will be the adoptive mother: — 'Annapurni Nachiar v. Collector of Tinnelvely', 18 Mad 277; — 'Annapurni Nachiar v. Forbes', 23 Mad 1 (PC).

If the man intending to adopt has two or more wives and dies giving a joint power to his widows to adopt and they adopt a boy the seniormost would, as the 'Dharmapatni' and on the principle that the adopted boy could not have more than one mother which is opposed to nature, be the adoptive mother in the event of an adoption: — 'Tirumangalaratnam v. Butchayya', 52 Mad 373. If the authority has been given to the widows severally, the junior may adopt without the consent of the senior, if the latter refuses to adopt: — 'Mondakini Dasi v. Adinath', 18 Cal 69. Where there are several widows, if a special authority has been given to one of them to adopt, she, of course, can act upon it without the assent of the others, and she alone could act upon it; Vide '2 Stra. H. L. 91' cited at page 205 of *Mayne on Hindu Law and Usage*, 11th Edn. These permutations and combinations establish the

right of the husband to designate or nominate the wife who should be the adoptive mother of the boy adopted.

(22) The learned advocate Mr. Bashyam concedes that no decision has gone to the extent of saying that the husband who is adopting a son to himself has got the power to nominate or designate a dead wife as the adoptive mother of the boy in reference to a living wife existing and present at the time of the adoption (obviously for the purpose of altering the natural line of devolution of property and consolidating it in his own family) but that this designation is nothing more than a logical extension of the powers of nomination of the husband set out in the second line of decisions. In other words, the substance of Mr. Bashyam's arguments is that when the law has been swallowing a camel why should it strain at a gnat of this description?

(23) We regret our inability to accept the contention of the learned advocate Mr. Bashyam on account of the following considerations.

(24) First of all, the correctness of — 'Sowntharapandian v. Periaveeru Thevan', 56 Mad 759 (FB) has come to be doubted by very eminent jurists and in fact was the subject matter of a reference to a Full Bench in — 'A. S. No. 83 of 1947' by Govinda Menon and Basheer Ahmed Sayeed JJ. This matter, however, could not be disposed of by a Full Bench because the parties compromised and the hearing of this matter became otiose. The order of reference contains the following:

"In *Mayne's Hindu law*, tenth edition, pages 258 and 259 the learned editor discusses the question regarding the adoption by a widower as well as which wife happens to be the adoptive mother. At page 258 the learned editor observes as follows:

'The real difficulty however lies elsewhere: Where a person has no wife in existence at the date of adoption, can his deceased wife be said to be the adoptive mother? This question requires much more consideration than it has received. Where an adoption is made by a widow, it relates back to her husband's death; but where the adoption is made by a widower, there is no reason or principle why it should date back to an earlier date such as the death of his wife. The *Dattaka Mimamsa* contemplates a living wife and not one who is dead. It is imposing a fiction upon a fiction to say, either that the wife must be deemed to be alive at the date of the adoption, or that the adoption should relate back to the moment of her death. For the legal fiction of maternity, there must be a wife in existence at the time of the adoption to whom the law can point as the mother.

For the adoption is to the husband, and not to her. But in consequence of the superiority of the husband, by his mere act of adoption, the filiation of the adopted as son of the wife, is complete in the same manner as her property, in any other thing accepted by the husband". This passage is conclusive to show that the acquirer of the property in the son must be a living person. So too, if a bachelor makes an adoption as he is entitled to do, the fiction of maternity has no scope and it is impossible to constitute the wife he may marry thereafter, as the



legal mother of the adopted boy. She might not have even been in existence at the date of adoption. The simpler and more logical conclusion appears to be that a person can be the mother of the adopted boy when she is in existence as a wife at the date of the adoption, whether or not, she consents to it."

(25) The editor remarks in the foot-note, "Ramesam J.'s dictum in — 'Sowndarapandian v. Periaaveeru Thevan', 56 Mad 759 (F B). "Nor is there any need to rely on any theory of the adoption relating back to Kothai Ammal's lifetime "proceeds upon a misconception."

(26) Another equally eminent authority has also criticised the correctness of the decision in — 'Sowntharapandian v. Periaaveeru Thevan', 56 Mad 759 (FB). Sir M. Venkatasubba Rao, after his retirement from the High Court of Madras, in reviewing Mayne's Hindu law, 10th Edn., observed as follows:

"By way of refreshing contrast, the criticism of the Full Bench decision in — 'Sowntharapandian v. Periaaveeru Thevan', 56 Mad 759 (FB) is liberal in outlook. That the adopted son of a widower becomes the son of his deceased wife is a rule that outrages both reason and natural feeling. To suppose that the deceased wife is alive, or to relate back the adoption to the moment of her death, as the editor rightly points out, is to impose a fiction upon a fiction. The absurdity of invoking the fiction of maternity in the case of a bachelor who first adopts and then marries is patent."

(27) We cannot, as was the case also with our learned brethren Govinda Menon and Basheer Ahmed Sayeed JJ., ignore that circumstance that two eminent jurists late Mr. S. Srinivasa Aiyangar and Sir M. Venkatasubba Rao were of the opinion that — 'Sowntharapandian v. Periaaveeru Thevan', 56 Mad 759 (FB) had not been correctly decided. We would have referred this matter to a Full Bench but for the circumstances that on the footing that — 'Sowndarapandian v. Periaaveeru Thevan', 56 Mad 759 (F B) has been correctly decided the extension which the learned advocate Mr. Bashyam asks for is not deducible from the 'ratio decidendi' in that case.

(28) In fact — 'Sowntharapandian v. Periaaveeru Thevan', 56 Mad 759 (FB) following the earlier decision of — 'Sundaramma v. Venkatasubbier', 49 Mad 941 which for the purpose of our argument can be considered to constitute one group, contained observations showing the need for caution in imposing fiction upon fiction in developing the fictitious theory of adoption. It is a salutary principle right through that the adopted son is after all a son by fiction only. To adopt the words of Lord Truro in — 'Egerton v. Brownlow', (1853) 4 H. L. C. 1, uttered in another context, the fiction of adoption constitutes "a very unruly horse and when once you get astride of it you never know where it will carry you." The caution enjoined in — 'Subramanian v. Soma-sundaram', (1937)-1 Mad L J 60: 59 Mad 1064 at 1078 that "even a fiction cannot be carried to illogical limits" is too wholesome to be ignored.

And in this connection it has to be remembered and borne in mind that the text writers should not be taken literally and verbally because those text writers, for instance like

Dattaka Mimamsa where it is stated about the wife of the adopter becoming the mother of the adopted boy independently of her volition, were only thinking of matters spiritual and in terms of perpetuation of the sacred fire (agnihotra), 'Shradha' etc. Otherwise, if we do not keep in mind this limitation there would be a complete perversion of the laws of inheritance. In a series of cases it has now been held by our court that more than one wife of the adopter cannot become the mother of the boy for the purpose of succession. Under the Shastras the theory of maternity arising in the case of all the wives of a person is based upon the spiritual aspect.

In fact Jagannatha has gone to the extent of remarking that if a son be adopted by a man married to two wives, he would have two maternal grandmothers and two sets of maternal ancestor; see Colebrooke's Hindu Law, 4th Edn. Vol. II. page 394. Similarly, Vyavastha-chandrika states that if an adopted son is received by none of the wives either in conjunction with or under the authority of the husband but by the husband alone, the adopted son should perform the 'Parvana Sradha' in honour of the ancestors of all such wives of the adopter: See Vol. II, page 147, verse 32. Therefore, unless we bear in mind the limitation, we would be creating confusion in regard to succession. So also if we literally accept these texts as not only covering matters spiritual but also matters secular, we would be making a mockery of adoption not by making it a substitute for the real thing, namely, the adopted son being the reflection of a real son, but a caricature of the same.

An 'aurasa' son if his father is married to two or more wives can only succeed to his own natural mother's properties and not be the heir of his step-mothers' properties devolving on them from their parents. Therefore when Mr. Bashyam asked for an additional fiction we must bear in mind these limitations and examine whether such an extension is based upon the two factors involved in an adoption, namely, the spiritual and the material one. But before examining this aspect of the case we shall draw attention to certain observations in — 'Sundaramma v. Venkatasubbier', 49 Mad 941 and — 'Sowndarapandian v. Periaaveeru Thevan', 56 Mad 759 (F B) which throw considerable light on the question to be considered. In — 'Sundaramma v. Venkatasubbier', 49 Mad 941, Phillips J. observed:

"The theory then appears to be that the adopted boy by a legal fiction becomes the natural son of the adoptive father and presumably also of his wife. The question here is not complicated by the existence of two or more wives."

In — 'Sowndarapandian v. Periaaveeru Thevan', 56 Mad 759 FB, Ananthakrishna Aiyar J. observed:

"In the case of plurality of wives, several tests have been indicated to find out the intention of the husband as to which of the wives should be the mother of the adopted son. In the absence of any indication by the husband himself just as, associating one wife with him in the act of adoption, or otherwise declaring who is to be the mother, it may be that the seniormost wife — 'Dharmapatni' — might be held to be the mother. If some



wives be dead but others living other circumstances might have to be considered."

In other words, these two decisions contain cautions against extending the fiction and take on an additional fiction as now called for by Mr. Bashyam.

(28a) The 'ratio decidendi' in both these cases is that the adopted boy gets entirely cut off from his natural family, though we may not go to the extent of considering whether he is civilly dead and concerning which there has been a lot of controversy. Therefore, courts have felt that wherever possible a mother should be found for the boy in 'Suddha Dattaka' affiliation. That mother was described as "Pratigrahitri Yamatha" and this term has in its turn led to a lot of controversy and our court has considered the definition of this term in — 'Sowndarapandian v. Periaaveeru Thevan', 56 Mad 759 (FB) and Justice Ananthakrishna Aiyar has held that the expression means only the adoptive mother and not the woman who actually received the boy.

In the article "Theories of Maternal affiliation in adoption" contained at p. 21 of 1948-2 Mad L J Journal portion the learned author Mr. S. Venkataraman points out that it is noteworthy that the term has always been understood by scholars as referring to an adoptive mother generally and not carrying its etimological significance. This construction was evolved because as I have stated the endeavour of the courts has always been whenever possible to find a mother for the boy and on that construction it was possible to deduce that where a widower adopts, the deceased wife could by fiction be made the adoptive mother of the son adopted so as to inherit her father's properties.

(29) Could this be done in the case of an adoptive father who has remarried before adoption and has a wife living and who has no necessity to haunt for a mother for the adopted boy because there is one ready to hand. In our opinion there can be only one answer and it is the answer which has been given by the learned District Judge, namely, that the deceased wife of the first defendant cannot be nominated or designated as the adoptive mother of the sixth defendant.

(30) This is based upon a two fold reasoning. First of all the various fictions in regard to the power of a husband to designate or nominate a deceased wife or in the case of a bachelor a subsequently acquired wife to be the adoptive mother is based on the principle that the adoptive boy having lost his natural mother must be found a mother wherever possible and this is not the case here. Secondly, powers of preference of the husband can apply only as between the living wives of a person and not for elucidating the rights of a wife who had died prior to the adoption and a wife who is living at the time of adoption. The recognition of such a nomination would not give effect to the rule that when the first wife dies the next wife becomes the 'Dharmapatni' and in fact a wife has to be taken in order that acts of religion might be done properly.

So, the importation of the fiction will result in the anomaly, namely, that with reference to the adopter and his then existing wife the son is fictionally born in his family on the date of the actual adoption but with reference to the deceased wife he should be deemed to have

come into existence on the date of her death, a different date; so much so the son comes into existence not at the same time as regards both the parents, namely, Shanker Bhatta and Shankeri but at one time with reference to Shanker Bhatta and his second wife and at another time with reference to the alleged adoptive mother Shankeri. Adoption ceases to be an imitation of nature but becomes a mockery of it.

(31) It is interesting in this connection to look into the Hindu Code, 1948, which has not been passed into law but is on the legislative anvil. It is printed as Appendix IV to Mayne on Hindu Law and Usage, 11th Edn. In S. 54 of the said Code it is stated that any male Hindu who is of sound mind and has completed the age of eighteen years has the capacity to take a son in adoption but cannot do so except with the consent of his wife or, if he has more than one wife, except with the consent of at least one of such wives. In S. 70 of the said Code it is stated that "where a Hindu who has a wife living adopts a son, she shall be deemed to be the adoptive mother" and

"where a Hindu has more than one wife living, that wife in association with whom or with whose consent he makes the adoption, or if more than one wife has been so associated or has so consented, the seniormost in marriage among the wives so associated or consenting shall be deemed to be the adoptive mother, and the other wives the step-mothers, of the adopted son. Where a widower adopts at any time after his wife's death, the wife who died last immediately preceding the adoption, shall be deemed to be the adoptive mother, and any other predeceased wife or any wife subsequently married by him shall be deemed to be the step mother of the adopted son. Where a bachelor adopts, any wife subsequently married by him shall be deemed to be step-mother of the adopted son."

There can be no dispute that these sections are the embodiment of the case-law as it now stands and the progress which is sought to be embodied. It will be noticed that the framers of the Code have not thought fit to apply the extension now sought for as it is opposed to both the spirit and of the texts as well as the limitations placed by case-law in regard to this thorny subject of adoption by the male.

(32) In the result, it follows that the decree and judgment of the lower appellate court has got to be set aside because Sankamma has subsequently died and there is no impediment to the reversioners' claim and the decree and judgment of the learned Subordinate Judge has got to be affirmed, though on different grounds. The second appeal by Tirumaleshwara Bhatta (S. A. No. 1823 of 1947) is dismissed and the second appeal by the reversioners (S. A. No. 2112 of 1947) is allowed.

(33) The reason which induced the learned District Judge to dismiss the action was that it was too premature as Sankamma was alive at the date of the suit and the date of first appeal. Subsequent to the filing of the appeal here the impediment has been removed by the death of Sankamma. Therefore it follows that the plaintiffs are entitled to a decree in terms of the learned Subordinate Judge's findings, but



as regards mesne profits we direct that the plaintiffs be entitled to a decree only from the date of the death of Sankamma, that is, 20th May 1949. Each party to bear its own costs throughout.

A/V.R.B.

Order accordingly.

**A.I.R. 1953 MADRAS 137 (Vol. 40, C. N. 40)**

RAMASWAMI J.

In re, V. V. Satyanarayanamurthy, Petitioner.  
Criminal Revn. Case No. 603 of 1952 and  
Criminal Revn. Petn. No. 499 of 1952, D/- 23-7-1952.

**Prevention of Corruption Act (1947) S. 5(1) (c) — Section does not pro tanto repeal S. 409 Penal Code — (Penal Code (1860) Ss. 5, 41 and 409). AIR 1952 Punjab 89 Dissented from. Case law reviewed. (Paras 3, 4)**

Anno: Penal Code, S. 5 N. 1; S. 41 N. 1; S. 409 N. 1.

Adavi Rama Rao, for Petitioner.

REFERENCES: Courtwar/Chronological/ Paras  
5 NWP 49

('32) AIR 1932 All 18: (33 Cri LJ 236)	5
('32) AIR 1932 All 69: (33 Cri LJ 309)	4
('95) 22 Cal 131	4
('07) 11 Cal WN 100: (4 Cri LJ 439)	4, 5
('67) 4 Myn Cri 17: (8 WR Cr 55)	4
('83) 6 Mad 249: (1 Weir 89)	5
('29) 52 Mad 79: (AIR 1928 Mad 1235: 30 Cri LJ 432)	4
('52) AIR 1952 Punj 89: (1952 Cri LJ 316)	3

**ORDER:** This is a revision petition sought to be filed against the affirming judgment of the learned Sessions Judge of Krishna in C.A. No. 17 of 1952 confirming the conviction and sentence of the Additional First Class Magistrate of Vijayawada in C. C. No. 432 of 1950.

(2) The facts of the case have been fully set out in the judgments of the lower courts and the record shows that there was valid, acceptable, and adequate evidence for the conviction that followed and the sentence is also found to be appropriate. Therefore, there are no grounds to interfere in regard to the merits as well as the extent of the sentence.

(3) The substantial point of law taken before me is the contention based upon the decision of the Punjab High Court in — 'The State v. Gurcharan Singh', AIR 1952 Punj 89, wherein it was held that S. 5 (1) (c) of Act II of 1947 repealed 'pro tanto' S. 409 I. P. C. But with greatest respect for the decision, I find no reasons whatsoever for holding that S. 5 (1) (c) of the Prevention of Corruption Act repeals S. 409 I. P. C.

(4) A "Special law" is a law applicable to a particular subject: see S. 41 I. P. C. Under S. 5 I.P.C., no special law is repealed, varied, suspended or affected by the enactment of the Indian Penal Code. Although an offence is expressly made punishable by a special or local law, it will be also punishable under the Penal Code, if the facts come within the definition of the Code: — 'The Queen v. Ramachandrappa', 6 Mad 249. The general principle of law is that the Penal Code would apply if the acts fall within the Indian Penal Code though there may be specific offences and penalties under the special Act. Accordingly, the High Court of Madras held that a prisoner might be punished

under Section 465 I. P. C. for making a false declaration under S. 5 of Act X of 1841 (Ship Register), though a specified penalty is provided by S. 23 of that Act. (See Rulings of 1865 on Sec. 5). There have been similar decisions in regard to other special Acts. It is enough to cite a few cases. In regard to offence under Indian Penal Code and Provincial Insolvency Act, see — 'Queen v. Ramachandrappa', 6 Mad 249; for offences under Local Boards Act and Indian Penal Code, see — 'Molaiappa Goundan v. Emperor', 52 Mad 79; for conviction under Indian Penal Code though offence falls within purview of Motor Vehicles Act also, see — 'Jiwa Ram v. Emperor', AIR 1932 All 69; for offences under Salt Act and Indian Penal Code, see — 'Emperor v. Joti Prasad', AIR 1932 All 18; for Indian Railways Act and Indian Penal Code, see — 'Kuloda Prosad Mazumdar v. Emperor', 11 Cal W N 100 distinguished — 'Chandi Pershad v. Abdur Rahman', 22 Cal 131, wherein it was held that a special penal provision as in the Railways Act would not always exclude the operation of the Penal Code.

The most familiar example however is of the identical provisions contained in the Indian Penal Code regarding rash and negligent driving and under the Motor Vehicles Act. Thus where the accused while driving a motor car on the wrong side of the road and at a blind corner between two roads of considerable traffic came into collision with a motor bicycle and caused damage to the side car of the bicycle it was held that the accused was guilty of an offence under S. 279 I. P. C. and the sentence of three months' rigorous imprisonment served on the accused by the lower court was upheld. It was argued on behalf of the accused in this case that the more appropriate section would be S. 59 of the Motor Vehicles Act but the Judges remarked that the offence committed by the accused was serious and that the mere fact that the Motor Vehicles Act also contained a provision for dealing with offences of this nature would not exclude the operation of the Indian Penal Code. Therefore, it is idle to contend that a special law repeals the provisions of the Indian Penal Code because both of them deal with offences arising under both the Acts.

(5) There are however two important restrictions. No prosecution under the Special law is admissible if it appears upon the whole frame of the Special Act that it was intended to be complete in itself and to be enforced by the penalties created by it. See — 'Chandi Pershad v. Abdur Rahman', 22 Cal 131 at p. 138. The court of session has jurisdiction to hear appeals on sentences passed by a Magistrate under such special and local laws (Rulings of Madras High Court, 1865, on S. 409 CrI. P. C. Act XXV of 1861); and conversely, it is no reason for quashing a conviction under a special law, for instance, under S. 29 of Act V of 1861 (General police), that the facts would constitute an offence punishable under the Penal Code: — 'Kasimuddin in re', 4 Myn CrI. 17. If the magistrate proceeds under the Penal Code it is better to drop the charge under the local Act. But secondly, a person cannot be punished under both the Penal Code and the Special law for the same offence. If an offence under a special law is likewise one under the Penal Code it is punishable either under the special law or under the Code as laid down in



— 'Queen v. Ramachandrappa', 6 Mad 249 and — 'Kasimuddin in re', 4 Myn. CrL. 17; but of course not under both as laid down in — 'Rex v. Husson Ali', 5 N. W. P. 49. See also S. 26 of the General Clauses Act X of 1897, viz., where an act or omission constitutes an offence under two or more enactments the offender is liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished twice for the same act or omission.

(6) Therefore, there are no grounds to interfere in revision and this revision case is dismissed.

A/R.G.D.

Revision dismissed.

**A.I.R. 1953 MADRAS 138 (Vol. 40, C. N. 41)**

**MACK AND CHANDRA REDDI JJ.**

In re Ramaswami Reddiar and another, Appellants.

Criminal Appeals Nos. 655 and 656 of 1951, D/- 22-8-1952.

†(a) **Criminal P. C. (1898) Ss. 164, 176(1), 364 and 533(1) — Who can record statement or confession — Magistrate holding inquest under S. 176 — Non-compliance with S. 364.**

It cannot be said that no Magistrate can ever record a confession from an accused person except in strict conformity with S. 164. Section 164 does not mean that a Magistrate of the second class not empowered under S. 164 Cr. P. C. and a Magistrate of the third class can under no circumstances record or give oral evidence of a confession made to them. Thus a Magistrate holding an inquest under S. 176 and not empowered to record confessions under S. 164 can record a confession, as the powers under S. 176(1) include the power of taking down any statement, whether it be a confession or not, from any person who knows anything about the cause of death. It is not necessary for the Magistrate to immediately send the accused to a Magistrate empowered to record confessions under S. 164. The confession should be recorded in the form of questions and answers as required by S. 364; but the failure to comply with this provision may, in the circumstances of a case, be curable under S. 533(1). AIR 1936 PC 253(2), Explan. and Disting.

(Paras 14, 16 and 20)

Anno: Cr. P. C., S. 164 N. 3. Pl. 7; S. 364 N. 1; S. 533 N. 4.

(b) **Criminal P. C. (1898) S. 164 — Scope of section.**

Section 164 Cr. P. C. comes into play when during an investigation an accused is formally brought before a Magistrate for the purpose of recording his confession.

(Para 18)

Anno: Cr. P. C., S. 164 N. 1.

(c) **Evidence Act (1872), S. 21 — Confession — Magistrate holding inquest under S. 176, Cr. P. C. recording confession — Admissibility — (Criminal P. C. (1898) Ss. 164 and 176).**

Per Chandra Reddy J.: A statement made to a Magistrate holding an inquest under S. 176 is admissible under S. 21 of the Evidence Act. It follows that a confession recorded by a Magistrate holding an inquest under S. 176, Cr. P. C. and not empowered under S. 164 to record confession is ad-

missible in evidence and can be used against the accused as it falls within the scope of S. 21, Evidence Act. (Para 23) Anno: Evidence Act, S. 21 N. 10; Cr. P. C., S. 164 N. 3.

R. V. Raghavan as Amicus Curiae, for Appellants; Asst. Public Prosecutor, for the State.

REFERENCES: Courtwar/Chronological/ Paras ('36) 17 Lah 629: (AIR 1936 PC 253(2):

37 Cri LJ 897) 15, 18, 19, 23

('51) Ghulam Hussain v. The King:

(51 Cri LJ 1552 PC) 23

('45) Govt. of Bombay v. Dashrath Ramnivas:

(AIR 1945 Bom 265: 46 Cri LJ 714 FB) 17

('39) 1939 Mad WN Cr 172: (AIR 1940

Mad 138): 41 Cri LJ 322 15

MACK J.: The two appellants, who incidentally bear the same name, have been found guilty under S. 302 I.P.C. of the murder of Sellappa Reddiar, an elderly man in the early hours of the 17th of May 1951 on a pathway leading from Paravoi village to Ariyalur, the nearest centre with a District Munsif's court and regular lawyers.

(2) The prosecution case is that the 1st accused and the deceased were proceeding together from their village of Vedakkalur to Ariyalur via Paravoi where they halted for some hours on the night of the 16th of May 1951. They left Paravoi together in the early hours of the 17th of August when about 1½ miles from Paravoi, the 2nd accused with implements for murder and burial by prior arrangement with the 1st accused came on the scene. Sellappa Reddiar was killed on the pathway and then buried about half a furlong away. It was not till the 24th of May seven days later that his body was dug up.

(3) The motive centres round the deceased's young wife Bangaru Ammal P. W. 2, now aged 18 whom he is said to have married when over 40 when she was only about nine years old. This girl came from a poor family of Paravoi. The 2nd accused is her elder brother. She grew into an attractive young woman and like the precious metal after which she was named, she was according to the prosecution case destined to lure men to murder and destruction. She joined her husband, who lived in Vedakkalur about six miles from Paravoi, about 3 or 4 years ago. It was not long before she and the 1st accused aged 30, a married man with two children, who owned a cattle shed near the deceased's house became enamoured of each other.

There is plenty of evidence including that of Bangaru Ammal herself as P. W. 2 to show that they were on terms of illicit intimacy in which Sellappa Reddiar ultimately acquiesced and he was at the time of the offence on terms of ostensible friendship with the first accused. The deceased appeared content so long as his wife stayed in his house, but about three months prior to the offence, she went to her mother's house at Paravoi where very soon she struck up illicit intimacy with one Sivalinga Padayachi (P. W. 3) a friend of her brother, the 2nd accused. Though she herself deposed that P. W. 3 was only a friend, P. W. 3 himself admitted intimacy with this young woman. So we have instead of the usual triangle, a quadrangle of a foolish old husband, a very young and attractive wife and two of her paramours.

(4) The immediate motive so far as the 2nd accused is concerned relates to property. Sel-



lappa Reddiar had settled on Bangaru Ammal a house and some land. The deed has not been filed. Incensed at her leaving him, he sold 2½ cents of this land under Ex. P. 1 dated 7-5-51 to P. W. 9, who has also deposed to strained relations between the deceased and his young wife for about two years, and her periodic absence at Paravoi, where the 1st accused used to visit her. There is no reason to disbelieve the evidence of P. W. 9 that deceased told him he wanted to cancel the settlement deed and asked P. W. 9 for a letter to his advocate at Ariyalur. It was while the deceased was on his way to Ariyalur accompanied by the 1st accused to instruct an advocate that he was, according to the prosecution case, killed.

Paravoi is six miles from Vedakkalur and about 11 miles from Ariyalur. The route from Paravoi is by a pathway between 4 and 5 miles long which joins the main Perambalur-Ariyalur road. There is, in the first place, ample evidence to show that deceased locked up his house at Vadakkalur on Thursday the 16th of May, handed over the key to a Muslim woman, P. W. 8 and left the village along with the 1st accused, his wife and two children in a bullock cart. P. W. 8 understood that they were both going to Ariyalur. The deceased did not return again and after the corpse was found, she handed over the key to the village Magistrate. P. W. 1 who is married to the deceased's brother's daughter, is the only male relation of this lonely old man examined as a witness. There is no reason to disbelieve his evidence and also that of another Reddiar, P. W. 18, that the deceased left Vadakkalur in the company of the 1st accused.

(5) Any doubt about this is set completely at rest by two Paravoi witnesses, P. W. 4 and her son P. W. 5. (His Lordship referred to the evidence of P. Ws. 4 and 5 and proceeded:)

(6) It was not till the 22nd of August that some persons hunting hare including P. W. 11 saw a human leg protruding from the ground with crows and kites all round it. P. W. 12 took information to the village Magistrate of Varagannur, P. W. 13, who sent reports Exs. P. 10 and P. 11 to the authorities. When he went to the scene, he saw no sign of any protruding leg bone and at the place pointed out by P. W. 12 there was earth thrown over and stones placed. This evidence suggests that an interested culprit in the vicinity had tried to repair the ravages of birds of prey. Ex. P. 10 reached the Perambalur police station 15 miles away at 4 p.m. on 23-5-51. Another report Ex. P. 13 by the village Magistrate of Paravoi P. W. 14, who inspected the scene at 9 a.m. on a Vetti's report, was also despatched at 11 a.m. and reached the Valikondapuram police station 10 miles from the scene of offence at 5-15 p.m. A constable there P. W. 16 registered a death report and went that night to the scene of burial and claims to have guarded the spot with village menials.

Next morning, in response to reports and requisitions, there was a convegence of various functionaries to the suspected place of burial including the Circle Inspector of Perambalur who has not been examined as a witness, the Sub Magistrate, Perambalur (P. W. 10) who received the requisition Ex. P. 2 at 5-45 p.m. on 23-5-51 and also the Assistant Surgeon, P. W. 15. P. W. 10 says he arrived at the spot at 9-45 a.m. and P. W. 15 at 9-30 a.m. The body had been superficially buried with the arms folded across the chest and the legs bent un-

der, the whole body wrapped up in a white lungi, M. O. 2. The whole of the face was eaten away. On the right ear, which was present, was a ear-ring set with a red stone, M. O. 1. In the pit was found one sandal (M. O. 3). Post-mortem examination by the doctor held on the spot disclosed two lacerated wounds each 1½" long and 2" deep in the region of the right thigh, fracture of no less than 6 ribs and fracture of the lower and upper jaws.

There was also what is described as a transverse cut over the middle of the thyroid cartilage which was hanging down. In the stomach was found one ounce of semi solid rice dhal and chillies bearing out the testimony of P. W. 4. There can be no doubt that the deceased died in consequence of a violent and murderous attack by both sharp and blunt weapons. The corpse was identified by P. W. 1 and also by Bangaru Ammal P. W. 2 herself as that of the deceased Sellappa Reddiar. Although the body was not identifiable and it has been urged that M. Os. 1, 2 and 3 do not conclusively establish its identity we are quite satisfied on the cumulative evidence in the case that this was the body of Sellappa Reddiar. It may even be impossible sometimes for relatives to identify a corpse exhumed after several days. But identity can be established by other evidence which is forthcoming in the present case in abundant measure.

(7) The inquest was held by the Sub Magistrate Sri R. W. Michael, P. W. 10 uptill 1 p.m. near the corpse. After that he moved with the Panchayatdars to Paravoi village and continued the examination of the witnesses in the chavadi from 3 p.m. until he closed the inquest at midnight. He recorded from the 2nd accused, who was produced before him a confession Ex. P. 6 inter alia to the effect that he had buried two weeding instruments and a sandal in his field. The Sub-Inspector of Valikondapuram who only reached Paravoi at 11 a.m. the morning after the other official accompanied the 2nd accused, who produced from his field buried there a left foot sandal M. O. 4, a weeding instrument M. O. 5, a stick M. O. 6 and a spade handle M. O. 7. M. O. 7, has a blood stain on it; proved on chemical analysis to be human blood.

It would appear that after these discoveries the Sub Magistrate examined the 1st accused, who made a long confessional statement Ex. P. 5. The learned Sessions Judge held that Exs. P. 5 and P. 6 were admissible in evidence. The Sub Magistrate, Sri R. W. Michael was not empowered under S. 164 CrI. P. C. to record confessions, though he was empowered to hold inquests. The admissibility in evidence of Exs. P. 5 and P. 6 has been elaborately argued before us by Sri Raghavan who has appeared amicus curiae for the two appellants and by the learned Public Prosecutor. Before dealing with this legal point, the other evidence in the case may be briefly referred to.

(His Lordship referred to the evidence in the case and proceeded:)

(8-12) Quite apart from the confessions Exs. P. 5 and P. 6 there is, therefore, a good deal of evidence both against accused 1 and 2 to prove their participation in this murder. Accused 1's total denial of all the evidence against him and his taking refuge in the unproved assertion that he never left Vadakkalur at all in the company of the deceased reinforces the prosecution case, once the evidence of accused 1's own relations P. Ws. 4 and 5 is accepted. So far as motive is concerned, that animating the



2nd accused is clear cut, solicitude for his sister and the preservation of the property settled on her. The motive so far as the 1st accused is concerned appears to be pure infatuation for Bangaru Ammal, as he had nothing very much to gain himself by killing this old man, who did not, according to the evidence, object to his amorous association with P. W. 2. The motive against the 1st accused is rendered weaker by the existence of P. W. 3 as another paramour of P. W. 2. But it may well be that the 1st accused did not know of this relationship, which P. W. 2 also denied, in the witness box. So far as motive is concerned, we are satisfied that the prosecution evidence discloses adequate motive so far as both the accused are concerned.

(13) We now come to the admissibility of the confessions Exs. P. 5 and P. 6. These are two long statements recorded by a Magistrate empowered to hold inquests under S. 176(1) Crl. P. C. who in any case mentioned in S. 174(a), (b) or (c)

"may hold an enquiry into the cause of death either instead of or in addition to the investigation held by the police officer and if he does so, he shall have all the powers in conducting it which he would have in holding an enquiry into an offence."

The Magistrate holding such an enquiry shall record the evidence taken by him in connection therewith in any of the manners hereinafter prescribed according to the circumstances of the case. The Magistrate examined other witnesses at the inquest on oath. When he came to the examination of accused 1 and 2, it would appear that on becoming aware that they were making confessions, he administered no oath to them in correct conformity with S. 342(4) Crl. P. C. after he completed the statements they were read out to the two accused, who signed them in the usual manner. The statements and confessions were recorded on police case diary paper.

(14) An extreme but in our opinion quite untenable position has been taken that no Magistrate can ever record a confession from an accused person except in strict conformity with S. 164 Crl. P. C. This section empowers all Magistrates of the First Class and any Magistrate of the second class, specifically empowered under it to record statements and confessions made in the course of an investigation in a particular manner. This however does not mean that a Magistrate of the second class not empowered under S. 164 Crl. P. C. and a Magistrate of the third class can under no circumstances record or give oral evidence of a confession made to them.

(15) The extreme position taken is sought to be founded on what appears to us to be a clear mis-interpretation of the Privy Council decision — *'Nazir Ahmad v. King Emperor'*, 17 Lah. 629 (PC). In that case the facts restricted the Magistrate clearly to the confines of S. 164 Crl. P. C. The investigating police took with them a First Class Magistrate and one, therefore, empowered under S. 164 Crl. P. C. to investigate a case of dacoity. The accused in handcuffs accompanied the party in another car. After sending the police to some distance, the Magistrate deposed that each of the accused pointed places out. He made rough notes of a full confession the convicted appellant made, destroyed them after dictating a memorandum to his typist and gave evidence in court on the basis of the memorandum

which apparently also was filed. This was not even read out to the accused and not even signed by him. This was very obviously a case to which S. 164 Crl. P. C. had clear application, the provisions of which were rather blatantly disregarded by the Magistrate. It was in this background of fact that their Lordships of the Privy Council made the following dictum reproduced in the headnote reporting the decision,

"it is a well recognised rule of construction that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all—other methods of performance are necessarily forbidden."

The effect of this decision was that a Magistrate, who was empowered to record a confession under S. 164 Crl. P. C. and grossly violated the requirements of that section, could not ignore such violation and give oral evidence of a confession he heard from an accused person in police custody in the course of an investigation. This decision was considered by Burn and Stodart JJ. in — *'Nainamuthu v. Emperor'*, 1939 Mad WN Cr 172. In that case, the accused after killing his concubine, appeared before a Magistrate and made a confession that he had killed her. The Magistrate took down the confession without observing any of the formalities required by S. 164 Crl. P. C. and it was held to be admissible in evidence as a first information of the crime. It was also a statement not recorded "in the course of an investigation" even to attract the operation of S. 164 Crl. P. C.

(16) The point for determination before us is really a simple one. In this case, the Magistrate who recorded these confessions could not have proceeded under S. 164 Crl. P. C. as he was not empowered to record confessions in cases to which that section applied. S. 164 is, therefore, for determination of the admissibility of these two confessions, quite irrelevant. The simple point we have to determine is whether this Magistrate who was holding an inquest empowered as he was to hold one under S. 176(2) Crl. P. C. recorded these confessions within the scope of these special powers. This inquest was held by him as "an inquiry into the cause of death" in addition to the investigation held by the Police officers, who were while the inquest was in progress, making their own investigation.

Under S. 176(1) Crl. P. C., the Magistrate shall have all the powers in conducting it which he would have in holding an enquiry into an offence. These powers in our opinion include the power of taking down any statement, whether it be a confession or not from any person who knows anything about the cause of death. Under this section, the Magistrate shall record the evidence in any of the manners prescribed by the Code. The only defect in the procedure adopted by this Magistrate holding the inquest appears to be that as soon as he was aware that these two accused were making confessions, he should have recorded their statements in the form of questions and answers as required by S. 364 Crl. P. C. We are unable to see any other defect in the procedure adopted by this Magistrate within his powers of holding inquest. Nor can we see how S. 164, Cr. P. C. which specifically empowers certain Magistrates to record statements or confessions under other circumstances can have the effect of destroying the powers of the Magistrate holding an inquest under S. 176 Crl. P. C. In this case the Magistrate could not have act-



ed at all under S. 164 CrI. P. C. nor was it necessary for him even to look into the provisions of that section to guide him.

Mr. Raghavan has urged that as soon as the Magistrate realised that a confession was being made to him at the inquest, which he was not empowered to record, or even listen to, he should have immediately sent these accused to a Magistrate empowered to record confessions. Any such interpretation of S. 176(1) CrI. P. C. in conjunction with S. 164 CrI. P. C. would reduce the position of a Magistrate holding an inquest to one of helpless absurdity. In the case of a police officer holding an inquest on a confession being made before him, he can and does record it nor is he bound as a Magistrate is by the procedure prescribed by S. 176(1) CrI. P. C. but a confession made at an inquest held by a Police Officer is unfortunately clearly inadmissible in evidence under Ss. 25 and 26 of the Evidence Act. Where the Magistrate holds the inquest, the position is, of course, entirely different.

(17) The only relevant decision amongst many which have been placed before us is a Full Bench decision of the Bombay High Court, — 'Government of Bombay v. Dashrath Ramnivas', (AIR 1945 Bom 265 FB). That was a case in which a Coroner appointed under Act IV of 1871, applicable only to Calcutta and Bombay, recorded a confession under S. 19 of the Coroners Act without observing the formalities laid down in S. 164 CrI. P. C. and some High Court circulars. In an appeal against an order of acquittal at the High Court criminal sessions a Full Bench set it aside and ordered a retrial holding inter alia that the remark of the trial Judge that the Coroner ought to have complied with the formalities of S. 164 CrI. P. C., when he was not in law bound to do so, would amount to a misdirection because it was not improbable that the jury was led to think that the confession was not properly recorded and therefore not voluntary.

It is significant in this connection that under S. 20 of the Coroners Act for the purpose of S. 26 of the Evidence Act, a Coroner shall be deemed to be a Magistrate. According to S. 26, no confession made by any person whilst he is in the custody of a police officer unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. The Coroner was therefore deemed to be a Magistrate for the explicit purpose of being able to record a confession made to him at an inquest, which could be proved at a subsequent trial. We can see no difference in the position of a Coroner under the Coroner's Act and a Magistrate holding an inquest under S. 176(1) CrI. P. C. in the matter of recording confessions.

(18) There is also a provision of law which is apt to be completely forgotten in excessive concentration on S. 164 CrI. P. C. and that is S. 163(2) CrI. P. C. which is to the following effect:

"No police officer or other person shall prevent by any caution or otherwise any person from making in the course of any investigation under this chapter any statement which he may be disposed to make of his own free will."

The extreme untenable position based on S. 164 CrI. P. C. would seek to make Magistrates of all persons (classes?) guilty of a violation of S. 163(2) CrI. P. C. by stopping such persons making statements of their own free will

by unnecessary cautions, nowhere contemplated by law. If for instance the Magistrate holding the inquest had also been a First Class Magistrate or one specifically empowered to record confessions under S. 164 CrI. P. C. and had in fact acted under this section, and adopted the procedure usually followed in these cases of giving the accused time to reflect after removing him from all police influence without taking any statement immediately from him, he would have acted in direct violation of the positive requirements of S. 176(2) CrI. P. C. and also from a minor standpoint in violation of S. 163(2). The admissibility of a confession rests fundamentally on its spontaneous and voluntary nature, and is irrelevant under S. 24 of the Evidence Act, if it appears to have been caused by any inducement, threat or promise having reference to the charge against an accused person proceeding from a person in authority, and sufficient in the opinion of the court to give the accused person reasonable grounds for thinking that by making it, he would gain some advantage or avoid some evil.

The type of case to which S. 164 applies is that in which an accused person is produced not at an inquest but in the course of a police investigation, after he has made a confession to the police or has declared his desire to confess while in police custody before a Magistrate. Sarkar in his law of Evidence, 8th edn., page 241 has an interesting commentary on the effect of the Privy Council decision — 'Nazir Ahmad v. King Emperor', 17 Lah. 629 (PC), and on the extent to which previous decisions have been affected by that decision. We find ourselves in complete agreement with the following observation of his:

"It may however be observed that S. 164, Criminal P. C. comes into play when during an investigation an accused is formally brought before a magistrate for the purpose of recording his confession."

This being in accordance with our opinion, we would like to give it judicial endorsement. We are also in agreement with his further opinion to the following effect:

"Admission of guilt or of an incriminating fact may be made by an accused to a Magistrate in the course of a statement to him on occasions other than when he is so brought for recording his confession and such statements appear to stand at least on the same footing as an extra judicial confession to a third person or an admission under S. 21."

(19) The extreme position, which seeks to push the Privy Council decision — 'Nazir Ahmad v. King Emperor', 17 Lah 629 (PC), to logical conclusion on the basis of the headnote to which we have referred and one which in our respectful opinion their Lordships of the Privy Council never contemplated would in fact reduce a Magistrate to a far lower level than an ordinary citizen in the matter of deposing to confessions made to him. A confession may be made to a village magistrate and be admissible but made to a Third Class Magistrate, it should be unconditionally ruled out nor should he make any record of it.

If made to a First Class Magistrate or one empowered under S. 164, Criminal P. C. whether in his personal or official capacity, he cannot depose to it unless he has recorded the confession in strict conformity with S. 164, Criminal P. C. and produced the document required by law to be reduced to a particular form under S. 91 of the Indian Evidence Act in strict conformity with S. 164, Criminal P. C.



We have taken the opportunity to dispel with the able assistance of the learned Public Prosecutor to the best of our ability erroneous notions of the interpretation of the decision — 'Nazir Ahmad v. King Emperor', 17 Lah 629 (PC), in a manner which we think their Lordships of the Privy Council never contemplated the observations relied on there having been made in a totally different and particular background to which S. 164, Criminal P. C. was exclusively applicable.

(20) The legal point for determination, a really simple one, can be answered out of the Acts themselves, which create no difficulty. No decision has been placed before us which lays down that a confession made before a Magistrate holding an inquest but not empowered under S. 164, Criminal P. C. has been held to be inadmissible. We can only as we stated 'supra', find one technical defect in the procedure of the Sub-Magistrate, i.e., in his failure to record the confessions of accused 1 and 2 in question and answer form in compliance with S. 364, Criminal P. C. We consider this however in the circumstances of this case a technical defect which is curable under S. 533 (1), Criminal P. C. We do not think that the omission of the Magistrate to put and record preliminary questions to these accused asking them whether they knew anything about the cause of death has injured their defence on the merits.

We have no reason to doubt that the result of such questions being recorded would have been the same and that the accused would have made to the Magistrate before the 'Panchayatdars' the same confessions they did. There was absolutely no time for these two long detailed confessions, Exs. P. 5 and P. 6 independently made before the Magistrate and the 'Panchayatdars' to have been induced in any manner contemplated by S. 24 of the Evidence Act. They are only explicable on the basis of their being substantially true and voluntarily made by these two accused in sudden consternation at the discovery of the corpse and their interrogation by the police. The two confessions have been set out 'in extenso' in the trial court judgment. Except that the first accused sought to fasten culpability for the actual attack on the deceased on the second accused and the second accused on the first accused the long confessions are in conformity with the salient facts and evidence in the case.

We have no hesitation in finding on the abundant evidence in this case that accused 1 and 2 jointly murdered the deceased and disposed of his body. The learned Sessions Judge has seen fit to pass on the two accused the lesser punishment for a rather curious reason which cannot have the seal of our approval viz., that as there were no eye-witnesses to the actual murder, it was not certain from the evidence as to who dealt the fatal blows and played the leading role. With the observation that the appellants have been fortunate in being awarded the lesser sentence, we confirm the convictions and sentences and dismiss the appeals.

(21) We would like to place on record our appreciation of the arguments of Mr. R. V. Raghavan who has appeared for the appellants 'amicus curiae'. Unfortunately existing rules do not permit the payment to him of any remuneration.

(22) CHANDRA REDDI J.: I am in general agreement with the conclusions of my learned brother. But I like to add a few words on the

admissibility of the two confessions, Exs. P. 5 and P. 6 made by the two appellants, having regard to the importance of the question. In the judgment of my learned brother, the contents of these two confessions and the circumstances under which they came to be made are set out. The two documents are very important as the convictions of the appellants to a large extent depend on them. If the confessions are receivable in evidence and if they have been found to be voluntarily made, the guilt of the appellants can be said to have been established beyond reasonable doubt.

(23) Counsel for the appellants contends that these confessions are not admissible in evidence as they were recorded by a Magistrate who was not empowered under S. 164, Criminal P. C. to record statements and confessions in the course of investigation. Although this contention is not altogether without substance I am afraid I cannot give effect to it. The Magistrate who recorded Exs. P. 5 and P. 6 did not purport to act under S. 164, Criminal P. C. as he was not one of those who was specially empowered to do so under that section and therefore they are outside the scope of S. 164, Criminal P. C. These statements were recorded by the Magistrate at the inquest which he was holding under S. 176, Criminal P. C. My learned brother has adverted to some of the cases bearing on the subject.

However I will refer to one decision of the Privy Council, viz., — 'Ghulam Hussain v. The King', (51 Cri LJ 1552 PC), which in my opinion gives support to our view. There it was ruled that a statement made to a Magistrate which did not amount to a confession being a self-exculpatory one could be used against the maker of it under Ss. 18 to 21 of the Evidence Act. This seems to be an authority for the position that statements of accused falling outside the purview of S. 164, Criminal P. C. are admissible as admissions within Ss. 18 to 21 of the Evidence Act. On the principle contained therein I must hold that a statement made to a Magistrate holding an inquest under S. 176, Criminal P. C. is admissible under S. 21 of the Evidence Act. It follows that Exs. P. 5 and P. 6 are admissible in evidence and can be used against the accused as they fall within the scope of S. 21 of the Evidence Act. In the result I agree that the appeal should be dismissed.

A/V.R.B.

Appeals dismissed.

### A.I.R. 1953 MADRAS 142 (Vol. 40, C. N. 42) RAMASWAMI J.

In re Sundara Nadar, Petitioner.  
Criminal Misc. Petn. No. 1345 of 1952, D/-  
20-8-1952.

**Constitution of India, Art. 19 (1) (f) (g) and (6) — Explosives Act (1884), not ultra vires.**

Explosives should not be manufactured and explosive substances should not be stocked except under conditions which would not be detrimental to the public safety, health, and convenience. Therefore, the restrictions imposed on the acquisition holding and disposal of property, that is to say, explosives and explosive substances and the right to practise one's profession, trade etc., in manufacturing explosives are restrictions permissible under Clause (6) of Art. 19 of the Constitution. Consequently, the Explosives Act is not ultra vires of the



Constitution and can be justified under the proviso in Art. 19(6) of the Constitution. The Explosives Act does not constitute a violation of the freedom guaranteed under clauses (f) and (g) of Art. 19 (1) of the Constitution. (Paras 6, 7)

A. K. Annaswami Aiyar, for Petitioner; Public Prosecutor, for the State.

REFERENCE.....

149 ALR 1416

Para.  
6

**ORDER:** This is an application under Article 228 of the Constitution of India for withdrawing C. C. No. 1419 of 1951 on the file of the City First Class Magistrate's Court, Madurai, to the High Court.

(2) The facts are: On 24th October 1951 on information received, premises bearing door No. 3, Veerabhadra Aiyar Lane, South Veli Street, Madurai, was searched after complying with the formalities prescribed by law. The third and fourth accused are living in door No. 3 and the first and second accused were found manufacturing explosives and on searching the premises articles which are obviously and exclusively required for the manufacture of explosives and components of explosive substances were found. These four persons have been charged, the first and the second for the manufacturing and the third and fourth accused for allowing 1 and 2 to manufacture explosives such as fire-works, crackers etc. in a residential locality without any licence or permit. I may add for the completeness of information that there is no dispute that these persons have no permit.

(3) The point taken now is that in charging these persons there has been infringement of fundamental rights given to citizens under clauses (f) and (g) of Art. 19 (1) of the Constitution of India.

(4) Article 19 (1), Clauses (f) and (g) state that all citizens shall have the right to acquire, hold and dispose of property and to practise any profession, or to carry on any occupation, trade or business.

(5) The point for consideration is whether the present case involves a substantial question of law?

(6) There is no substantial question of law involved as would compel the High Court to withdraw the case. It is no doubt true that under the Constitution of India any citizen has the right to acquire, hold and dispose of property in any place to which he goes or in which he resides and that place may be anywhere within the Indian Union and that the expression "property" includes every interest one may have in any and everything that is the subject of ownership by man together with right to freely possess, enjoy and dispose of the same: — 'Metropolitan Trust Co. v. Jones', 149 ALR 1416. It is also quite true that the right of every citizen to practice any profession or to carry on any occupation, trade or business is guaranteed under the next clause. But it is also equally obvious that these freedoms are subject to the same conditions and restrictions as the freedom vouchsafed under the other clauses of Art. 19, viz., that restrictions may be imposed upon the use of the property or in practising one's profession, trade, etc. in promotion of the public welfare, convenience, health and general prosperity. That explosives substances should not be manufactured and that explosive conditions which would not be detrimental to

the public safety, health, and convenience requires no expatiation whatsoever. Therefore, the restrictions imposed on the acquisition, holding and disposal of property, that is to say, explosives and explosive substances and the right to practise one's profession, trade etc., in manufacturing explosives are restrictions permissible under clause (6) of Art. 19 of the Constitution. Consequently, it cannot be stated at all that the Explosives Act is 'ultra vires' of the Constitution and cannot be justified under the proviso in Art. 19 (6) of the Constitution.

(7) On coming to the conclusion that the Explosives Act does not constitute a violation of the freedom guaranteed under clauses (f) and (g) of Art. 19 (1) of the Constitution of India, there are no reasons whatsoever to withdraw C. C. No. 1419 of 1951 on the file of the City First Class Magistrate's Court, Madurai, to the High Court. This criminal miscellaneous petition is hereby dismissed and the lower court is directed to get along expeditiously with the disposal of the case which under the device of this petition has been getting protracted.

A/D.H.

Petition dismissed.

**A.I.R. 1953 MADRAS 143 (Vol. 40, C. N. 43)**

**RAJAMANNAR C. J.**

**AND VENKATARAMA AIYAR J.**

P. S. Abdul Kadir, Appellant v. The Mahlarathul Kadiria Sabha Kayalpatnam, represented by its President Vilak Mohideen Thambi Kulam Sathak Thambi brought on record, Respondent.

Appeal No. 383 of 1947, D/- 1-8-1952.

**(a) Muhammadan Law — Wakf—Alienation — Sanction of Kazi or Court can be given retrospectively.**

Alienation of wakf property has to be sanctioned by Kazi. The sanction of the Kazi is evidently intended to be a safeguard against improper alienations. That purpose will be amply served by insisting upon sanction of the Court, either previous or subsequent, so long, of course as there is an assurance that the transaction could be examined on its merits, and there is an enquiry as to whether it is supported by legal necessity or benefit to the trust. The Court can give sanction with retrospective effect. 37 Cal 179 Followed. Case law Ref. Views of text writes Wilson and Ameer Ali not followed.

(Para 9)

**(b) Muhammadan Law — Wakf — Muta-walli may lawfully change wakf property i.e. alter investment — Alteration has to be sanctioned by Court — Sanction can be given retrospectively — Alteration of property by selling it and investing proceeds in purchase of another property held beneficial—Retrospective sanction granted.**

(Para 12)

K. Rajah Ayyar & R. Ramamurthy Iyer, for Appellant; B. Pocker, for Respondent.

**REFERENCES:** Courtwar/Chronological/ Paras  
(35) 57 All 727: (AIR 1935 All 792) 5  
(42) AIR 1942 Bom 21: (138 Ind Cas 439) 5  
(10) 37 Cal 179: (3 Ind Cas 353) 5, 6, 7, 9  
(32) 59 Cal 586: (AIR 1932 Cal 356) 5

**RAJAMANNAR C. J.:** The defendant in O. S. No. 58 of 1945 in the court of the Subordinate Judge of Tuticorin is the appellant before us. The suit was for the recovery of property consisting of a house and site in Kayalpatnam in Tirunelveli district. The suit



property originally belonged to one Abdul Khadar who made a wakf of the same by a deed dated 14-6-1921, Ex. D. 2. The wakf deed was executed in favour of two persons, M. K. K. T. Ahmed Mohideen and Chinna M. K. Ahmed Moideen as managers of the Mahlara at Ambala Maricair Avergal Street belonging to the Kadiria Muslim community of Kayalpatnam south. The Kadiria Tharikh is a small sect of Muslims said to have been founded by a disciple of the Holy Prophet. The sect holds certain peculiar tenets and believes in the efficacy of *zikir*. This property was sold to the defendant by a deed dated 10-4-1941 for a sum of Rs. 1550 by Chinna K. M. Mahomed Labbai and Chinna A. K. Sheik Abdul Khadar describing themselves as managers of the Mahlara. It is common ground that with the monies raised by this sale the vendors purchased as managers and on behalf of the Mahlara property consisting of site and buildings in the town of Tuticorin for a sum of Rs. 1430.

(2) The plaintiff is the Mahlaratual Kadiria Sabha, Kayalpatnam, a society registered under the Societies Registration Act and is represented by its President. The plaintiff alleged that the affairs of the Mahlara for whose benefit the wakf had been created in 1921 were being managed by it since 1941 and that it is entitled to represent the Mahlara, that the sale in favour of the defendant was invalid and illegal as it was beyond the competence of the managers to sell the property which had been dedicated under a wakf, and that the sale was for inadequate consideration and was not justified by any necessity. The plaintiff referred to the purchase of the property in Tuticorin but refrained from making any statement regarding it. The defendant denied the plaintiff's claim to represent the Mahlara and its competence to maintain the suit. He asserted that the plaintiff Sabha did not represent the Kadiria community in Kayalpatnam. The main plea, however, was a justification of the sale in his favour. It was alleged by him that the building had deteriorated in value and was not in a sound condition, that a large amount of money would have been required for putting it in good repair but the Mahlara had not sufficient surplus funds to effect the repairs and that under the circumstances the persons who were in management thought it a most prudent act to sell away the property and to purchase with the sale proceeds property which was likely to fetch more income for the Mahlara & that the property purchased at Tuticorin did yield more income than the property in suit. It was also pleaded by him that ever since the Tuticorin property had been purchased the plaintiff had been in possession and enjoyment of it and had been collecting the income therefrom, and, therefore, the plaintiff was precluded from questioning the validity of the sale in favour of the defendant which formed a part of the same transaction along with the Tuticorin sale.

(3) The learned Subordinate Judge found that the plaintiff Sabha was not a *de jure* manager of the Mahlara and its property because the general body meeting at which its members were elected did not represent the entire Kadiria sect of Kayalpatnam, but it was a trustee '*de son tort*' and as such entitled to file the suit for recovery of possession of property belonging to the Mahlara. He found that the suit property at about the time of the sale

to the defendant was fetching only a rent of Re. 1 per mensem, that a portion of the western wall of the building had fallen down, that the roof of one of the shops had collapsed and another was about to collapse and that the Mahlara had no reserve or surplus funds from which the building could be repaired, nor was there evidence that the repair could be done within a reasonable amount. The entire sale proceeds had been invested in purchasing pucca house properties at Tuticorin which fetched a rent of Rs. 12 per mensem. He further found that the consideration for the sale in favour of the defendant was proper and adequate. On the question of law raised in the case the learned Judge was of the opinion that an alienation of wakf property could be validly made only with the prior sanction of the Kazi, or as the court is vested with the powers of the Kazi, with the sanction of the court, and that it was impossible for him to validate the transaction retrospectively merely because it was beneficial to the Mahlara, as he considered that the transaction was not strictly necessary. He, therefore, held that the sale to the defendant was not binding on the Mahlara. He also held against the defendant on his plea of estoppel. In the result he decreed the suit for recovery of possession, but dismissed it as regards the other reliefs.

(4) Mr. Rajah Aiyar who appeared for the defendant-appellant did not challenge the finding of the learned trial Judge that the plaintiff Sabha was entitled to maintain the suit as *de jure* trustee of the Mahlara. He urged before us two grounds, (1) that the retrospective approval or sanction can be given by the court to an alienation of wakf property if it was found to be supported by necessity or if it was beneficial to the trust and (2) that the plaintiff had accepted the benefit of the transaction which comprises the purchase in Tuticorin along with the sale to the defendant and was precluded from attacking the sale to the defendant, after retaining the Tuticorin property.

(5) The first ground raises an important question of Muhammadan Law on which there is no direct authority of this court. The leading decision on the subject is that of the Calcutta High Court in — '*Nemai Chand v. Mir Golam Hossein*', 37 Cal 179. That was no doubt a case of a mortgage of wakf property, but the decision has been understood to apply generally to any alienation of wakf property. The learned Judges Mookerjee and Vincent JJ. after an examination of several texts, observe as follows:

"These texts indicate that property which has been validly dedicated as wakf cannot, unless the Mutavalli is expressly empowered by the deed of endowment to do so, be ordinarily sold or mortgaged. If, however, necessity is established and the permission of the Kazi is obtained, such alienation is valid. Some of the texts, however, indicate that the Mutavalli may borrow on his own authority if the Cadi happens to be at a distance..... This would seem to show that the previous permission of the Cadi is not a condition precedent, and Sir Roland Wilson appears to favour this view when he suggests that the transaction may be retrospectively confirmed by the court..... The texts, however, to which we have referred, indicate plainly that



the consent of the Cadi is essential whenever he is available, and if so, there is no reason why approval subsequent to the transaction should not be treated as effective in the same manner as approval prior to the transaction. It is but rational to hold that the approval of the Cadi was deemed requisite, primarily with a view to make sure that the loan was necessary, and in this view approval, antecedent or subsequent, ought to be equally effectual."

So far as we are aware the soundness of this decision has not been challenged in any subsequent decision of any of the High Courts in this country. On the other hand, in — '*Afzal Husain v. Chhedi Lal*', 57 All 727, this decision was expressly followed in so far as it held that the requisite sanction to validate an alienation of wakf property could subsequently be given by the court with retrospective effect. In — '*Sailendranath v. Hade Kaza*', 59 Cal 586, the principle laid down in the earlier decision was again affirmed (See p. 611). In — '*Zafarbai v. Chhaganlal*', AIR 1942 Bom 21, dealing with a long term lease of wakf property, Divatia J. took the same view. He said,

"I see no distinction in principle between antecedent and subsequent sanction in the case of a long term lease if a mortgage by a Mutavalli can be validated by subsequent sanction as in — '*Nemaichand v. Golam Hossein*', 37 Cal 179 and — '*Afzal Hussain v. Chhedilal*', 57 All 727. The test in both the cases is the same, viz., necessity or benefit to the institution."

Mr. Rajah Aiyar, besides relying on these decisions, also referred us to the opinion of text writers. Mulla in his *Mahomedan Law*, 13th Edn., states thus:

"A Mutavalli has no power, without the permission of the court, to mortgage, sell or exchange wakf property or any part thereof, unless he is expressly empowered by the deed of wakf to do so..... It has been held in Calcutta that a mortgage of wakf property though made without the previous sanction of the court may be retrospectively confirmed by the court."

In Tyabji's *Muhammadian Law*, 3rd Edn., we find the following summary of the law on the point,

"Unless the dedication or the court authorises the Mutavalli to sell or mortgage the wakf property he has no authority to do so; and where he does so he is guilty of a breach of trust for which he may be removed. The court may, if wakf land becomes unfit for the objects of the wakf, order its sale; or, in a proper case, for urgent necessity, empower or retrospectively approve and validate a sale, or mortgage, or a long or perpetual lease." (pages 657-658).

(6) Sir Ronald Wilson in an earlier edition (3rd Edn.) of his *Anglo-Muhammadian Law* was apparently inclined to the view that an alienation by a Mutavalli could be retrospectively confirmed by the court. This view of his was also relied on by the learned Judges in — '*Nemaichand v. Golam Hossein*', 37 Cal 179 at p. 187. But in a subsequent edition the learned author corrected the impression and said,

"The learned Judge went on to say, 'Sir Ronald Wilson appears to favour this view when he suggests that the transaction may

be retrospectively confirmed by the court'. My suggestion, however, (omitted in the present edition) was made with reference to leasing, not to mortgaging."

He pointed out that it was based on a passage in Baillie's Digest which did not seem to him subsequently to bear that construction. He then adds:

"It seems likely that if this loophole is left open the parties concerned will always be disposed to consider that the 'Kazi' is at too great a distance to be conveniently applied to, and mortgages of wakf property will have been placed practically on the same footing as mortgages of Hindu family property, namely, that the parties take the risk of being able to satisfy the court that there was a bona fide necessity, if the transaction is challenged."

We fail to see anything so startling in the result as appeared to Sir Ronald. There appears to us no reason why any substantial difference should be made between alienations of property belonging to Hindu religious institutions and Muhammadan religious institutions.

(7) Ameer Ali made strong adverse comment on the decision in — '*Nemai Chand v. Golam Hossain*', 37 Cal 179 as follows:

"Speaking with respect, the view here expressed misses the principle underlying the rule of Mussalman Law. According to all the authorities the validity of a transaction creating a burden on a wakf depends on the prior sanction of the Judge, which is essential in every case and not as is said in the judgment merely 'whenever he is available'. The qualification of the law implied in these words, it is respectfully submitted is not warranted by the authorities for even the statement that when the mutavalli is at a distance from the Judge he may act of his own authority does not vary the law; it only throws the responsibility on the Mutavalli himself. 'Ex post facto' sanction was never contemplated by the Mussalman jurists. For the permission of the Judge was made an absolute condition to see not only that the loan was necessary, but also whether it was proper, that the terms were not onerous and there was no other mode of meeting the necessity." (4th Edn., p. 490).

(8) With due respect to the learned author we may remark that the Mussalman jurists could not have contemplated the Kazi ceasing to have the powers with which he was vested in their days and the substitution of the Court for the Kazi.

(9) Notwithstanding the opinion of the text writers, Wilson and Ameer Ali, we are inclined to follow the decision in — '*Nemaichand v. Golam Hossein*', 37 Cal 179, which, as already mentioned, has been consistently followed in other courts. The sanction of the Kazi was evidently intended to be a safeguard against improper alienations. That purpose will be amply served by insisting upon sanction of the Court, either previous or subsequent, so long, of course as there is an assurance that the transaction could be examined on its merits, and there is an enquiry as to whether it is supported by legal necessity or benefit to the trust.

(10) We wish to observe further that in this case there is no alienation of wakf property in the sense that the proceeds of the alienation have been spent away and, therefore, are irre-



coverably lost to the institution. In this case what has happened is a sale of a particular wakf property and a re-investment of the sale proceeds in another property. That this kind of transaction was contemplated and permitted by Muhammadan Law is clear from several authorities. In 'Raddu-ul-muhtar', Vol. 3, page 600, we find that in the absence of any power of sale expressly reserved in the deed of wakf the Kazi, if he deem it expedient, may authorise the sale of the wakf property and re-investment of the proceeds in any shape conducive to the proper maintenance of the wakf. The following is from Surrat-ul-Fatawa, pages 420-421:

"In the Fatawa's Sirajia it is stated that when the sale or exchange of a wakf property is distinctly advantageous to the wakf, the Kazi may direct it. For example, if no income is derived from the property, and somebody is anxious to purchase it, and in lieu thereof is willing to give such land or house as would yield an income for the wakf, in that case the exchange is authorised according to Abu Yousuf as well as Mohammed.

"Where the wakf property yields an income, but some person is desirous of exchanging it for another property yielding a much larger income, e.g. if the wakf property is a bazar situated in a lane and the person anxious to take it is willing to exchange it for a bazar situated in a better place, in such a case, but not otherwise the exchange is lawful according to Kazi Abu Yousuf; on(?) this is the practice.

In the Commentary of Nazim Wahbandi it is stated upon the authority of the Muhit and Kazi Khan that according to Imam Mohammed the Mutavalli is authorised to exchange for a better and more productive piece of land the one dedicated, if it has deteriorated in productive powers."

(11) To the same effect is the following passage in Fath-ul-Kadir (Vol. II, page 639):

"In the Fatawari Kazi Khan it is stated that the rule laid down by Abu Yousuf & Hillal is correct. So has Ansari declared that such a condition is lawful, but it cannot be sold (by the Mutavalli) without the sanction of the Judge. And when this matter is brought before the Judge and it appears to him necessary for the benefit of the wakf (that the investment should be changed), he should give the sanction."

(12) Ameer Ali in his text book, has summarised the result of the authorities thus:

"The general result of the authorities seems to be that the wakf (mutawalli ?) may lawfully change the wakf property, in other words, alter the investment provided he has reserved, at the time of dedication, power to that effect. Otherwise, no alteration can be effected without the leave of the Kazi or Judge, who has the power to authorise a change of investment whenever he considers it beneficial for the wakf" (page 436).

(13) No doubt, the sanction of the Kazi contemplated in these texts is sanction prior to the transaction. But we entirely agree with the learned Judges of the Calcutta High Court that no difference should be made between antecedent and subsequent sanction of the court which now takes the place of the Kazi.

(13a) The learned advocate for the respondent contended that on the evidence it could

not be said that the transaction was justified because the state of the building was not so bad as to render it thoroughly useless, that even if repairs were needed much money was not necessary and there were surplus funds at the disposal of the Mahlara for the execution of the repairs. We were taken through the evidence on this point. But learned counsel for the respondent was unable to persuade us to come to a conclusion different from that of the learned trial Judge. We concur with the learned Judge who had the opportunity of seeing and listening to the witnesses, in his estimate of the oral evidence, namely, that the evidence on the side of the defendant is far superior to and deserves between credit than that of the plaintiff's witnesses. We also agree with him that the price fetched by the sale to the defendant was adequate and that the Mahlara had no surplus funds from which the building could be repaired and that the building was in need of extensive repairs which could not be effected with a small amount. The learned Judge was of the opinion that the transaction was beneficial to the Mahlara (see para. 47), but he thought that as the transaction was not strictly necessary it was impossible for him to validate it retrospectively. We think otherwise. On the facts and in the circumstances above narrated it was clearly beneficial to the Mahlara that the Kayalpatnam property should be disposed of and the proceeds of the sale invested in a more remunerative property. Admittedly the Tuticorin property brought more income to the trust. The case was eminently fit for the exercise of the power of the court to grant retrospective sanction. We accordingly give the necessary sanction to the transaction.

(14) In this view the suit must fail. It, therefore, becomes unnecessary to deal at length with the other grounds raised by Mr. Rajah Aiyar, namely, that the plaintiff Sabha is precluded from challenging the sale in favour of the defendant as it retained the benefit of the Tuticorin purchase. We are inclined, however to hold that it would be most inequitable to allow the plaintiff Sabha on behalf of the Mahlara to keep both the Tuticorin property and the property sold to the defendant. The Secretary of the Sabha deposed as follows:

"Tuticorin property belongs to the Mahlara now. With the sale proceeds of suit property the Tuticorin property was purchased..... I want both the properties, but I am prepared to pay the indemnity amount of Rs. 1550."

We are clearly of opinion the Sabha cannot be permitted to do this, that is, to keep both the properties.

(15) The appeal is allowed and the suit dismissed with costs here and in the court below. The Memorandum of objections is not pressed and dismissed. No costs.

A/R.G.D.

Appeal allowed.

A.I.R. 1953 MADRAS 146 (Vol. 40, C. N. 44)  
SATYANARAYANA RAO AND RAJA-  
GOPALAN JJ.

Grandhi Ramakrishnayya and others, Appellants v. Grandhi Atchutha Ramayya and others, Respondents.

Appeal No. 523 of 1948, D/- 17-7-1952.



**(a) Hindu Law — Partition — Mode of — Partition of bad debts.**

An outstanding due to a family, although a bad debt, can be a subject of partition. The proper direction in such a case would be to order that this item should be sold in auction between the parties and the highest bidder should get the debt assigned to him, the purchase price being divided in proportion to the shares of the coparceners. (Para 5)

**(b) Hindu Law — Partition — Minor — Notice and suit on behalf of minor by person other than lawful guardian.**

A notice demanding partition issued on behalf of the minor by a person other than the lawful guardian as his next friend is effective in law to bring about severance in status from the date of the notice, if in the suit for partition it is ultimately found that the partition is for the benefit of the minor. AIR 1945 Mad 290 and AIR 1933 Mad 890 (FB) Applied. (Para 7)

K. Ramamurthy, for Appellants; N. Bapiraju, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras  
(34) 57 Mad 95: (AIR 1933 Mad 890 FB) 7  
(45) ILR (1945) Mad 710: (AIR 1945 Mad 290) 7

**JUDGMENT:** There is an appeal by the defendants and a memorandum of cross-objections by the plaintiffs against the decree of the Subordinate Judge of Rajahmundry in the suit O. S. No. 126 of 1947 for partition. The first defendant is the father of plaintiffs 1 to 3. Plaintiffs 2 and 3 are minors represented by their next friend and brother the first plaintiff. They are the sons by the deceased first wife of the first defendant, and the second defendant is the second wife of the first defendant. The third defendant is the son of the first defendant, born on 15-11-1947 during the pendency of this suit which was instituted on 13-3-1947. The suit was preceded by a notice of 1-12-1946, Ex. B. 1, issued on behalf of the plaintiffs by their pleader in which they claimed a partition of the family properties into four shares and for delivery of possession of three out of them to the plaintiffs. In the suit, the plaintiffs claimed a division of the properties specified in A, B, C and D schedules into four equal shares and for allotment of three shares to the plaintiffs and also for recovery of profits of Rs. 1360 for 1946. The first defendant, the father, claimed in the suit certain items of property comprised in A, B, C and D schedules as self-acquisitions in which the plaintiffs were not entitled to any share. Those items are specified in issue 4 in the suit. He further resisted the suit on the ground, that the partition of the properties was not in the interests of the minor plaintiffs 2 and 3, and that the status of the family was not divided on 1-12-1946 the date of the notice and that it continued undivided till the filing of the suit.

(2) It was found by the trial court that the items claimed by the first defendant as his self-acquisitions were in fact joint family properties, as they were acquired from out of the nucleus of the ancestral property which came into the hands of the first defendant consequent on the partition between him and his brothers in 1931, as evidenced by the registered partition deed, Ex. A. 1. He, however, found with reference to item 13 of D schedule, an outstanding due to the family, that it was a bad

debt and, therefore, it was not available for partition. On issue 2 he found that the interests of the father were undoubtedly adverse to that of the minor plaintiffs 2 and 3, and that in fact his whole conduct established that he was acting hostile to the interests of the minor plaintiffs. He, therefore, found that the partition of the family properties was undoubtedly in the interests of and for the benefit of the minor plaintiffs. These two findings were not challenged by the first defendant, in the appeal. The plaintiffs, however, claimed in their memorandum of cross-objections that even if item 13 of D schedule is a bad debt, the Subordinate Judge should have divided it and should have given a direction to that effect in the preliminary decree. As regards the division in status, as the first plaintiff was an adult coparcener on the date of Ex. B. 1, the learned Judge found that it had effected an immediate severance in status from 1-12-1946 so far as he was concerned. It was claimed by the first defendant that the third defendant who was born on 15-11-1947 during the pendency of the suit was in fact in his mother's womb even on the date of the notice, and that, therefore, even if there was a division in status so far as the first plaintiff was concerned which would take effect from 1-12-1946, it is of no consequence and that the property should be divided into five equal shares taking into consideration the right of the third defendant also. In the alternative, it was contended that even if he was not in his mother's womb on that date, the notice issued by the first plaintiff on behalf of himself and on behalf of his minor brothers, was in any event ineffective to bring about a division in status so far as plaintiffs 2 and 3 were concerned, as the first plaintiff was not the lawful guardian of plaintiffs 2 and 3, and such a notice even if it was subsequently found in the suit that the partition was in the interests of and for the benefit of the minor plaintiffs, could not effect a severance in status so far as plaintiffs 2 and 3 were concerned. The learned Judge did not accept the case of the first defendant, that the third defendant was in his mother's womb on the date of Ex. B. 1, as the period of gestation of a long period of 345 days was unusual and no extraordinary circumstances were disclosed in the evidence to accept the position, that in fact the third defendant was in his mother's womb on the date of the notice. He, however, felt that as there was no binding authority on the point that as the first plaintiff was not the lawful guardian of plaintiffs 2 and 3, the notice issued by him on behalf of the minors was ineffective to bring about a severance in status. The result was that he gave a one-fourth share to the first plaintiff, the major coparcener; but so far as the remaining three fourth share is concerned, he found that it continued to be joint family property until the date of suit, as meanwhile the third defendant was born, the three-fourth share should be divided into four equal shares and out of it the plaintiffs 2 and 3 should get two shares leaving the remaining two shares to defendants 1 and 3. The memorandum of cross-objections filed on behalf of the plaintiffs challenges the correctness of this position adopted by the trial Court.

(3) In the appeal filed by the defendants, the only point of substance is whether the third defendant was conceived on the date of Ex. B. 1. This question can be easily disposed of, and it does not present any difficulty. The



first defendant was married to the second defendant in 1945 and she joined her husband sometime in September 1945. In June 1946, a child was born but that child died immediately. In the reply notice which the first defendant gave, Ex. B. 2, there was a reference to the pregnancy of the second defendant, but that must have reference only to the pregnancy in 1946 when she was driven out of the house along with her husband according to the allegations in the notice. On the 23-12-1946, the first defendant filed a complaint before the District Superintendent of Police, Kakinada, Ex. B. 3, in which he asserted that by then the second wife was carrying three months, which will take the date of conception to September or October 1946. According to the evidence of the second defendant, examined as D. W. 3, the third defendant was in the womb for 11 months, and again she stated that the child was born 10 months and 15 days after conception. To substantiate this statement, except her interested testimony, there is no other evidence on record. The birth of the first child was quite normal. If the evidence of the second defendant were to be accepted, the conception could not have been at or before the date of the notice, Ex. B. 1. It could only be subsequent to the notice. There is no special reason disclosed in the evidence why the period of gestation which was normal in the case of the first child should have been abnormal in the case of the third defendant. (After considering the evidence of a doctor, the judgment proceeds:)

His evidence is, therefore, of no value, and there is no reason to accept the case of the first defendant, that the third defendant was in existence in the eye of law even by the date of Ex. B. 1, i.e., 1-12-1946. The finding of the Subordinate Judge, therefore, must be accepted, the result of which will be that the appeal must be dismissed with costs.

(4) There remains the memorandum of cross-objections filed by the plaintiffs. It raises two questions, first, regarding the disallowance of a share in item 13 of D schedule to the plaintiffs on the ground that it is a bad debt, and second, whether or not there was division in status by reason of the notice Ex. B. 1 even with regard to plaintiffs 2 and 3, and whether the view of law taken by the learned Subordinate Judge on this question is correct.

(5) On the first point we think it is but just that even if item 13 of D schedule was a bad debt, it should be the subject of partition. The proper direction in the circumstances would be to order that this item should be sold in auction between the parties and the highest bidder should get the debt assigned to him. The purchase price will be divided in proportion to the shares of the coparceners.

(6) It is true that the third defendant died subsequent to the filing of the appeal, but if the position taken up by the first defendant were correct, he would get the advantage of the share of the third defendant. If, however, the view taken by the learned Subordinate Judge is wrong, plaintiffs 2 and 3 would also be entitled to a quarter share in the entire properties in the same manner as the first plaintiff. If his view is correct the decree of the lower court in so far as it directed the division of the three fourth share into four equal shares will be legal.

(7) It is now well established that in order to bring about a disruption of the joint status of a member in a coparcenary it is not necessary that there should be an agreement between all the coparceners, though if there should be actual division and distribution of property such an agreement would be essential. Division in status as opposed to physical division can be brought about by a definite and unambiguous declaration of the intention by one member to separate himself from the joint family, communicated to the other members. This declaration may be by a notice or by conduct or by institution of a suit for partition by an adult member. So much has been settled by the decisions of the Judicial Committee and also by the decisions of various High Courts. It is the exercise of the individual volition of the adult coparcener to get himself divided in status that determines the choice and justifies the exercise of discretion by him to get himself severed in status from the coparcenary. In the case of adults, therefore, it is the exercise of discretion by the adult member and his judgment that counts. If a suit is instituted by an adult coparcener claiming partition in such a case, the intention expressed in the plaint and communicated to the other coparceners who are defendants to the suit would effect a severance in status from the date of plaint. In the case of minors, however, as a minor is incapable of exercising any discretion by himself, it is recognised by decisions that this may be exercised on his behalf by his lawful guardian. The lawful guardian may either issue a notice or may institute a suit as a next friend. But in either case, it is subject to one qualification, that the division in status would be brought about only if ultimately it is found by the court that the partition of the properties is for the benefit of the minor and to his interest. If this is not found, the notice or the institution of the suit will be ineffective in law and insufficient to bring about a disruption of the status of the minor coparcener from the family.

In our High Court for some time there was a conflict of decisions whether in the case of a suit instituted on behalf of a minor coparcener by his next friend, the division in status dates from the date of the plaint or from the date when in the suit the decision is reached by the court that the division is in the best interests of the minor. This conflict was, however, resolved by the Full Bench in — '*Rangasayi v. Nagarathnamma*', 57 Mad 95. But in this case also, the guardian who acted on behalf of the minor as the next friend was the natural guardian, the mother. It is a case of a suit and no notice issued before suit. That the severance in status can be taken back even to the date of the notice issued anterior to the suit was laid down by a Bench in — '*Kotayya v. Krishna Rao*', ILR (1945) Mad 710. This is really the logical extension of the doctrine elaborately discussed and settled in — '*Rangasayi v. Nagarathnamma*', 57 Mad 95 (FB). If once it is conceded that a unilateral declaration of intention to sever exercised and intimated on behalf of a minor coparcener by a lawful guardian is effective in law to bring about a severance in status from that date if ultimately it is found in the suit that the physical division is in the interests of the minor, there is no reason for limiting the taking effect



of the division in status to the date of the suit itself, if such volition was exercised anterior to the suit. In such an event there is every justification to extend its operation even to the date of the notice and the logical extension of the principle, therefore, if we may say so with respect, was perfectly justified as found by the learned Judges in — 'Kotayya v. Krishna Rao', ILR (1945) Mad 710. In that case, however, the question whether a notice given on behalf of a minor by a person other than a lawful guardian would have the same consequence if ultimately it was found in the subsequent suit for partition that it was in the circumstances not only justified but was to the positive benefit of the minor coparcener was left open as the learned Judges were not called upon to decide that point. It is this question that now arises for decision in the present appeal. We are unable to see any difference in principle between the notice given by a lawful guardian on behalf of a minor and the case where the notice was given by a person other than the lawful guardian, as in the present case by the elder brother. Take for example this very case. The interests of the lawful guardian, the father, are adverse to the interests of the minor plaintiffs; the mother is no more; and the lawful guardian cannot act on behalf of the minors because it is not to his interests that there should be a division. On the other hand, he has been opposing tooth and nail such a division. In such a case, apart from the question of any anterior notice if the suit was instituted by a person other than the lawful guardian, the court would be called upon to try the question whether such a partition was or was not in the interests of the minor plaintiff.

In law there is no objection to a person other than a lawful guardian acting as next friend and institute a suit on behalf of the minor plaintiff subject of course, to the provisions of O. XXXII, Civil P. C. Under that Order as amended in Madras, any person of sound mind and who has attained majority may act as next friend of the minor. If there is a guardian appointed or declared by a competent authority, however, unless for reasons to be recorded the court appoints another person as next friend and permits him to act, he alone can institute the suit. A person who has an interest adverse to that of the minor cannot, of course, be appointed as next friend. Subject to these and other limitations imposed by the Code, a person other than the lawful guardian can always institute a suit on behalf of a minor plaintiff. If, therefore, a suit for partition was instituted by a person other than a lawful guardian as next friend of the minor and in such a suit it is found ultimately that the partition is for the benefit of the minor, according to the decision of the Full Bench in — 'Rangasayi v. Nagarathnamma', 57 Mad 95, when there is a decree, for partition in the suit, the division in status takes effect from the date of the plaint. The fact that the choice was exercised by a person who is not the lawful guardian would not prevent the application of the rule in — 'Rangasayi v. Nagarathnamma', 57 Mad 95 (FB), to such a case. If, therefore, a suit can validly be instituted by a person who is not the legal guardian of the minor members with a view to bring about a division in status, if it is established to the

satisfaction of the court that such a division is in the interests of the minor, there is no reason in principle and there is no authority to the contrary to make a distinction between the case of such a suit and a notice which preceded such a suit issued by a person, who is not the lawful guardian of the minor. In our opinion, the suit and the notice in such circumstances so far as the legal consequences are concerned must stand on the same footing subject, of course, to the same limitation in both the cases, viz., that it is ultimately found by the court that the division was in the interests of the minor. The volition in either event exercised by the person who is not the lawful guardian always takes effect conditional on the court finding ultimately that the severance is in the interests of the minor and for his benefit.

It must be remembered whether by a suit or by a notice issued on behalf of the minor, the division in status results not merely by the exercise of a volition by somebody on behalf of the minor but by the ultimate sanction of the court and it is its imprimatur that brings about the result. It may be said that this might encourage frivolous and vexatious suit by meddlesome persons purporting to act in the interests of the minor but really to serve their private ends. But this inconvenience was noticed by Ananthakrishna Aiyar J. in — 'Rangasayi v. Nagarathnamma', 57 Mad 95 (FB), and such suits as pointed out by the learned Judge may be stayed by the court during the course of the trial if it is satisfied that the object of the suit was not bona fide and the next friend may be penalised by being made to pay the costs personally. A notice would not have a legal effect by itself. It must ultimately be put in suit and the question of the propriety of the partition in the circumstances of the case must be decided by the court. It is only then that the division in status is brought about. We, therefore, think that on principle there is no reason to limit the operation of the rule laid down in — 'Kotayya v. Krishna Rao', ILR (1945) Mad 710, to the case of lawful guardians alone. In the present case, the first plaintiff was the only other person who could have served the interests of the minors in the circumstances, and his action was found to be in the interests of the minors by the court. That finding was not challenged by the first defendant in the appeal. It, therefore, follows that plaintiffs 2 and 3 also became divided in status on 1-12-1946 along with the first plaintiff. They would, therefore, be each entitled to a quarter share in the whole of the property and not merely a quarter share in the three fourth as decreed by the lower court. The result is the memorandum of cross-objections must be allowed and the decree of the lower court must be modified in the manner indicated above. As the plaintiffs have succeeded they are entitled to their costs in the memorandum of cross-objections.

A/G.M.J.

Decree modified;  
Cross-objections allowed.

A.I.R. 1953 MADRAS 149 (Vol. 40, C. N. 45)

SATYANARAYANA RAO AND RAJA-  
GOPALAN JJ.

Devaraja Shenoy and others, Petitioners v.  
State of Madras, by Secretary, Legal Department and another, Respondents.

Writ Petn. No. 668 of 1951, D/- 13-12-1951.



**Constitution of India, Art. 26 — Religious Denomination — Gowd Saraswath Brahmin community is a religious denomination — Inclusion of Shri Venkataramana Temple, Mulki in list under S. 38, Madras Act 19 of 1951 — Petition under Art. 26 is maintainable — (Madras Hindu Religious and Charitable Endowments Act (19 of 1951) S. 38).**

The Gowd Saraswath Brahmin community is undoubtedly a religious denomination or at any rate a section of a religious denomination. Therefore, the protection under Art. 26 can be claimed on behalf of the trustees of a temple belonging to the denomination. Therefore, the provisions of the Madras Hindu Religious and Charitable Endowments Act in so far as they interfere with the autonomy of the religious denomination which own and has the sole and exclusive control of the temple should not be allowed to be enforced, including the provision relating to notification procedure which vests an arbitrary power in the Commissioner and the Government to wrest from the hands of the trustees the power to administer the temple (Para 3).

Mere inclusion of the temple in the list under S. 38, is enough for the trustees to move the Court under Art. 26 since inclusion of temple in the list means that the Board have taken a definite decision to apply the provisions of the Act to the temple owned by the trustees. The petition cannot be thrown out in limine on the ground that the petitioners are not persons aggrieved and that there is at present no danger of the provisions of the Act being applied to the temple. On the contrary the petitioners are entitled to a rule absolute directing the Board not to enforce any of the provisions of the Act which interfere with the autonomy of the petitioner's institution. AIR 1952 Mad. 613 Relied on. (Para 4)

In the case of Sri Venkataramana Temple, Mulki, the temple and its properties belong to the entire denomination of the community (Gowd Saraswath Brahmin community) resident in Mulki comprising all the three villages, excluding, of course, the Vaidikis, i.e. the priests of the temple. Therefore, what applies to the Chidambaram temple owned by the denomination of Dikshitaras should also apply to this temple Sri Venkataramana Temple, Mulki, owned by the religious denomination consisting of Gowd Saraswath Brahmins resident in Mulkipetta. It is, therefore, unnecessary to enumerate over again the provisions of the impugned Act which are ultra vires the Legislature in so far as the Act applies to Sri Venkataramana Temple Mulki, the trustees thereof and the religious denomination that owns it. Those sections have already been enumerated in AIR 1952 Mad 613. AIR 1952 Mad 613. Rel. on. (Para 5)

M. K. Nambiar and M. L. Nayak, for Petitioners; Advocate General, for the Govt. Pleader, for Respondents.

REFERENCES: Courtwar/Chronological/ Paras  
(51) 1951 SCJ 29: (AIR 1951 SC 41) 4  
(51) CMP No. 2591 of 1951:  
(AIR 1952 Mad 613) 3, 5  
(1912) 230 US 513: (57 Law Ed 1597) 4

ORDER: This application relates to Sri Venkataramana Temple, Mulki, South Kanara

district and was filed by five of the trustees for the issue of a writ of mandamus or any other appropriate writ or order directing the first respondent, the State of Madras, to forbear from enforcing any of the provisions of the Madras Hindu Religious and Charitable Endowments Act, 1951, against the petitioners, the Shri Venkataramana Temple and its endowments. The application was filed after the new Act came into force. The administration of this temple is governed by a scheme framed by the Sub-Court, South Kanara, in O. S. No. 26 of 1915 known as the Moolki Temple Scheme. There are certain peculiar features regarding this temple which can be gathered from the scheme framed in that suit which for convenient reference is added as an appendix to this judgment as the contentions raised turned mostly upon a correct appreciation of the principles underlying the scheme.

Under the scheme the general control and the management of the affairs of the temple both secular and religious are vested in the members of the Gowd Saraswath Brahmin community, residing at in Moolkypeta, i.e., the villages of Bappanad, Karnad and Manampadi. The Vaideekis who are the temple priests are excluded from this. The actual management of the affairs of the temple, however, has to be conducted by a council of trustees called Moktessors through a Parpathyagar (Manager). Five of the trustees are elected by an electorate consisting of every member of the community whose name is registered in a book called the register of electors which it is the duty of the trustees to maintain. The qualifications of the electors are enumerated in the scheme as well as the mode of conducting the elections. The Council of Moktessors consists of seven members of whom two shall be senior members for the time being of the families of U. Srinivasa Shanbhogue and T. Vasudeva Shanbhogue, and the rest shall be elected by the general body of electors. Two out of the seven, therefore, may be treated as hereditary trustees. The responsibility for the due and proper administration of the trust is laid on the council of Moktessors. Provision is made to elect out of the Moktessors two treasurers, and there are other provisions requiring them to meet periodically and providing for the manner and method of conducting the business at such meetings. It is unnecessary to refer to these details. The Parpathyagar is to be appointed by the Moktessors on a salary of not less than Rs. 75 a month. The rights and duties of the Parpathyagar have been specified in the scheme. It contains as many as 67 clauses. This scheme was in vogue ever since it was settled by Court.

(2) After the new Act came into force on 30-9-1951 the Commissioner for Hindu Religious and Charitable Endowments by his memorandum of 30-9-1951 issued an order stating that the temple of Sri Venkataramana was included in the list published by the Commissioner under S. 38 of the Act. Attempts were being made to enforce the order under the new Act notwithstanding the protests of the trustees. It was, therefore, apprehended by the petitioners that all the provisions of the new Act will be enforced by the Commissioner. The Act was questioned on the ground that it was ultra vires the State Legislature in so far as its provisions relate to the petitioners' temple



and its endowments, as the Gowd Saraswath community is a religious denomination which is entitled to protection under Art. 26 of the Constitution. It is also further claimed that the Board had no right to impose a contribution under S. 76 of the Act, which is a tax the levy of which is prohibited by Art. 27. The notification proceedings and the other provisions relating to the control and management of the religious institutions were also attacked. It appears, and it is not disputed, that an original petition is now pending in the District Court, South Kanara, O. P. No. 46 of 1950 for amending the provisions of the scheme.

(3) The Gowd Saraswath Brahmin community is undoubtedly a religious denomination or at any rate a section of a religious denomination. Therefore, the protection under Art. 26 has been rightly claimed on behalf of the petitioners. The effect of classifying the temple and including it in the list maintained under S. 38 is to decide that it is an institution whose income is not less than Rs. 20000 and that the jurisdiction of the Area Committee does not extend to it. It implies, therefore, that all the provisions of the Act are applicable, the provisions relating to the settlement of the scheme, the notification proceedings and the control and supervision, the duty to obey all lawful directions and so on which have been more fully set out in our judgment in — *'Shirur Mutt v. Commr. Hindu Religious Endowments, Madras'*, C. M. P. No. 2591 of 1951 (Mad). As rightly contended by Mr. Nambiar, learned advocate for the petitioners, the provisions of the Act in substance and in effect destroy the community's right of administration. The right to appoint, dismiss, suspend and remove trustees is vested in the Commissioner and also the appointment of non-hereditary trustees—vide Ss. 18 and 39(2). This power to appoint trustees under Ss. 39 and 41 of the Act can be exercised by the authorities concerned notwithstanding that a scheme has been already settled which scheme is deemed under the new Act to have been settled under that Act in respect of such institution. This institution has among the council of trustees, non-hereditary as well as hereditary trustees. Power is vested under the scheme in the religious denomination. That power is now taken away.

The power to remove and dismiss trustees which is vested under the scheme in the general body is vested by the new Act in the case of the present temple in the Commissioner. The trustees are under an obligation to obey and carry out all lawful directions issued as provided by S. 54 and S. 45(b) provides that disobedience of lawful orders will entail suspension, removal or dismissal of a trustee. The power to fix the fees for archakas and determine their apportionment as well as fixing the standard of scales of expenditure or the dittam is also taken away from the trustees and vested in the Commissioner. The budget has to be passed. The surplus funds can be diverted to objects other than those of the temple. In other words, the effect of the Act is to reduce the trustees to the position of servants, the Government and the Commissioner being the masters, as the relationship is nothing more and nothing less. In case of disputes with reference to various matters, the determination by the Government or its servants, the decision of the Commissioner or the Deputy Com-

missioner is final. The Act vests in executive with judicial functions and the rights guaranteed under the Constitution have been made illusory and nugatory by the provisions of the Act. The trustees cannot have any legitimate objection if the Act should have provided for submitting the accounts or budgets for information; but what they contend is that they should not be dictated with reference to these matters by an extraneous authority so as to seriously interfere with and destroy the religious freedom that has been guaranteed by Art. 26. So long as one wants to know what one is doing there may not be a serious objection; but when the other party tries to dictate as to what one should do then comes the rub.

In the light of the various considerations adverted to by us in the judgment in — *'C. M. P. No. 2591 of 1951 (Mad)'*, we have no hesitation in holding that the provisions of the Act in so far as they interfere with the autonomy of the religious denomination which own and has the sole and exclusive control of the temple should not be allowed to be enforced including the provision relating to notification procedure which vests an arbitrary power in the Commissioner and the Government to wrest from the hands of the trustees the power to administer the temple. We have held in — *'C. M. P. No. 2591 of 1951 (Mad)'*, that the levy of contribution under S. 76 offends Art. 27 and, therefore, is illegal.

(4) Apart from contending on the lines in which arguments were advanced in the other cases regarding Art. 26 which we have already dealt with, on behalf of the respondent one other fundamental objection has been raised and that is that nothing serious has been done by way of infringing the rights of the religious denomination as all that was done was the harmless and innocuous inclusion of the temple in the list maintained under S. 38. The learned Government Pleader relied on the observations of Fazl Ali J. in — *'Chiranjit Lal v. Union of India'*, 1951 S. C. J. 29, and also a passage from Willis on Constitutional Law and Cooley's Constitutional limitations. He also relied on the decision in — *'Chesapeake & Ohio Railway Co. v. William G. Conley'*, (1912) 230 U. S. 513. The passage in Willis at page 91 is as follows:

"Who can raise constitutional questions? Who are entitled to raise questions of constitutionality? Any one whose rights are injuriously affected and no one else. It is not enough that the Statute is unconstitutional, as to other persons or classes. The person attacking the statute must come within the class. A party benefited rather than injured by a statute may not question its constitutionality. If no attempt is made to enforce a provision, one cannot attack it."

To similar effect is the opinion of Cooley in his *Constitutional Limitations*, Vol. I, at pages 335 to 341 where the matter is fully discussed. Unlike the case in — *'Charanjit Lal Chowdhury v. Union of India'*, 1951 S. C. J. 29 the petitioners are personally aggrieved as trustees of the institution as the Endowments Board issued a notice that the temple was included under S. 38, which means that they have taken a definite decision to apply the provisions of the Act to the temple owned by the petitioners. The Commissioner did not stop with pious intentions but has taken a step and perhaps a



serious step, in deciding to apply the provisions of the Act to the institution. It is rather difficult, therefore, to accept the contention of the learned Government Pleader that the petition should be thrown out in limine on the ground that the petitioners are not persons aggrieved and that there is at present no danger of the provisions of the Act being applied to the temple. We are, therefore, unable to agree with that contention and the petitioners, in our opinion, are entitled to maintain the petition. The petitioners are entitled to a rule absolute directing the Board not to enforce any of the provisions of the Act which interfere with the autonomy of the petitioners' institution.

(5) In — 'W. P. Nos. 379 and 380 of 1951', we have held that the sections of the impugned new Act, enumerated in detail in — 'Sri Shirur Mutt v. Commr. Hindu Religious Endowments, Madras', C. M. P. No. 2591 of 1951 (Mad), were ultra vires the State Legislature. The Sri Venkataramana Temple, Mulki, in South Kanara, with which we are concerned in this petition, is analogous to the Sri Sabhanayakar temple at Chidambaram, with which we had to deal in W. P. Nos. 379 and 380 of 1951. In the case of Sri Venkataramana Temple, Mulki, also, there is a judicial decision, that the temple and its properties belong to the entire denomination of the community resident in Mulki, comprising all the three villages, excluding, of course, the Vaidikis, i.e., the priests of the temple. Therefore, what applies to the Chidambaram temple owned by the denomination of Dikshitaras should also apply to this temple, Sri Venkataramana Temple, Mulki, owned by the religious denomination consisting of Gowd Saraswath Brahmins resident in Mulkipetta. It is, therefore, unnecessary to enumerate over again the provisions of the impugned Act which are ultra vires the Legislature in so far as that Act applies to Sri Venkataramana Temple, Mulki, the trustees thereof and the religious denomination that owns it. Those sections have already been enumerated in C. M. P. No. 2591 of 1951.

The rule nisi must be made absolute.

The petitioner is entitled to his costs. Advocate's fee Rs. 250. We certify under Art. 132 of the Constitution that this is a fit case for appeal to the Supreme Court.

A/R.G.D.

Rule made absolute.

#### A.I.R. 1953 MADRAS 152 (Vol. 40, C. N. 46)

RAJAMANNAR C. J. AND VENKATARAMA AIYAR J.

Commr. of Income-tax, Madras, Complainant v. G. M. Dandekar of Messrs. M. K. Dandekar & Co., Chartered Accountants, Madras, Respondent.

Refd. Case No. 57 of 1951, D/- 10-4-1952.

† Chartered Accountants Act (1949) S. 21 and Sch. Cl. (q) — Chartered Accountant — Duty to Income-tax Department.

If the Chartered Accountant was auditing the accounts of a joint stock company, he is under a clear duty to "probe into the transactions" and report on their true character. But when the auditing relates to the accounts of individuals, the auditor acts only for those individuals and it is his duty to act on their instructions, and to

audit the accounts produced by them and prepare statements from them. He is under an obligation to them to perform the auditing with due skill and diligence and if he does that it is difficult to see what further obligation he has in the matter and in favour of whom. The accountant is under a duty to prepare and present correct statements of the accounts of the assessee, and he should, of course, neither suggest nor assist in the preparation of false accounts. But he is under no duty to investigate whether the accounts produced by the assessee are correct or not. That is a matter for the decision of the Income-tax Tribunals. He is under no duty to the department. (Held that the accountant was not guilty of any conduct which rendered him unfit to be a member of the Institute). Case law rel. on.

(Paras 8, 9, 10 and 11)

R. Ramamurthi Aiyar, for Forwarding Authority; A. Sundaram Aiyar, for C. S. Rama Rao Sahib, for Secretary to the Govt. of India (Ministry of Finance); T. V. Viswanatha Aiyar and C. R. Pattabhiraman, for Respondent.

REFERENCES: Courtwar/Chronological/ Paras  
(1895) 2 Ch 673: (64 LJ Ch 866) 8  
(1896) 2 Ch 279: (65 LJ Ch 673) 8  
(1925) Ch 407: (94 LJ Ch 445) 8

VENKATARAMA AIYAR J.: This is a reference under S. 21 Chartered Accountants Act (Act XXXVIII of 1949). The respondent is a partner in firm of Chartered Accountants. Messrs. A. Mohamed and Co. are a firm of merchants carrying on business in hardware in the City of Madras and they entrusted the work of auditing their accounts and preparing income-tax returns to the respondent's firm. The complaint against the respondent is that he performed this work negligently.

(2) It appears from the assessment order dated 31-10-1944 that Messrs. A. Mohamed and Co. had considerable business in black-market and maintained two sets of accounts — regular day books and ledgers for the open market transactions and a separate book for the black market transactions. While the former accounts contained entries showing daily transactions the latter contained only consolidated entries made at the end of each week, of all the transactions of that week. At the end of the financial year all the weekly entries in the separate account were totalled up and these totals were entered in the regular accounts. For the year in question, 1943-44, the entries thus carried into regular account books show purchases of the value of Rs. 97,403-7-6 and sales of the value of Rs. 1,69,766-7-6.

(3) The respondent examined only the regular account books of the assessee and prepared the statements and incometax return on the basis of those accounts. All the statements were signed by him and there was also an endorsement at the foot of the balance-sheet that it was "verified and found to be correct." The profit and loss statement as drawn up by the respondent contained under the heading "stocks" the following entry: "Recorded in separate book Rs. 97,403-7-6" and under the heading "Sales" the following entry: "Recorded in separate book Rs. 1,69,766-7-6". The income-tax return was signed by the assessee and the respondent forwarded the same and the statements prepared by him to the Income-



tax Officer, with a covering letter dated 11-7-1944. Therein he stated as follows:

"To

The Incometax Officer,  
Special (Central) Circle, Madras.

Sir,

Re: G. I. No. 510 Incometax and E. P. T. Assessment 1944-45—Messrs. A. Mohamed and Company.

We have examined the books of accounts of Messrs. A. Mohamed and Co. Hardware merchants, Madras, for Samvat year 1999 ended 29-10-1943 and beg to report as under:

Books examined: 1. Rokad — cash and day book  
2. Khatavahi — ledger  
3. Jinna Nondh — purchase journal  
4. Udhar Nondh — sales journal and account books pertaining to property income purchases and sales vouchers, invoices, bank pass books

and again

"The books of accounts are kept in the Gujarathi style in the usual course of business and the statement and schedules prepared therefrom represent in our opinion correct income of the firm."

(4) On receipt of the return and the statements mentioned above, the Income-tax Officer called upon the assessee to produce their accounts and on examining them he found several discrepancies the most important of which was the difference between the sales as entered in the regular accounts and the sales as shown in the statements. On 23-8-1944 he wrote to the respondent for an explanation of this difference. On 2-10-1944 the respondent replied that the difference was to be accounted for by the sales entered in the separate book and it was added that there were "unfortunately no details" for those sales in the account book. The Income-tax Officer held that the separate accounts were inaccurate and unreliable. He accordingly proceeded to assess the profits made by the assessee in the black market transactions on estimate and computed the same at Rs. 3,50,000 and determined the tax payable on the basis of that figure. This assessment was finally confirmed on 30-7-1947.

(5) On these facts the Income-tax Department took up the matter against the respondent, and filed a complaint against him on 6-1-1951 charging him with gross negligence in the discharge of his duties. Their contention is that the statements of the respondent in his letter dated 11-7-1944 that the account books of the assessee were maintained in the usual course of business and that the income received by the firm as shown in the statement was correct were erroneous and could easily have been discovered to be erroneous by the proper investigation. They also contend that the explanation given by the respondent in his letter dated 2-10-1944 is equally erroneous and could have been avoided if he had acted with due diligence.

(6) Notice of this complaint was given to the respondent. He filed a statement in which he pleaded that he prepared the return and the statements only on the basis of the accounts produced before him by the assessee, that he

acted throughout only as their representative, that he had no personal responsibility in the matter and that he was not guilty of any negligence. The matter was enquired into by the Disciplinary Committee who held that the charge of negligence was made out and that the respondent was guilty under Cl. (q) of the schedule of the Act. The matter comes up before us on reference under S. 21 of the Act.

(7) The point for decision is whether on the facts above mentioned the respondent can be held to be guilty of gross negligence. There can be no negligence unless there is a duty cast upon the person to do a particular act and he fails to do it.

(8) It is, therefore, necessary to ascertain what the duties of the respondent are as the auditor of Messrs. A. Mohamed and Co. It is contended by the respondent that when an assessee engages him for auditing his accounts and preparing the income-tax returns for him, his duty is only to prepare the statements on the basis of the accounts produced by the assessee and that he is under no obligation to go further and enquire whether the account books maintained by the assessee are reliable. The view taken by the Disciplinary Committee is that the respondent had not discharged his duty by merely preparing the abstracts from the accounts of the assessee, that it was further his duty "to probe into the matter" and investigate whether the accounts were correct. That such would have been his duty if he was auditing the accounts of a joint stock company, we do not doubt. In that case the audit is intended for the protection of the share-holders and the auditor is expected to examine the accounts maintained by the directors with a view to inform the share-holders of the true financial position of the company. The directors are in the position of trustees in relation to the share-holders and in auditing the accounts maintained by the directors the auditor acts in the interests of the share-holders who are in the position of beneficiaries. The auditor is, in such a case, under a clear duty to "probe into the transactions" and report on their true character. It was so held by Lord Alverstone C. J. in —'In re: London Oil Storage Co. Ltd. v. Seear Haslack and Co.', Dicksee on Auditing, p. 781, 10th Edn. wherein he observed:

"That he must exercise such reasonable care as would satisfy a man that the accounts are genuine, assuming that there is nothing to arouse his suspicion of honesty and if he does that he fulfils his duty; if his suspicion is aroused, his duty is to "probe the thing to the bottom" and tell the directors of it and get what information he can."

Vide also the observations in—'In re: London General Bank (No. 3)', (1895) 2-Ch. 673; — 'In re: Kingston Cotton Mill Co. (No. 2)', (1896) 2-Ch. 279 and — 'In re: City Equitable Fire Insurance Co. Ltd.', (1925) Ch. 407.

(9) But the question is whether there is the same duty when the auditing relates to the accounts of individuals. In those cases the auditor acts only for those individuals and it is his duty to act on their instructions, and to audit the accounts produced by them and prepare statements from them. He is under an obligation to them to perform the auditing with due skill and diligence and if he does that it is difficult to see what further obligation he has in the matter and in favour of whom. Mr. Ra-



mamurthi Iyer the learned advocate for the Council contended that the respondent was a representative of the assessee in the income-tax proceedings; that his position was analogous to that of an advocate appearing for a party in court and that he owed a duty to the income-tax department to act fairly in the presentation of the case of the assessee.

We agree that the position of Chartered Accountants representing the income-tax assessee is similar to that of Advocates representing parties in court and that their obligations are similar to those of advocates. But what are the obligations of the Advocates? They are bound to act strictly within the instructions of their clients; they are under a duty not to misrepresent facts or to mislead the court and they should be no parties in any manner to setting up false defences but they are under no obligation to suspect their clients or to investigate whether their case is true or false. It is a matter for the court to decide and not for the advocates to "probe into". In like manner the accountant is under a duty to prepare and present correct statements of the accounts of the assessee; and he should, of course, neither suggest nor assist in the preparation of false accounts. But he is under no duty to investigate whether the accounts produced by the assessee are correct or not. That is a matter for the decision of the Income-tax Tribunals. Judged by this standard the question is whether the respondent has said or done anything which can be held to be a breach of his duties as aforesaid.

(10) The points that have been urged against him are the following: 1. In his letter dated 11-7-1944 the respondent stated that "books of accounts are kept in the Gujarathi style in the usual course of business". It is argued that this statement is incorrect because it has been found that the account books are imperfect and unreliable. But the statement of the respondent only means that the entries in the account books were made at about the time when the transactions took place or shortly thereafter and that is what they purported to be. It has not been found by the Disciplinary Committee that the entries in the regular account books were not made in the usual course and indeed the Income-tax Officer accepted them as correct so far as they went. The opinion of the Committee that the accounts were not kept in the usual course of business is based on its finding that those account books were not complete. But they do not for that reason cease to be accounts maintained in the usual course of business.

2. In the letter dated 11-7-1944 the respondent stated that,

"the statements and schedules prepared therefrom (from the accounts) represent, in our opinion, correct income of the firm";

and he also endorsed on the balance sheet that it was "verified and found correct". It is argued that it would be impossible to make a correct determination of the profits made by the assessee without a proper examination of the separate book; that the Income-tax department has in fact found that the statements prepared by the respondent were incorrect and that, therefore, he must be held to have acted negligently in passing on the figures from the accounts without making an independent investigation. It is also added that the reference

to separate book in the profit and loss statement is misleading as it suggests that the book was also examined. But if the duty of the respondent was only to prepare a correct statement from the accounts of the assessee and not to investigate whether those accounts are correct or not this charge must fall to the ground. The respondent did not state that the figures mentioned in the statement represented the real profits made by the assessee. He only stated that the balance sheet represented the correct position according to the accounts of the assessee. Nor is there any foundation for the suggestion that the reference to the separate books in the profits and loss statement was misleading. It represents only the entries in the separate book carried forward into regular account books which had been examined by the respondent. In fact the letter clearly mentions that all accounts had been examined by the respondent and this is not one of them.

3. Finally it was stated that in his letter dated 2-10-1944 the respondent gave an explanation that the differences between sales mentioned in the regular account books and those shown in the statements were to be accounted for by the sales entered in the separate book and that this explanation was found to be false, and that the respondent was negligent in passing on the statement of his client without satisfying himself whether it was correct or not. But if he was only acting as the representative of the assessee, he was under a duty to place their representation before the Income-tax authorities and that is all that was done by the respondent in his letter dated 2-10-1944.

(11) There is no charge against the respondent that he connived at the assessee's putting forward a false statement or that he had in any manner associated himself with the attempt of the assessee to mislead the department. The charge is that he owed a duty to the department, to himself investigate the truth and correctness of the accounts of the assessee and not merely to act as their post office in transmitting them. We do not agree that the respondent is under such duty to the department and, therefore, no question of negligence arises.

(12) Before concluding we think it is necessary to comment on the inordinate delay in the institution of these proceedings. The statements complained of were made on 11-7-1944 and 2-10-1944; they were found to be unacceptable by the department by its order dated 31-10-1944; the assessment proceedings were themselves finally closed on 30-7-1947 and this complaint is filed on 6-1-1951. It is essential that charges of this kind should be made with promptitude.

(13) In the result, we hold that the respondent is not guilty of any conduct which renders him unfit to be a member of the Institute. There will be no order for costs in this reference.

B/D.H.

Order accordingly.

**A.I.R. 1953 MADRAS 154 (Vol. 40, C. N. 47)**  
RAMASWAMI J.

In re E. P. Arumugham Pillai and another, Petitioners.

Criminal Revn. Cases Nos. 34 and 35 of 1952 (Criminal Revn. Petns. Nos. 34 and 35 of 1952), D/- 4-9-1952.



**Factories Act (1948) Ss. 2(m) and 85 — Madras G. O. No. 2210 (Development Department), D/- 22-4-1948 — Order is ultra vires of S. 85.**

The Madras G. O. No. 2210 (Development Department), D/- 22-4-1948 which declares every place in the Province wherein more than 10 and less than 20 people are employed and a manufacturing process is carried on without the aid of power, generally as a factory, is illegal and ultra vires the powers conferred under S. 85, Factories Act. It practically renders nugatory the definition of a factory in S. 2(m) of the Act. The object of S. 2(m) in restricting the term "factory" to places which employ 20 or more persons engaging in a manufacturing process without the aid of power, is that small undertakings, most often practically family businesses, should not be subjected to the rigorous restrictions imposed by the Factories Act and that in fact such business would not be requiring the rigorous restrictions under the Factories Act. The Central Legislature has at the same time contemplated that in particular places and in certain types of businesses run with less than 20 but more than ten persons without the aid of power conditions may exist calling for the application of the salutary provisions of the Factories Act in ensuring the welfare of the workers.

(Para 5)

Anno: Factories Act, S. 2 N. 1.

S. Ramachandra Aiyar, for Petitioner; Public Prosecutor, for the State.

**ORDER:** These are criminal revision cases which have been filed against the convictions and sentences of the Additional First Class Magistrate, Tiruchirapalli, in S. T. Nos. 1138 and 1141 of 1951 respectively.

(2) The facts are: The petitioners before us who were respectively accused in the lower court were running cigar factories in Tiruchirapalli town. There is no dispute that each of these businesses is employing only less than 20 workers and that the manufacturing process is being carried on without the aid of Electric power. P. W. 1, the Assistant Inspector of Labour, First Circle, Tiruchirapalli, visited these places and noted certain contravention of the provisions of the Factories Act which need not detain us here. These petitioners Arumugham Pillai, and Sundaram Pillai were prosecuted for infraction of the provisions of the Factories Act. Each of them was fined Rs. 10 or in default to simple imprisonment for ten days.

(3) The point taken is that these business premises are not factories within the meaning of the Indian Factories Act and that the lower court should have held that the G. O. No. 2210 (Development Department) dated 22-4-1948 is illegal and ultra vires.

(4) S. 2(m) Factories Act, LXIII of 1948, defines a factory as any premises including the precincts thereof wherein 20 or more workers are working or were working on any day of the preceding 12 months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on. But notwithstanding this definition power is given under S. 85(i) to the State Governments by notification in the Official Gazette to declare that all or any of the provisions of the Act shall apply to any place

wherein manufacturing process is carried on notwithstanding that the number of persons employed is less than 20, if working without the aid of power. In pursuance of this, G. O. No. 2210 (Development Department) dated 22-4-1948 has been issued in the following terms:

"In exercise of the powers conferred by S. 85(1) of the Factories Act, 1948 (Central Act LXIII of 1948) His Excellency the Governor of Madras, declares that all the provisions of the said Act shall apply to any place wherein a manufacturing process is carried on without the aid of power or is so ordinarily carried on and ten or more but less than 20 persons are employed."

(5) There can be no doubt that this G. O. is illegal and ultra vires and beyond the powers conferred under S. 85, Factories Act. The State Government would have been within its powers if they notified particular named places as factories. But instead of doing so this G. O. makes every place from Ganjam to Ram-eswaram generally as a factory provided there are more than 10 and less than 20 people employed and engaged in the manufacturing process without the aid of power. This practically renders nugatory the definition of a factory in S. 2(m) of the Act. The object of S. 2(m) in restricting the term "factory" to places which employ 20 or more persons engaging in a manufacturing process without the aid of power, is that small undertakings most often practically family businesses, should not be subjected to the rigorous restrictions imposed by the Factories Act and that in fact such business would not be requiring the rigorous restrictions under the Factories Act. The Central Legislature has at the same time contemplated that in particular places and in certain types of businesses run with less than 20 but more than ten persons without the aid of power conditions may exist calling for the application of the salutary provisions of the Factories Act in ensuring the welfare of the workers. The Central Legislature has also certainly contemplated that the provisions of the Factories Act might get defeated by scrupulously keeping the number of workers down to 19. That is why power has been given to the State Governments to prevent the abuse of the limitations imposed in S. 2(m). This special power conferred on the State Government cannot be exercised in this manner and used as if it were a blank cheque and issue a G. O. in the aforesaid terms. One instance how this power should be used by the State Government is to be found in S. 3. Section 3 for instance lays down that "in this Act references to time of day are references to Indian Standard time." But they recognising that the Indian Standard Time might not be observed all over India and that local conditions would require modifications, a proviso has been inserted that for any area in which Indian standard time (?) is not ordinarily observed the Provincial Government may make rules specifying the area, defining the local meantime observed therein, and permitting such time to be observed in all or any of the factories situated in the area. In a reported Scotch decision — 'Macbeth v. Ashely', Vol. II, 1870-5 (33-39 Vict) Scotch Appeal cases, 352, the term "any particular locality" was construed as follows: "Eleven O'clock at night is the hour appointed for closing public houses in Scotland (under 25 and 26 Vict. Ch. 35) although in special cases and for well considered reasons a deviation is allowed with reference



to any particular locality really requiring it. An order by the Magistrate of Rothesay for closing at ten, instead of eleven, though limited by its words to a 'particular locality' embraced every public house in the burgh. Held, by the House of Lords, agreeing with the court below, that the Magistrate's order was ultra vires."

In these circumstances the lower court ought to have held that G. O. No. 2210 was illegal and ultra vires and erred in holding that the business premises of the accused was a factory and that there was any contravention of the Indian Factories Act.

(6) This does not mean that we are leaving the State without any remedy in regard to bringing these businesses within the meaning of the Factories Act. All that the State has got to do is to make use of the provisions of S. 85 of the Act in special cases and for well considered reasons, and notify the particular places as factories.

(7) These revision cases are allowed and the convictions and sentences are set aside. The fine amounts, if collected, will be refunded. (The rest of the order is not material for the purposes of this report.)

A/K.S.

Revisions dismissed.

#### A.I.R. 1953 MADRAS 156 (Vol. 40, C. N. 48)

RAMASWAMI J.

In re Kasi Raja, Proprietor, Thiruveswarar Rice Mills, Ariyur, Petitioner.

Criminal Revn. Case No. 1027 of 1951 (Criminal Revn. Petn. No. 1088 of 1951), D/- 28-8-1952.

**Essential Supplies (Temporary Powers) Act (1946) S. 7(1) — Govt. Order, 432, Food Department, D/- 12-4-47 — Contravention of — Accused, owner of Rice Mill, prosecuted for hulling paddy without permit — Owner held liable for act of his servant done without his knowledge — Plea of absence of mens rea — (Penal Code (1860) S. 40) — (Master and servant — Vicarious liability).**

It is quite true that as a general rule of criminal law the master is not responsible for the unauthorised acts of his servants. But in many cases the law imposes upon the owner of the property the obligation of managing it, so that it shall not injuriously affect any one else or the public, or requires or forbids the dealing with it in some particular way. In such cases, where the breach of obligation is punishable criminally, the owner cannot free himself from liability by delegating the management to some one else on his behalf. This liability of the master is insisted upon because otherwise every master will be able to get at nought the entire series of special Acts by employing servants AD HOC and getting illegal acts done and at the same time disown his liability therefor and would take care always to be out of the way. (Para 5)

The true test is to look at the object of each Act that is under consideration to see how far knowledge is of the essence of the offence created. In arriving at this decision, it has been held material to enquire; (1) whether the object of the statute would be frustrated, if proof of such knowledge was necessary; (2) whether there is anything in the wording of the

particular section which implies knowledge; (3) whether there is anything in other sections showing that knowledge is an element in the offence, which is omitted or referred to in the section under discussion. These tests have been applied in cases arising under the Licence Laws and other special enactments. (Para 11)

The accused an owner of a rice mill was prosecuted under S. 7(1) of the Essential Supplies Temporary Powers Act, 1946, for contravention of Govt. Order, 432, Food Department, dated 12-4-1947 by which hulling of paddy by the owner or a person in charge of the mill without a permit was made punishable. On a certain night at 2-30 A.M. a surprise raid was made on the rice mill belonging to the accused. The engine driver who was the person in charge of machine was caught red-handed while hulling paddy without a permit. The owner who was living in the same village not far away was absent.

Held that in the circumstances of the case and in terms of the particular enactment which the accused had violated, the master was liable for the acts of his servant notwithstanding the plea that he might put forward that as the acts were done without his knowledge, he had no mens rea. Case law discussed. (Para 16)

Anno: Penal Code, S. 40 N. 1.

S. Sitarama Iyyar, for Petitioner; Public Prosecutor on behalf of the State.

REFERENCES: Courtwar/Chronological/ Paras

('47) 1947-2 Mad LJ 328: (AIR 1947 PC 135)	6
('51) 1951 Mad WN Cri 102: (AIR 1951 SC 204: 52 Cri LJ 768)	12
('48) AIR 1948 Bom 364: (49 Cri LJ 551)	6
('49) 53 Cal WN 300: (50 Cri LJ 590)	7
('49) Cri Revn Case No 1181 of 1949 (Mad)	6
('50) 1950 Mad WN Cri 302: (AIR 1951 Mad 261)	7
(1875) R v Prince: (1875-2 CLR 154)	9
(1901) 2 KB 290: (70 LJKB 747)	15
(1906) 1 KB 131: (75 LJKB 163)	15
(1910) 2 KB 471: (79 LJKB 1123)	15
(1917) 2 KB 836: (87 LJKB 82)	12
(1924) 1 KB 102: (93 LJKB 50)	5
(1924) 1 KB 311: (93 LJKB 144)	15
(1930) 1 KB 211: (99 LJKB 146)	6
(1866) 1 QB 702: (7 B & S 710)	5
(1874) 9 QB 292: (43 LJMC 61)	14
(1891) 2 QB 588: (61 LJMC 38)	13
(1895) 1 QB 918: (64 LJMC 218)	15
(1876) 1 QBD 89: (45 LJMC 65)	5
(1879) 5 QBD 259: (49 LJMC 45)	15
(1884) 13 QBD 207: (53 LJMC 125)	15
(1888) 20 QBD 771: (57 LJMC 100)	15
(1889) R v Tolson: (1889-23 QBD 168)	9
(1890) 21 QBD 249: (57 LJMC 105)	5

ORDER: This is a Criminal Revision Case which has been filed against the conviction and sentence of the Second Additional First Class Magistrate of Thiruchirapalli in S. T. Case No. 129 of 1951.

(2) The facts are: The petitioner Kasi Raja son of Periyasami Muthuraja is the proprietor of the Thiruveswarar Rice Mills, Ariyur. This proprietor employed a driver who has been examined as P. W. 3 in this case for driving the rice mill. On the night of 21-10-1950 at about 2-30 A.M. the Taluk Supply Officer, who has been examined as P. W. 1, made a surprise visit. Then he found that the driver was hulling four kalams of paddy belonging to one Appu Ayyar of Ariyur village without a permit. The pro-



prietor was absent from the place. Therefore the Taluk Supply Officer recorded statements from the engine driver as well as the village Munsif. The statement given by the driver is Ex. P-1 and the statement given by the village Munsif is Ex. P-2. In the statement given by the driver and from which he went behind in the Court when he was examined as P. W. 3, on account of which he was treated as hostile to the prosecution and was cross-examined, this driver has admitted as follows: (After quoting the evidence of this witness His Lordship proceeded:) The village munsif gave a statement to which he has stuck to in the Court when he was examined as P. W. 2 namely that when the mill was suddenly inspected by the Taluk Supply Officer at 2-30 A.M. the facts found were as set out in the above statement of the driver. The village munsif also touched the machine and found it very hot showing that it had just been running. In addition, the Taluk Supply Officer stated that when he made this surprise raid he found persons dispersing with loads of paddy & that the lights were put out. Therefore he obtained necessary sanction of the Collector and prosecuted this proprietor Kasi Rajan under S. 7(1), Essential Supplies Temporary Powers Act.

(3) The case for the accused seems to be two-fold namely that there was no running of the machine & hulling of paddy of Appu Ayyar without a permit & secondly that he the master is not liable for the act of the servants. One is a finding of fact and the other is a point of law.

(4) Turning to the point of fact, there cannot be the slightest doubt that the version of the petitioner before us is a tissue of lies from beginning to end. (After discussion of the evidence His Lordship concluded). It is manifest therefore, that what was being hulled was hulled without the proper hulling permit. Therefore it is absolutely clear that when the Taluk Supply Officer had raided this mill at an unearthly hour, the mill was working and was actually grinding paddy for Appu Ayyar without a hulling permit.

(5) Then we come to the point of law raised which is (not?) unsubstantial and which has practically become a time-honoured defence in these cases. The point taken is that the master who was quietly at home and did not know what was going on in the mill is not liable for the act of the servant and that since the master has not got the necessary MENS REA he could not be convicted. It is quite true that as a general rule of criminal law the master is not responsible for the unauthorised acts of his servants. But in many cases the law imposes upon the owner of the property the obligation of managing it, so that it shall not injuriously affect any one else or the public, or requires or forbids the dealing with it in some particular way. In such cases, where the breach of obligation is punishable criminally, the owner cannot free himself from liability by delegating the management to someone else on his behalf. This liability of the master is insisted upon because otherwise every master will be able to set at nought the entire series of special acts by employing servants AD HOC and getting illegal acts done and at the same time disown his liability therefor and would take care always to be out of the way. (*R. v. Stephens*, (1866) 1 Q B 702; — *Redgate v. Haynes*, (1876) 1 Q B 89; — *Bond v. Evans*,

(1890) 21 Q B D 249; — *Allen v. Whitehead*, (1930) 1 K B 211; — *Griffiths v. Studebaker, Ltd.*, (1924) 1 K B 102.)

(6) In fact this very argument was advanced in this Court in — *Cri. Rev. Case No. 1181 of 1949 (Mad)* and it was repelled. The argument was that the master had no MENS REA because the actual hulling was done at the instance of the manager. My learned brother Govinda Menon J. repelled that argument and stated that this plea did not appeal to him because of the specific provisions of the order which had been contravened, and that the learned Magistrate had also pointed out that in Government Order 432, Food Department dated 12-4-1947 hulling paddy either by the owner or a person in charge of a mill without a permit was made punishable. The Privy Council decision in — *Srinivas Mall v. Emperor*, 1947-2 Mad L J 328 was relied upon before my learned brother and he pointed out as follows:

"There Sir John Beaumont quotes a passage from the judgment of the Lord Chief Justice where a specific mention is made that in cases where the legal provision contravened exempts matters in which MENS REA is made not necessary in such cases the master can be made liable for the acts of servants. The learned counsel also relies upon the judgment of the Chief Justice of Bombay in — *Isak Solomon Macmull v. Emperor*, AIR 1948 Bom. 364. I do not find that the Bombay decision can be of much help to the facts of the present case. Here according to the order promulgated 'any owner who allows paddy to be hulled in his rice mill without a permit is made liable'."

(7) The question as to the precise kind of MENS REA which is required in such cases formed also the subject-matter of discussion in — *Narayana Naik v. State*, 1950 Mad W. N. Cri. 302 where reliance was placed in — *Bhola-prasad v. The King*, 53 Cal. W. N. 300, before Panchapagesa Sastry J. Panchapagesa Sastri J. held that what was meant by saying that MENS REA should be established was that it should be proved that the accused had a guilty mind in doing the act; if the accused knew that the law and the conditions of the licence given to him required that he should comply with certain formalities (such as making certain entries in the receipts issued by him) and with that knowledge he deliberately omitted to comply with those formalities, he must be held to have a guilty mind; what the law requires is only a conscious violation of the statute and the profit motive or anything analogous to it is not essential. In that case Panchapagesa Sastri J. examined relevant circumstances and found that the accused could not have escaped having a guilty mind.

(8) In the instant case let us examine the circumstances which the Taluk Supply Officer found when he raided the mill. Its owner, the accused, is living in the village not far from the mill. The mill was kept working at the most unusual part of the night namely 2-30 a.m. On seeing the Taluk Supply Officer many persons with head loads of paddy dispersed helter-skelter. Then the person who was caught was the driver with the machine running with the hull full of paddy and the vazhi full of rice. The owner could not escape having knowledge



that his mill was being run in the night and that it was hulling paddy without permits and the hulled paddy not being brought into account. The accused cannot escape by saying that because he was living at some distance he had no knowledge of the mill running, for in order to run the mill there must be consumption of oil and other incidental expenses. So how can this owner escape knowledge of the fact that his mill was being run at nights for illegal purposes? Therefore, in this case even if a conscious violation of the statute is required such conscious violation was present in this case and can be deduced from the circumstances set out above.

(9) But as a matter of fact this plea of *MENS REA* is very often used without fully comprehending its place either in the Indian Penal Code or in the special Acts which are being enacted in larger and larger numbers. It is an almost immemorial common place of English Judges to state that there can be no conviction on a criminal charge, unless the prisoner has a 'mens rea' or guilty mind. The maxim which lays down this doctrine ('actus non facit reum nisi mens sit rea'): ('Non est reus nisi mens sit rea') has been traced by Sir James Stephen backwards through Lord Coke to the laws of Henry I. Its meaning was discussed with great elaboration in two cases (— '*R. v. Prince*', (1875) 2 CLR 154) and — '*R. v. Tolson*', (1889-23 Q B D 168) where the Judges differed completely as to its application. In the last case, Stephen J., with characteristic independence expressed an opinion that the maxim itself was not of much practical value, and was not only likely to mislead but was absolutely misleading and in this opinion, Manisty J. who agreed with him in nothing else, most heartily concurred. When the maxim originated, criminal law practically dealt with common law offences, none of which was defined. The law gave them certain names, such as treason, murder, burglary, larceny or rape and left any person who was interested in the matter to find out for himself what these terms meant. To do this he had to resort to the explanations of text-writers and the decisions of Judges. There he found that the crime consisted not merely in doing a particular act, such as killing a man, or carrying away his purse, but in doing the act with a particular knowledge or purpose. This superadded mental state was generalized by the term 'mens rea'.

(10) But under the Penal Code such a maxim is wholly out of place. Every offence is defined, and the definition states not only what the accused must have done, but the state of his mind with regard to the act when he was doing it. It must have been done, knowingly, voluntarily, fraudulently, dishonestly, or the like. And when it is stated that the act must be done with a particular knowledge or intention, the definition goes on to state what he must have known, or what he must have intended.

(11) If this is the case with the Indian Penal Code, we find now a large and growing class of statutory offences, where acts previously innocent are forbidden, or acts previously optional are commanded, simply because the State considers such legislation necessary for its own interests, or for the protection of some particular class of community. We shall now examine what place this plea of mens rea has got in

these special Acts. Here the object of the State is merely to compel the adoption of a particular line of conduct, and the penalties that are imposed are intended, not for punishment, but for prevention as the only means which the State has at its disposal for the enforcement of its laws. Now, in regard to such cases, questions have frequently arisen, whether a person is punishable under the statute, when he has violated its provisions in ignorance of the fact on which the violation depends. In some cases of this sort, the Judges, influenced by the 'mens rea' doctrine, have sought to solve the question by enquiring whether the proceeding was really a criminal proceeding or not. It is now, however, settled that the true test is to look at the object of each Act that is under consideration to see how far knowledge is of the essence of the offence created. In arriving at this decision, it has been held material to enquire: (1) Whether the object of the statute would be frustrated, if proof of such knowledge was necessary; (2) Whether there is anything in the wording of the particular section which implies knowledge; (3) Whether there is anything in other sections showing that knowledge is an element in the offence, which is omitted or referred to in the section under discussion. These tests have been applied in cases arising under the Licence Laws and other special enactments.

(12) The place of mens rea in special Acts has been discussed at considerable length in Supreme Court decision in — '*Hariprasada Rao v. The State*', 1951 Mad W N Cri 102 (S.C.). There the English decisions were examined & have been cited with approval. It is pointed out there that in — '*Mousell Brothers Ltd. v. London and North Western Railway*', (1917) 2 K. B. 836 at P. 844, Viscount Reading C. J. dealing with a case under the Railways Clauses Consolidation Act, 1845, observed as follows:

"*'Prima facie'* then, a master is not to be made criminally responsible for the acts of his servant to which the master is not a party. But it may be the intention of the Legislature, in order to guard against happening of the forbidden thing, to impose a liability upon a principal even though he does not know of, and is not party to, the forbidden act done by his servant. Many statutes are passed with this object. Acts done by the servant of the licensed holder of licensed premises render the licensed holder in some instances liable, even though the act was done by his servant without the knowledge of the master. Under the Food and Drugs Act there are again instances well known in these Courts where the master is made responsible, even though he knows nothing of the act done by his servant and he may be fined or rendered amenable to the penalty enjoined by the law. In those cases the Legislature absolutely forbids the act and makes the principal liable without a mens rea."

(13) In the same case, Atkin J. expressed the same view in these words:

"I think that the authorities cited by my Lord make it plain that while *prima facie* a principal is not to be made criminally responsible for the acts of his servants, yet the Legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his



servants. To ascertain whether a particular Act of Parliament has that effect or not regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed. If authority for this is necessary, it will be found in the judgment of Bowen L. J. in — 'Reg v. Tyler', (1891) 2 Q. B. 588 at P. 592"

(14) In — 'Mullins v. Collins', (1874) 9 Q. B. 292 the servant of a licensed victualler having knowingly supplied liquor to a constable on duty without the authority of his superior officer, it was held that the licensed victualler was liable to be convicted although he had no knowledge of the act of his servant. In dealing with this case, Blackburn J., observed thus:

"If we held that there must be a personal knowledge in the licensed person, we should make the enactment of no effect."

(15) There are many other cases in England in which the same view has been enunciated and some of them have been collected and classified in the judgment of Wright J. in — 'Sherras v. De Rutzen', (1895) 1-Q. B. 918 at P. 921. The familiar English cases are:—'R. v. Duke of Leinster', (1924) 1 KB 311. c.f. 18 Cox 2:—'R. v. Bishop', (1879)-5 Q.B.D. 259; —'Hobbs v. Corporation of Winchester', (1910)-2-K.B. 471; —'Betts v. Armstead', (1888) 20 Q.B.D. 771; —'Goulder v. Rook', (1901) 2 K. B. 290; —'Laird v. Dobell', (1906) 1 K. B. 131; —'Cundy v. Lecocq', (1884) 13 Q.B.D. 207. The principle laid down in these cases has been followed in several cases in this country also.

(16) There cannot be the slightest doubt, therefore that in the circumstances of the case and in terms of the particular enactment which this accused has violated the master is liable for the acts of his servants notwithstanding the plea that he might put forward that as the acts were done without his knowledge, he had no 'mens rea'.

(17) In the result, this criminal revision petition, wholly devoid of merits, is dismissed.  
B/K.S. Revision dismissed.

**A.I.R. 1953 MADRAS 159 (Vol. 40, C. N. 49)**

**FULL BENCH**

**P. V. RAJAMANNAR C. J., SOMASUNDARAM AND VENKATARAMA AIYAR JJ.**

**Bandi Veeraju and others, Appellants v. Bandi Narayanamma, Respondent.**

**S. A. No. 488 of 1948 and Memo of objections, D/- 25-7-1952.**

**Hindu Law — Widow — Maintenance — Fixing quantum — Income of family as on which date relevant.**

The widow of a deceased coparcener in a joint Hindu family has a right of maintenance against the surviving coparceners quoad the share of her deceased husband which survives to them. This is an absolute right which accrues to her as a member of the joint family. On the death of her husband a widow continues to be a member of the joint family along with the male coparceners. Her fortunes are bound up with the fortunes of the family. If the income of the family increases she will be entitled to the benefit of it. Like-

wise, if the income of the family decreases, she must submit to a reduction of her maintenance. The quantum of maintenance to which a widow is entitled is subject to variation, even when fixed by the court, by reason of a change of circumstances. Therefore, it is right to fix the rate of maintenance taking into consideration the income of the joint family at the time of the institution of her suit and not as on the death of her husband: 27 MLJ 291, Foll.; 27 Mad 45 and 21 MLJ 706, Expl. and Disting.; Case law discussed.

(Paras 7, 9)

**K. Ramachandra Rao, for Appellants; Y. G. Krishnamurthy, for Respondent.**

**RAJAMANNAR C. J.:** This second appeal was first heard by Ramaswami J. who considered that an important question affecting the award of maintenance to the widow of a deceased coparcener against the surviving coparceners arose in this case, on which there appeared to be a conflict of judicial opinion. Hence this reference to a Full Bench.

(2) The second appeal arises out of a suit filed by the respondent for the recovery of maintenance at the rate of Rs. 1000 per annum from the date of suit and for arrears of maintenance for about a year before the institution of the suit at the same rate, for provision for residence and other minor reliefs. The respondent's deceased husband, Venkatarayudu, and defendants 2 and 4 who are appellants 1 and 3 were the undivided sons of the first defendant. The 3rd defendant (2nd appellant) is the son of the 1st appellant. The respondent's husband died undivided from the family nearly 30 years before the suit. The respondent claimed a sum of Rs. 1000 as a proper rate of maintenance on the allegation that the family owned about 150 acres of land fetching an annual income of Rs. 20,000 and had also a large moneylending business. The defendants pleaded 'inter alia' that soon after the plaintiff's husband's death there was an agreement between the plaintiff's father acting on her behalf and the first defendant that the plaintiff should be paid a sum of Rs. 100 per annum towards her maintenance and that neither the plaintiff nor the defendants should ask for its alteration at any time. This amount was fixed, according to them, having regard to the extent of the family estate at the time of the plaintiff's husband's death namely, about 54 acres of land of which 6 acres alone were wet. The learned District Munsif of Kovur who tried the suit held that the arrangement set up by the defendants was not true and proceeded to fix the maintenance. He held that the quantum of maintenance had to be fixed taking into consideration the income of the family on the date of the suit and the plaintiff's husband's share therein if he had been alive. He estimated the nett income of the family at not less than Rs. 7000 and fixed a sum of Rs. 750 per annum. He also awarded arrears of maintenance at the same rate for the year 1943. The defendants appealed to the Subordinate Judge, who confirmed the decision of the District Munsif except as regards costs. The defendants thereupon filed the second appeal which is now before us.

(3) The main ground which was taken in the memorandum of appeal was that the lower courts should have held that the plaintiff was entitled to maintenance only from the share of



her husband in the properties that the family owned and possessed at the time of his death. Learned counsel for the appellants pressed only this point before us. He contended that the rate of maintenance should be fixed having regard to the properties which were owned by the joint family at the time of the plaintiff's husband's death and she should not get the benefit of subsequent acquisitions made by the family.

(4) On this question there is direct authority in this court. In — *Manicka Mudaliar v. Sowbagiammal*, 27 Mad L J 291 it was held by a Division Bench consisting of Sankaran Nair and Spencer JJ. that the amount of maintenance should be fixed with reference to the income of the family as it stood at the date of the suit and not as it stood at the date of the husband's death. In that case, the plaintiff's husband died in 1897 and the suit for maintenance was brought in 1911. When the plaintiff's husband died the joint family was possessed of about 1 acre of wet land and about 1½ acres of dry land and was carrying on a small trade in cloth. After his death, the trade increased and the profits became large and properties were purchased out of the income from the trade. The income of the family on the date of the suit was estimated at Rs. 17500 per annum on an average. The District Judge awarded maintenance at the rate of Rs. 50 per mensem. It was contended that the lower court was wrong in fixing the maintenance with reference to the present income of the family but this contention was overruled. They observed:

"It is not contended that the property out of which the plaintiff seeks to be maintained is not joint family property; that the defendants did not take her husband's interest by survivorship and that formed in part the nucleus of this acquisition. It is also clear that if the family income had been reduced, the plaintiff would only get a reduced rate of maintenance and she would not be entitled to have it fixed with reference to the family income at the date of her husband's death."

They followed two rulings of the Bombay High Court in — *Madhavray Keshav Tilak v. Gangabai*, 2 Bom 639 and — *Adhibai v. Gurusandas Nathur*, 11 Bom 199. In — *Madhavray Keshav Tilak v. Gangabai*, 2 Bom 639, Westropp C. J. and Kemball J. had held that a Hindu widow is not entitled to a larger portion of the annual produce of the joint family property as maintenance than the annual proceeds of the share to which her husband would have been entitled on partition were he then living, and this decision had been followed in the later case. Wadsworth J. followed the decision in — *Manicka Mudaliar v. Sowbagiammal*, 27 Mad L J 291 in — *Veerayya v. Chellamma*, ILR 1939 Mad 234. No doubt, that was a suit for enhancement of maintenance already fixed by a decree of court. But the principle applied was the same. He held that the maximum which could be awarded to the widow be the amount of the income from the share to which her husband would have been entitled had he been alive and a coparcener at the date of the suit for enhancement. The learned Judge pointed that the ruling in — *Manicka Mudaliar v. Sowbagia Ammal*, 27 Mad L J 291 had not been challenged by subsequent rulings of this court in the 24 years which had elapsed since that decision had been passed.

(5) The only support which learned counsel for the appellant sought for the contrary view for which he contended was from certain observations in two decisions of this court. In — *Jayanti Subbiah v. Alamelu Mangamma*, 27 Mad 45, Bhashyam Aiyangar J. said:

"When an undivided Hindu family consists of two or more males related as father and sons or otherwise and one of them dies leaving a widow, she has a right of maintenance against the surviving coparcener or coparceners, 'quoad' the share or interest of her deceased husband in the joint family property which has come by survivorship into the hands of the surviving coparcener or coparceners, and though such right does not in itself form a charge upon her husband's share or interest in the joint family property, yet, when it becomes necessary to enforce or preserve such right effectually, it could be made a specific charge on a reasonable portion of the joint family property, such portion of course not exceeding her husband's share or interest therein."

(6) In — *Rangathayi Ammal v. Munuswami Chetti*, 21 Mad L J 706, the following passage occurs in the judgment in a discussion as to the amount of maintenance which a Hindu widow is entitled to:

"No hard and fast rule can be laid down that she is entitled to a particular fraction of the income, although she could, in no event, claim more than the income of the share of the estate which her husband would have been entitled to, if a division had taken place during his lifetime."

As pointed out in — *Bansidhar Lala v. Champoo Bibi Mst.*, 21 Luck 152, the observations in — *Jayanti Subbiah v. Alamelu Mangamma*, 27 Mad 45 cited above can scarcely be regarded as authority for the proposition that the maximum limit for the maintenance allowance of a Hindu widow is her husband's share in the income of the family property at the time of his death. In that case, no question arose as to the amount of maintenance. A creditor of the deceased husband of a widow had obtained a decree on a promissory note executed by him and in execution of that decree he became the purchaser of the house which belonged to the deceased in which the widow was living. When the decree-holder proceeded to obtain delivery of the house he was resisted by the widow on the ground that she had a right of residence during her lifetime and that she could not therefore be ejected from the residential portion of the house. The District Judge upheld her contention. But the learned Judges of this court reversed the decision of the District Judge on this point. It was in the course of dealing with the nature of the widow's right of maintenance that the learned Judge made the observations above extracted. In — *Rangathayi Ammal v. Muniswami Chetti*, 21 Mad L J 706, no doubt the question was, what was the proper rate of maintenance to be awarded to a widow against her step-son. It appears from the facts set out in the judgment that no considerable time elapsed between the death of her husband and the institution of the suit for maintenance by the widow. No question therefore arose as to whether the income of the family on the date of the husband's death or on the date of the institution of the suit should be taken into consideration in fixing the amount



of maintenance. We cannot therefore take this decision as a direct authority on the question now before us. We may also mention that there is no reference by the learned Judges to the Bombay decisions which were referred to in — 'Manicka Mudaliar v. Sowbagiammal', 27 Mad L J 291.

(7) On principle, we are in entire agreement with the decisions in — 'Manicka Mudaliar v. Sowbagiammal', 27 Mad L J 291 and — 'Veerayya v. Chellammal', ILR 1939 Mad 234. The law is well settled that the widow of a deceased coparcener in a joint Hindu family has a right of maintenance against the surviving coparceners 'quoad' the share of her deceased husband which survives to them. This is an absolute right which accrues to her as a member of the joint family. The correct conception of the widow's right is thus set out in — 'Lingayya v. Kanakamma', I L R 38 Mad 153, at p. 154:

"The wives of the male coparceners in a Hindu family are not entitled to equal shares with the males in the family estate, nor do they take their husband's shares by representation on their death, but in place thereof, they are entitled to a portion of their estate for their enjoyment during their lifetime sufficient to maintain them in comfort according to the means of the family. This is an absolute right due to their membership in the family and does not depend on their necessity arising from their want of other means to support themselves."

(Vide also — 'Commr. of Income-tax v. Bhagwati', ILR 1947 All 543 at p. 551 P.C.).

(8) It must not be overlooked that the wives or widows of the coparceners, though they may not be themselves coparceners are members of the undivided family along with the males. (— 'Bhagwati v. Commissioner of Income-tax', ILR 1941 All 43). There can be a joint family even with the single male member provided there are widows of the deceased coparceners or other persons entitled to maintenance from him (— 'Vedathunni v. Commissioner of Income-tax, Madras', 56 Mad 1). Their Lordships of the Judicial Committee expressly say that they do not agree that a Hindu joint family necessarily consists of male members only: (— 'Kalyanji Vithal Das v. Commissioner of Incometax, Bengal', ILR 1937-1 Cal 653 PC). There can be a joint family where there are widows only, for a Hindu joint family is not finally terminated so long as it is possible in nature or law to add a male member to it. Any of the widows can bring into the family a new male member by adoption (Mayne's Hindu Law, 11th Edn., page 334).

(9) It follows, therefore, that on the death of her husband a widow continues to be a member of the joint family along with the male coparceners. Her fortunes are bound up with the fortunes of the family. If the income of the family increases she will be entitled to the benefit of it. Likewise, if the income of the family decreases she must submit to a reduction of her maintenance. The learned advocate for the appellants did not contest the proposition that the quantum of maintenance to which a widow is entitled is subject to variation, even when fixed by the court, by reason of a change of circumstances. This feature is inconsistent with the contention of the appellants that the widow's maintenance should be fixed taking into consideration her husband's share in the in-

come of the joint family at the time of his death and at no subsequent time. Reference was made to the decision in — 'Audemma v. Varadareddi', ILR 1948 Mad 803. The exact question which is now before us did not arise in that case. But Govindarajachari J. notices the apparent conflict between — 'Rangathayi Ammal v. Munisami Chetti', 21 Mad L J 706 and — 'Manicka Mudaliar v. Sowbagia Ammal', 27 Mad LJ 291. It was unnecessary for the purpose of that case to resolve the conflict. But we agree with the following observations made by the learned Judge in dealing with the claim for maintenance by a widow against coparcenary property in which at one time her husband was a sharer:

"If it is borne in mind that the widow's right of maintenance is the truncated right which still remains out of what was at one time a claim to a share of the family property, there will be no difficulty in recognising that, as a necessary and logical consequence of the nature of the right possessed by the widow, her maintenance would be dependent upon the varying fortunes of the family. Her comforts would dwindle if the family property is reduced; but, if the family becomes more affluent, she will be entitled to participate in that affluence."

We have therefore no hesitation in holding that in fixing the rate of maintenance the courts below were right in taking into consideration the income of the joint family at the time of the institution of the suit. Having regard to the net income estimated at Rs. 7,000, we think that the amount fixed by the courts below, namely, Rs. 750 per annum, is proper and reasonable. We see no reason to alter that figure. The second appeal and Memorandum of objections are dismissed with costs.

A/M.K.S.

Appeal dismissed.

# A.I.R. 1953 MADRAS 161 (Vol. 40, C. N. 50)

CHANDRA REDDI J.

Syed Sulaiman Sahib, Appellant v. Kader Ibrahim Meeral Bivi and others, Respondents.

Second Appeal No. 1461 of 1948, D/- 29.1.1952.

(a) **Family settlement — Essentials** — For a family settlement, the parties thereto must have competing titles in respect of the properties in dispute — Invalid gift deed cannot be construed as a family settlement; 13 Rang 679 and ILR 1943 Mad 1 (PC) Rel. on. ILR 52 All 716 Disting — (Transfer of Property Act (1882), S. 5).

Anno: T. P. Act, S. 5 N. 4.

(b) **Muhammadian Law — Succession — Relinquishment of future inheritance does not operate as estoppel** — (Evidence Act (1872), S. 115).

As Muhammadian Law prohibits relinquishment of rights of future inheritance, whether for consideration or not, such a relinquishment is void and it cannot be relied upon as an estoppel against the heir apparent so as to preclude him from repudiating the transaction by which he was benefited: 41 Mad 365 Rel. on. ILR 1936 All 834 Diss.

(Para 10)

Apart from it, there can be no estoppel on a question of law or against statute:



AIR 1939 PC 201 Relied on. (1945) 2 MLJ 208 Ref. (Para 11)  
Anno: Evi. Act, S. 115 N. 3(c), 50.

**(c) Transfer of Property Act (1882), S. 35 — Courses to be elected must be legal — Doctrine cannot be resorted to cure illegality.**

No question of election arises when one of the courses open to the person is not a legal or lawful one. If the result of electing one of the remedies is to put a person to the necessity of choosing a course which is opposed to law this doctrine should not be invoked. The doctrine of election cannot be resorted to in order to cure an illegality: Case law referred. (Para 13)  
Anno: T. P. Act, S. 35 N. 15.

**(d) Muhammadan Law — Gift — Gift by father to his sons — Eldest son alienating properties donated to him — Death of father — Suit by eldest son for partition of father's estate — Maintainability.**

A, a Muhammadan, executed a gift deed in favour of all his sons. B, his eldest son, alienated the properties donated to him for consideration. On A's death B sued for partition and possession of his share in A's property.

Held (1) that the gift deed was invalid under the Muhammadan Law and hence inoperative.

(2) that there was no estoppel against B by reason of his sale of the properties gifted to him under the deed.

(3) That A would be deemed to have died possessed of the entire estate including what was gifted to B and that the parties in the suit were entitled to share in the entire estate in accordance with the provisions of Muhammadan Law.

(Para 15)

S. Ramachandra Iyer, for Appellant; G. R. Jagadesa Iyer, for Respondents.

**JUDGMENT:** The plaintiff is the appellant. His suit for partition of his father's estate and for possession of 98-616 share in those properties with past and future mesne profits was dismissed by the District Munsif of Tenkasi, which was confirmed on appeal by the District Judge of Tinevelly.

(2) Plaintiff and defendants 1 to 7 are the children of one Sehu Mian Tharaganar by his three wives. On 9-7-1934, Sehu Mian executed Ex. D. 1, a gift deed in which he made various dispositions, the construction of which is one of the tasks in this appeal. He died in April 1941. Prior to his death, the plaintiff, who was one of the donees under the deed sold a portion of the properties under Ex. D. 2 for a sum of Rs. 200. In 1943, i.e., on 10-3-1943 the plaintiff alienated the other properties which were gifted to him under Ex. D. 1 for a sum of Rs. 2235, the sale deed being Ex. D. 3. Having sold away the properties which he got under the gift deed, he filed the suit, which has given rise to the present appeal, for the reliefs mentioned above.

(3) While the 2nd defendant supported the plaintiff the other defendants contested the suit. The defences to the suit were

1. That the gift deed was a valid one.
2. That even if it were not valid as a gift, it amounted to a family settlement, and
3. That the plaintiff was estopped from questioning the validity of the settlement deed.

The trial court answered the issues relating to the family settlement and estoppel in favour of the defendants and against the plaintiff and dismissed the suit. On appeal, the District Judge agreed with the trial court on the issue as to estoppel and in that view thought it unnecessary to consider whether the dispositions under Ex. D. 1 could amount to a family settlement or not. In the result, the appeal was dismissed with costs.

(4) The plaintiff, who is dissatisfied with the decision of the District Judge has preferred the second appeal. In support of the appeal, various contentions were put forward by Mr. Ramachandra Aiyer.

(5) The first point that arises on these contentions is whether Ex. D. 1 evidences a valid gift in favour of the plaintiff and defendants or not. In spite of the strenuous arguments of Mr. Jagadisan to convince me that the gifts in favour of the several donees are valid and can take effect, I am satisfied that the dispositions made by the donor under Ex. D. 1 are opposed to the provisions of Muhammadan law & therefore void. It is unnecessary for me to make a detailed examination of the various provisions in Ex. D. 1 as the document *prima facie* appears to contain invalid gifts.

(6) Mr. Ramachandra Aiyer, while arguing that the dispositions in favour of the other parties were void, being forbidden by Muhammadan law, wanted to save the gift in favour of the plaintiff by urging that there is nothing invalid so far as the disposition in favour of the plaintiff is concerned. I do not think I can give effect to this argument. On reading the documents as a whole and having regard to the fact that these gifts are inter-dependent on one another, I should hold that Ex. D. 1 as a gift deed was invalid.

(7) Finding that it is a hopeless task to support the validity of Ex. D. 1 as a gift deed Mr. Jagadisan attempted to have the various gifts upheld on the plea of a family settlement, which plea found favour with the trial court. I do not think I can accept this argument. Apart from the question whether an invalid gift can be supported as a family settlement which seems to be doubtful in view of the decision in — '*Phul Bee Bee v. R. M. P. Chettiar Firm*', 13 Rang. 679 which decided that an invalid gift cannot be construed as a family settlement, it looks to me that it is futile to contend in this case that the gift deed evidenced a valid family settlement. For a family settlement, the parties thereto should have competing titles in respect of the properties in dispute. In — '*Ramayya v. Lakshmayya*', ILR (1943) Mad 1, in dealing with the argument that an arrangement, which was sought to be supported in that case was a bona fide settlement of family disputes, their Lordships of the Privy Council remarked thus:

"But what is important to notice is this, that Subbaramayya had no right to the properties except what he derived by the gift made in his favour by Bangaramma. Since it has not been shown that Subbaramayya had any competing title of his own in respect of the properties in dispute, there can be no basis in their Lordships' opinion for a valid family settlement between the parties which would bind the reversion. In — '*Khunilal v. Gobind Krishna Narain*', 33 All 356, their Lordships pointed out that 'the true test to apply to a transaction which is challenged by



the reversioners as an alienation not binding on them is whether the alienee derives title from the holder of the limited interest or life tenant.' In the present case, it is clear that what title Subbaramayya had to the properties was acquired under the compromise from the widow since he had no antecedent title of his own to them. In the circumstances their Lordships agree with the High Court that the claim of the contesting defendants to a two thirds share of the properties cannot be sustained on the basis of the arrangement in 1867."

(8) In support of his contention that Ex. D. 1 could be viewed as a family settlement, Mr. Jagadisan placed reliance on a ruling of the Allahabad High Court in — '*Poohar Singh v. Dulari Kunwar*', 52 All 716. But that decision is not an authority for the proposition that, to sustain a family settlement the parties thereto need not have competing titles. All that that case laid down was that the dispute need not be a present one & that the existence of a family dispute to be settled was not essential to the validity of a family arrangement. So, this contention also fails.

(9) This leads me to the question whether the plaintiff was in anyway estopped from claiming a share in the suit properties. In coming to the conclusion that the plaintiff was so estopped, the learned District Judge relied on a ruling of the Allahabad High Court in — '*Latafat Hussain v. Hidayat Hussain*', ILR 1936 All 834. It was laid down there that a relinquishment or renunciation of a future right of inheritance is void as it is prohibited under Muhammadan Law; but the heir apparent who so renounced that future right to inherit, may be estopped from claiming the inheritance when it falls due by this conduct. The opinion of the learned Judges was that while the relinquishment or renunciation of the future right of inheritance is void, a contract made by the heir for consideration not to claim that right, cannot be in anyway illegal or forbidden by any law. I am unable to appreciate the distinction drawn by the learned Judges. I fail to see how a contract to enforce a thing which is void can be said to be valid. With respect to the learned Judges, I am unable to accept the proposition as a sound one. Section 23 of the Indian Contract Act lays down in unmistakable terms that it is only contracts which are not forbidden by law, that are valid and can be enforced.

(10) Further this ruling seems to be opposed to the view taken in our High Court. In — '*Asa Beevi v. Karuppan Chetti*', 41 I. C. 361, the question arose whether an arrangement by which an heir apparent renounced his future right for consideration to inherit property was a valid one and could be enforced. Sadasiva Aiyar J. took the view that as Muhammadan Law prohibits relinquishment of rights of future inheritance, whether for consideration or not such a relinquishment was void and it could not be relied upon as an estoppel, while Spencer J. came to a contrary conclusion. In the opinion of Spencer J. a renunciation of a right to succession is not opposed to the principles of Muhammadan law and when, under that arrangement the heir apparent accepts a benefit, he is estopped from repudiating the transaction by which he has benefited. Dealing with the question of estoppel, Sadasiva Aiyar J. observed, there can be no question of estoppel on a question of law and that the represen-

tation in order to work as an estoppel must be a material statement of fact and must have reference to present or past state of things.

(11) On this difference of opinion, the matter came up for hearing before Sir John Wallis C. J., Bakewell J. and Kumaraswami Sastriar J. The decision of these three Judges is reported in — '*Assabeevi v. Karuppan Chetti*', 41 Mad 365. The learned Judges agreed with the conclusion arrived at by Sadasiva Aiyar J. on the ground that the transfer of an expectancy of that kind was not permitted by Muhammadan law. They did not expressly state that there could be no estoppel in such a case. However in view of the fact that the learned Judges agreed with Sadasiva Aiyar J. that the second appeal should be dismissed, which could only be on the basis that the heir apparent who entered into the arrangement referred to above was not estopped from claiming a share in the inheritance it can be reasonably assumed that they concurred with Sadasiva Aiyar J. on that point also. Even apart from it, the principle that there can be no estoppel on a question of law or against statute cannot be open to serious doubt. In — '*Kartar Singh v. Dayal Das*', AIR 1939 P. C. 201, it was laid down by the Privy Council that there could be no estoppel on a statement of law relating to the validity of nomination of a person as a chela under the terms of a will. See also — '*Virayya v. Bapayya*', 1945-2-M.L.J. 208.

(12) Mr. Jagadisan sought to support the judgment of the courts below on the question of estoppel by putting forward the following argument. By adopting Ex. D. 1 as a valid one the plaintiff induced the defendants to believe that he would not claim a share in the suit properties and thereby led them to discharge the debts left by the donor. He referred to a number of cases for the position that a party can be estopped if he has so conducted himself as to induce other person to act in a manner which would materially affect their position. It is unnecessary for me to refer to any of these decisions as the foundation, necessary for building such an argument, has not been laid in this case. There is absolutely no evidence in this case that any debts were discharged by the defendants subsequent to the alienation by the plaintiff under Ex. D. 3. It follows that the plea of estoppel is not available to the defendants in this case.

(13) The next point that arises for consideration is whether there is any scope in this case for the doctrine of election. Mr. Jagadisan urged that by virtue of the plaintiff having alienated a major portion of the properties under Ex. D. 3 in 1943, long after succession opened which amounts to his having accepted the validity of the gift deed, he cannot be permitted to resile from that position and challenge Ex. D. 1. I do not think I can agree with this contention. For one thing, I am not able to see anything in Ex. D. 3 which amounts to an acceptance of the whole gift deed as a valid one or a declaration of his intention not to claim a share in the properties as argued by the learned counsel for the respondents. Secondly, even if there is any such acceptance no question of election arises, when one of the courses open to him is not a legal or lawful one. If the result of electing one of the remedies is to put a person to the necessity of choosing a course which is opposed to law, this doctrine should not be invoked. I think the doctrine of election can-



not to be resorted to in order to cure an illegality. The following passage in Mulla's *Transfer of Property Act* III edition page 168 is pertinent.

"The doctrine of election cannot be resorted to in order to cure an illegality and a gift which infringes the rule against the perpetuities cannot be used to raise a case for election."

In — *Volloston v. King*, 1869 L. R. 8 Eq. 165 a testatrix under her marriage settlement had power to appoint a fund to her children. She appointed a part of the fund to her son C for life, with remainder to such persons as C might by will appoint. C was in esse at the time when the power was created and therefore, the remainder after C's life estate was void as contravening the rule against perpetuities. By the same will she made a general residuary appointment of the settled fund to her daughter to whom she bequeathed other benefits. As the gift of the remainder to C's testamentary appointees was void, the daughters were not put to their election. In a latter case in — *Re Oliver's Settlement*, 1905-1-Ch. 191 Farwell J. said

"the court will refuse to aid a testator to commit any breach of the law."

To show that the passage extracted above does not contain a sound principle of law, Mr. Jagadisan cited to me a decision of Kekewich J. in — *In re Bradshaw; Bradshaw v. Bradshaw*, 1902-1-Ch. 436, where the learned Judge was not inclined to agree with the principle embodied in the cases referred to in that passage.

(14) But in — *Cook v. Frederick*, 1910-1-Ch. 1 the court of appeal was not prepared to follow the opinion of Kekewich J. and preferred to follow rulings which took the contrary view. Cozens-Hardy Master of the Rolls who delivered the judgment of the Court, expressed the opinion that the view taken by the majority of the Judges which was opposed to the one adopted by Kekewich J. in — *In re Bradshaw*, 1902-1-Ch. 436 was a sound one and he did not think that he could usefully add anything more than to say that

"I desire for myself to adopt not merely the decision but the careful and elaborate reasoning of Farwell J. in the case of — *In re Oliver's Settlement*, 1905-1-Ch. 191."

It may be mentioned that the last mentioned case is one of the cases relied on by the learned author in support of his view.

(15) Mr. Jagadisan then referred to — *Douglas Mezi v. Umphelby*, 1908 A. C. 224 and contended that the facts in that case are analogous to the present one and that I should decide this case on the same lines. Even if I apply the principle laid down in that decision to the present case the plaintiff cannot be non-suited on the doctrine of election. All that was laid down in — *Douglas Menzies v. Umphelby*, 1908 A. C. 224 was that a person who claims under law and against a will cannot claim a legacy given to him under the will, i.e., a person who defeats a will in part cannot claim a legacy under another part of the will. Giving effect to the principle laid down in that case, all that could be legitimately argued is that the plaintiff who was trying to defeat the gift deed could not get any benefit under another part of the same document and that he should be called upon to renounce the benefit which he has derived under the gift deed. But, in this case, the same result will be reached as a corollary to my having held that no disposi-

tion under Ex. D. 1 will take effect for the reasons stated above. The resulting position is that Sehu Mian Thanagunar would be deemed to have died possessed of the entire estate including what was gifted to the plaintiff and that the parties in the suit are entitled to share in accordance with the provisions of Muhammadan law. What follows is that the plaintiff will be entitled to a share in the estate left by his father under Muhammadan law along with the defendants. For this purpose the property alienated by him and the property gifted to the 2nd defendant but which has not been included in the suit, will also form part of the property to be partitioned amongst the various sharers.

(16) In the result there should be a preliminary decree for partition. In allotting the shares to the parties the suit properties and the properties alienated by the plaintiff not only under Ex. D. 3 but also under Ex. D. 2 as well will be valued as on the date of the allotment of the shares and the properties alienated by the plaintiff should be allotted to the share of the plaintiff as a part of his share.

(17) Mr. Jagadisan argues that it should be made clear in the judgment that if the properties alienated by the plaintiff should exceed the value of the share to be allotted to him, the plaintiff will not be entitled to anything more by way of a share. I do not think it is necessary for me to state it because if as a matter of fact, the properties sold by him under Exs. D. 2 and D. 3 are equivalent to or in excess of the share to be allotted to him, he will certainly not be given anything more.

(18) It should also be made clear that plaintiff would also be liable along with the other sharers for any debts that might have been left by their father. It follows that the decree of the lower appellate court, which confirmed that of the trial court cannot be sustained and ought to be set aside. On the mistaken view of the law, the courts below dismissed the suit instead of passing a preliminary decree on the terms indicated above.

(19) In the result the appeal is allowed and the suit is remanded to the trial court passing preliminary decree and for consequential proceedings. The appellant will get a refund of the court fee paid by him in this appeal and in the lower appellate court also. The other costs incurred so far will abide the result. Leave refused.

A/D.R.R.

Appeal allowed.

A.I.R. 1953 MADRAS 164 (Vol. 40, C. N. 51)  
MACK J.

Veerni Soorayya, Petitioner v. Veerni Mallayya and others, Respondents.

Civil Revn. No. 1370 of 1950, D/- 22-4-1952.

Provincial Small Cause Courts Act (1887), Sch. II Art. 41 — Joint and several decree for costs against several judgment-debtors — One of them paying entire decretal amount — Suit for contribution against other co-judgment-debtors — Sch. II, Art. 41 is not applicable — Suit is therefore cognizable by a Small Cause Court. 14 M.L.J. 480 and 28 All 292 Rel. on: AIR 1941 Pat 49 Dist. (Para 1)

Anno: Prov. Sm. Cause Courts Act, Sch. II Art. 41 N. 1, 2 and 5.

C. Rama Rao, for Petitioner.



**JUDGMENT:** Petitioner and defendants were made jointly and severally liable on a decree for costs amounting to Rs. 442-8-0. Petitioner paid the whole amount and filed a small cause suit to recover Rs. 86-11-0 from defendants 1, 2 and 3 and from defendants 4 to 7. The learned Small Cause Judge erroneously held that this suit was not cognizable by a Small Cause Court and returned it for presentation to the proper court. He followed a Patna decision — 'Mt. Sarror Fatima v. Chaudhury Seikh Mohammad Safiuddin', AIR 1941 Patna 49, which is not in point. It was there held that where a suit was brought by one co-sharer, who had paid land revenue to Government to recover contribution from the other co-sharers it could not be tried by a Small Cause Court under Art. 41 of Schedule II of the Small Cause Courts Act. In a suit of that kind, there were several avenues for contest open which took it out of the category of a small cause suit. The present suit is clearly not covered by Art. 41 where there has been a decree already passed making the petitioner and defendants jointly liable. It was well-settled long ago that this type of suit for contribution is cognizable by a Small Cause Court. See — 'Ramaswami Pantulu v. Narayanamurthi Pantulu', 14 MLJ 480 and also, if it is necessary to go outside our State, — 'Bhairon v. Ram Baran', 28 All 292. The view taken by the lower court is erroneous. Its order is set aside. The plaint will be received and tried as expeditiously as possible as a small cause suit.

(2) The petition is allowed with costs.  
B/K.S. Revision allowed.

**A.I.R. 1953 MADRAS 165 (Vol. 40, C. N. 52)**  
**SUBBA RAO J.**

Punithavalli Ammal, Appellant v. K. P. Chidambara Mudaliar, Respondent.

A. A. A. O. No. 22 of 1949, D/- 24-4-1951.

(a) **Debt Laws — Provincial Debts Laws (Temporary Validation) Ordinance (XI (11) of 1945), S. 2 — Decree passed before issue of Ordinance — Re-opening.**

Where, after adjudication, the Court refused to apply the provision of the Madras Agriculturists' Relief Act and passed decree for the unscaled amount, cl. (a) of S. 2 cannot have the effect of reopening the decree passed; nor does clause (b) apply to such cases. It does not touch the case of a decree being passed on the basis that the Madras Agriculturists' Relief Act was ultra vires of the Legislature so far as promissory notes were concerned. The Ordinance will not enable the judgment-debtor to reopen decrees passed before the issue of the said Ordinance whereunder the provisions of the Madras Agriculturists' Relief Act were not applied.

(b) **Debt Laws — Madras Agriculturists' Relief Act (IV (4) of 1938), S. 19(2) — Retrospective effect.**

Section 19(2) has no application to decrees that had become final before the Madras Act 23 of 1948 came into force: CMA Nos. 316 and 391 of 1947 Foll.

(Para 3)  
V. Seshadri and K. S. Ramamurthy, for Appellant; A. Sundaram Ayyar, for Respondent.

**JUDGMENT:** This civil miscellaneous second appeal arises out of an order passed in execution

in E. P. No. 38 of 1947 in O. S. No. 8 of 1942 on the file of the court of the Subordinate Judge, Vellore. The appellant obtained a decree in O. S. No. 8 of 1942 on a promissory note executed by the respondent in his favour. The learned Subordinate Judge dismissed the suit applying the provisions of the Madras Act 4 of 1938. In appeal, the District Judge of North Arcot confirmed the decree of the first court. The plaintiff preferred the second appeal to the High Court, S. A. No. 116 of 1944. The High Court held that the Madras Act 4 of 1938 did not affect the claims on promissory notes and decreed the suit on 8th March 1945. The decreeholder filed E. P. No. 38 of 1947 for executing the decree. After the disposal of the second appeal Government issued an ordinance, Ordinance No. 6 of 1945 Provincial Debts Laws (Temporary Validation Ordinance, 1945) whereunder the Act was made expressly applicable to transactions based on promissory notes. Relying upon this Ordinance the judgment-debtor opposed the execution petition and asked for scaling down the decree amount under the Act. The Subordinate Judge and in appeal the District Judge held that in view of the Ordinance the decree was liable to be scaled down. The plaintiff preferred the above second appeal.

(2) The learned counsel for the appellant contended that the Ordinance does not reopen decrees passed before the issue of the said Ordinance whereunder the provisions of the Madras Agriculturists Relief Act were not applied. The Ordinance reads as follows:

"S. 2: Temporary validation of Provincial debt laws in certain respects — While this Ordinance remains in force (a) the provisions of the Acts set out in the first schedule and of the amendments enacted after the 1st day of April 1937 and before the 12th day of December 1944 to the Acts set out in the second schedule shall, in so far as they relate to, or affect promissory notes, transactions based on promissory notes or proceedings arising out of such transactions, be deemed to be and always to have been as valid & effectual for all purposes as if they had been in relation to such matters as aforesaid, enacted by the Central Legislature & (b) no decree, declaration or order of any court for debt settlement tribunal (by whatever name called) made whether before the commencement or during the continuance of this Ordinance shall be called in question or subjected to notification on the ground that such of the said provisions as are relevant are invalid and ineffectual by reason of the incompetence of the Provincial Legislature concerned to make laws relating to aforesaid matters."

Clause (a) cannot obviously apply to decrees passed in suits for in express terms the operation of that clause is confined only to promissory notes and to transactions based upon promissory notes or proceedings arising out of such transactions. Where, after adjudication the court refused to apply the provisions of the Act and passed decree for the unscaled amount this provision cannot have the effect of reopening the decree passed; nor does cl. (b) apply to such cases. Under cl. (b) decrees, declarations or orders made on the basis that the Madras Agriculturists Relief Act applied to promissory notes could not be questioned. It does not touch the converse case of a decree being passed on the basis that the Madras Agriculturists Relief Act was 'ultra vires' of the Legislature so far as promissory notes were concerned. I, therefore agree with the contention of the learned counsel for the appellant and hold that the Provincial Debts Laws Temporary Validation Ordinance,



Ordinance No. 11 of 1945 will not enable the judgment-debtor to obtain relief under the provisions of the Madras Agriculturists Relief Act.

(3) It is then argued by the learned counsel for the respondent that the lower courts had jurisdiction to scale down the decree under S. 19(2) of the Madras Act IV of 1938. S. 19(2) was added to S. 19 by the amending Act 23 of 1948. By reason of that amendment, an application could be filed for amending the decree though passed after the commencement of the Act 4 of 1938. The first objection to this contention is that no application under S. 19(2) of the Madras Agriculturists Relief Act was filed and that the question was raised only in execution. Apart from this technical objection, I am also of opinion that S. 19 clause (2) has no application to decrees that had become final before the Madras Act 23 of 1948 came into force. S. 16 of the Madras Act 23 of 1948 limits the scope and its retrospective effect to the category of cases mentioned thereunder. S. 16 of the Act reads:

"The amendments made by this Act shall apply to the following suits and proceedings, namely: (i) all suits and proceedings instituted after the commencement of this Act; (ii) all suits and proceedings instituted before the commencement of this Act, in which no decree or order passed has not become final, before such commencement; (iii) all suits and proceedings in which the decree or order passed has not been executed or satisfied in full before the commencement of this Act; Provided that no creditor shall be required to refund any sum which has been paid to or realised by him, before the commencement of this Act."

A Bench of this court of which I was a member explained the scope of S. 16 in C.M.A. Nos. 316 and 391 of 1947. The learned Judges say

"clauses 2 and 3 of S. 16 of the Madras Act 23 of 1948 are independent of each other and cl. 3 cannot have any application to proceedings in which decrees or orders have become final before the commencement of the Act. Clause 3 is confined to suits and proceedings in which decree or order has not become final. In other words, the section gives retrospective operation in regard to suits and proceedings before the Act in which decrees or orders had not become final and also had not been fully satisfied."

I am bound by that judgment. In the present case, the decree in O. S. No. 8 of 1942 had become final. If so S. 19(2) which had been added by the Amending Act 23 of 1948 cannot apply as by reason of S. 16 of the Act its retrospective activity is confined only to a decree that has not become final.

(4) For the aforesaid reasons, I hold that the respondent is not entitled to have the decree scaled down under the provisions of the Madras Agriculturists Relief Act. In the result the appeal is allowed with costs throughout. Leave refused.

B/D.H.

Appeal allowed.

**A.I.R. 1953 MADRAS 166 (Vol. 40, C. N. 53)**

**SATYANARAYANA RAO  
AND RAJAGOPALAN JJ.**

Mrs. D. M. Alexander, Applicant v. The Commissioner of Income-tax, Madras, Respondent.

Case Ref. No. 14 of 1948, D/- 15-4-1952.

**(a) Income-tax Act (1922), S. 2 (4) — Adventure or concern in the nature of trade — Test to decide — Isolated transaction of purchase and re-sale — Intention to resell with profit — Not conclusive proof — Transaction**

**held on facts to be adventure in the nature of trade.**

In the case of isolated transactions, there is no test of universal application or an infallible test to decide whether a given transaction is an adventure in the nature of trade within the meaning of S. 2 (4), Income-tax Act. It is really with reference to the facts held proved in each case that the difficult question has to be answered.

(Para 14)

Though a dominant or even a sole intention to resell is not by itself conclusive proof, it is certainly a relevant factor in deciding whether a particular transaction of purchase and resale was an adventure in the nature of trade, and in conjunction with other circumstances including the conduct of the assessee, such an intention might well establish beyond doubt that the adventure was in the nature of trade: 15 TC 333, Relied on. Case law referred.

(Para 17)

Held on facts that there was certainly sufficient evidence for the Tribunal to conclude that the transaction of the purchase and sale of certain group of estates by the assessee was an adventure in the nature of trade and that the profits of that transaction in the hands of the assessee constituted an assessable income.

(Para 24)

Anno: I.-tax Act, S. 2 N. 6.

**(b) Income-tax Act (1922), S. 66 (1) — Reference under — Jurisdiction of High Court — Nature of.**

That it is possible for a different judicial tribunal to arrive at the opposite conclusion is no justification for a Court acting within the limited scope of S. 66 (1), Indian Income-tax Act, to refuse to accept the finding of the Tribunal.

(Para 19)

Anno: I.-tax Act, S. 66 N. 20.

**(c) Income-tax Act (1922), S. 13 — Scope — Method of accounting — When can be determined by Income-tax Officer.**

No doubt, under S. 13 an assessee has a statutory right to choose his method of accounting. But before he can claim that his assessable income should be computed on the basis of the system of accounting of his choice, he must satisfy two conditions: (1) that it was a method of accounting regularly employed and (2) that it was a method of accounting from which, in the opinion of the Income-tax Officer, the income, profits and gains could be properly deduced. If neither of those conditions was satisfied, the proviso to S. 13 gave a statutory right to the Income-tax Officer to determine the basis and manner in which the income should be computed for purposes of assessment.

(Para 29)

Thus, where the assessee neither maintained any accounts nor regularly adopted any method of accounting for his income from his coffee estate, the Income-tax Officer had a right under S. 13 to adopt the mercantile basis of accounting the value of the stock of the produce which remained on hand unsold at the end of the year.

(Para 30)

T. M. Krishnaswami Aiyar, for M. Subbaraya Aiyar, for Applicant; C. S. Rama Rao Sahib, for the Respondent.



## JUDGMENT:

The two questions that were referred to this court were:

1. Whether there are materials for the Tribunal to come to the conclusion that the sum of Rs. 3,00,000 received by Captain T. P. M. Alexander by the sale of Cottangady estate in excess of its purchase price was a revenue receipt.
2. Whether in the circumstances of the case for the proper ascertainment of the profits and gains in respect of raising and selling coffee, tea and other produce of the estate, the Tribunal was right in upholding the decision of the Appellate Assistant Commissioner in taking into consideration the value of the produce which remained on hand unsold at the end of the year of account.

The accounting year was 1-4-1942 to 31-3-1943, and the year of assessment was 1943-44.

(2) It is better to deal with each question separately, as the sets of facts necessary for answering each question are different.

(3) The facts necessary for considering the points raised by the first question are as follows. Though the assessee, Captain T. P. M. Alexander, died in July 1946 — the proceedings have been continued by his widow — it should be easier to refer to him as the assessee in the rest of this judgment. The assessee was a planter in South India. He acquired estates where rubber, tea, coffee and cardamom were raised. We need not concern ourselves in this case with the Kailasam estate which the assessee owned and which he sold in 1938; nor with the Aruna group of estates which the assessee purchased in 1936 jointly with Sir James Deak; the assessee's interest in the Aruna group of estates appears to have been sold in March 1949. The assessee purchased the Sivalogam estate in Travancore State in 1929; he sold that in August 1942. That estate was managed by the agents Messrs. Harrison and Crossfield all through. Though the assessee was originally a planter himself, for a period of about 12 years, i.e. between 1930 and January 1942, he was employed as a Labour Officer in Burmah Shell Company. After retiring from the service of the Burmah Shell Company in January 1942, he obtained employment as the agency manager of the South India Plantations Agency Ltd. at Coonoor. That company acted as agents and secretaries of various tea and coffee estates in South India. He occupied that post till February 1943, when he became the director of that company, the South India Plantations Agency Ltd. In the latter half of 1942, the assessee was also the Secretary of the Southern India Planters Association for about three months. He left India finally in January 1944. He died in England in July 1946.

(4) When the assessee sold the Sivalogam estate in August 1942 he realised a sum of Rs. 4,46,000. That obviously provided the capital for his subsequent transactions. In September 1942 the assessee started negotiations for the purchase of four estates, comprehensively referred to as the Cottangady group of estates. One of these four belonged to one Mr. Hall, and the other three to his mother Mrs. Emily Hall. These estates were first offered for sale to the Southern India Planters

Association at a time when the assessee was the Secretary of that association. The association declined the offer. On 2-9-1942, the assessee inspected the Cottangady group of estates with a view to purchase. Again on 6-10-1942, he inspected the estates along with Mr. Walker Leigh of Messrs. Davidson & Company. The company sold agricultural implements. The inspection of Mr. Leigh was to suggest improvements to the estate and the purchase of the necessary material including machinery. On 9-10-1942, Mr. Leigh drew up a report which he forwarded to Harrison and Crossfield, who, it should be remembered, had been managing the Sivalogam estate for the assessee, and Mr. Leigh requested Messrs. Harrison and Crossfield in that letter to furnish estimates to the assessee to give effect to the recommendations of Mr. Leigh. Though the estimate furnished by Messrs. Harrison and Crossfield was not on record, it would appear that their estimate came to Rs. 80,000. The assessee paid the purchase price of Rs. 2,50,000 for all the four estates and took possession of them on 11-11-1942. It was agreed between the vendors and the assessee that the purchase should take effect from 1-7-1942 i.e. the assessee became entitled to the crops that stood on the estates on 1-7-1942 or were grown thereafter. No sale deed however was executed then. Even before the purchase it would appear that the assessee arranged through Messrs. Shaw Wallace Company to supply manure for the estates; and the supply of manure was on a long range basis i.e. to improve the productivity of the estates on a long term plan. Though Mr. Hall and his mother Mrs. Emily Hall offered the estates for sale first to the Southern India Planters Association, they would appear to have been keen on the idea that the sale should be to a person who would keep the estates and satisfy their sentiment based on pride of ownership of a well-maintained estate. On 21-9-1942 Mr. Smith, Director of South India Plantations Agency Ltd., of which the assessee was then the Agency Manager, wrote to Mr. Hall:

"Glad that Alexander is pleased with the estate. I am sure that Mrs. Hall and you will be better pleased for the estate to be sold to a proprietor who will take the same interest in it as you have done in the past, rather than to a public company."

From the extracts of correspondence supplied by the assessee during the enquiry before the Income-tax authorities and appended to the printed record made available to us, it would appear that on 13-11-1942 — it should be remembered that the assessee took possession of the estates on 11-11-1942 — the assessee supplied his agent Velu Menon of Cottangady with sets of account books. There were also other letters to show that the assessee himself was managing the estates up to 5-2-1943. From a letter written on 8-2-1943 by the assessee to Davidson and Co., it would appear that the assessee placed an order with them for the supply of a Sirocco Drier and a 44" S. A. Roller. These were two items of machinery included in the improvements suggested by Mr. Leigh in his report dated 9-10-1942. The order itself was not put in evidence, and there was nothing to indicate on which date the order was placed with Davidson & Co. Davidson & company would appear to have supplied the 44" S. A.



Roller, because in the letter dated 8-2-1943 the assessee asked for the erection of this plant. In the same letter, the assessee cancelled his order for the Sirocco Drier. It was represented during the arguments before us that the 44" S. A. Roller cost about Rs. 9,500. As the assessee himself explained in his letter dated 8-2-1943, he cancelled the order for the Sirocco Drier as he had already taken steps to sell the Cottangady group of estates. On 3-2-1943, the assessee entered into an oral agreement with Mr. P. S. George to sell the Cottangady group of estates to him for Rs. 5,50,000 and the assessee received an advance of Rs. 27,500. On 13-2-1943, the assessee executed the written agreement of sale. It was during the interval, on 8-2-1943, that the assessee informed Davidson & Company that the order for the supply of the Sirocco Drier should stand cancelled.

(5) It should be remembered that, though the assessee took possession of the Cottangady estates on 11-11-1942, no document of sale was executed by the vendors. It was subsequent to the agreement of sale between the assessee and Mr. P. S. George that the sale deeds were executed by Mr. Hall and Mrs. Emily Hall. One sale deed was executed on 11-2-1943 covering the three estates that were situated in Cochin State. The second sale deed for the fourth estate, which was in British India, was executed on 26-2-1943. Though Mr. P. S. George negotiated the purchase of this group of estates, it was obviously his intention that the eventual purchaser should be the Chandramalai Estate Ltd., which company Mr. P. S. George promoted. The agreement of sale dated 13-2-1943 provided for the sale to Mr. George or his nominee. Clause 7 of that agreement required the assessee to make out a good and clear title to the properties sold, and that was apparently why the assessee had to obtain the sale deeds from the previous owners, Mr. Hall and Mrs. Emily Hall. Rs. 27,500 of the agreed purchase price, it should be remembered, was paid to the assessee on 3-2-1943 itself. The agreement of 13-2-1943 provided for the payment of the balance before 31st March 1943; the balance was actually paid on 10th March 1943. On 19-4-1943 the assessee executed the sale deeds in favour of Chandramalai Estate Ltd.

(6) Thus the position was that within about three months after his purchase of the Cottangady group of estates for Rs. 2,50,000, the assessee entered into an agreement to sell the estates for Rs. 5,50,000, and within a month thereafter, i.e., by the 10th March 1943, he received in full that Rs. 5,50,000. The Income-tax Officer treated the difference between the purchase price and the sale price in the hands of the assessee as income that accrued to the assessee during the year of account and assessed that sum to income-tax. The contention of the assessee was that he intended to keep the property as a source of income, that it was an investment, and that the excess of Rs. 3,00,000 of the sale price over the purchase price he had paid was a capital accretion. That contention was rejected by the Income-tax Officer and also on appeal by the Assistant Commissioner of Income-tax. A further appeal preferred by the assessee to the Tribunal also failed. It was subsequent to that that the first question was referred to this Court under S. 66 (1), Indian Income-tax Act.

(7) When the matter came up for hearing first, the Court was of the opinion that the statement as drawn up by the Tribunal and submitted to the Court was defective, and the Court called upon the Tribunal to furnish a further and better statement of the case. That statement was furnished.

In paragraph 11 of the further statement submitted by the Tribunal it recorded:

"The tribunal held that almost simultaneously with the negotiations for the purchase of the estate and its improvement, negotiations for its sale were also being carried on by the assessee. The letters written to Harrison and Crossfield and Davidson & Co., dated 8th February 1943 suggested that the negotiations for sale were complete by that date and that in these circumstances, it was difficult to hold that the assessee's intention at the time of the purchase of the property was to keep it and improve it; that the idea at the time of the purchase in the mind of the assessee was to make a profit upon it; and that the interval of time that lapsed between the dates of purchase and sale also suggested that his intention was to make a profit by sale which he actually did. Under these circumstances, the tribunal came to the conclusion that the profit was received from a business transaction."

(8) To complete the statement of the case, it is necessary to refer to the purchase and sale of the Umbhidikhan estate in Mysore. The assessee purchased it in October 1942 for Rs. 75,000 in partnership with Mr. H. S. Cameron, also an employee of the Southern India Plantations Agency Ltd. The partnership sold the estate in March 1943 for Rs. 1,05,000, thus making a profit of Rs. 30,000. In this case also, the original owner Mr. Mayer did not execute any sale deed in favour of the assessee and Mr. Cameron. Subsequent to the sale in March 1943 by the Assessee and Mr. Cameron to the Southern Plantations Ltd, Calicut, Mr. Mayer executed the sale deed under directions of the partnership directly in favour of the Southern Plantations Ltd., Calicut. The assessee's share of the profit of Rs. 30,000 was treated as income and was assessed to income-tax. The assessee appears to have accepted that decision.

(9) It was as a receipt from business that the Rs. 3,00,000 was assessed to income-tax. That represented the profits of an "isolated" transaction, the purchase and sale of the Cottangady group of estates. It is well-established that if a person is engaged in the buying and selling of lands, he can be assessed to tax upon any surplus only if he is shown to have carried on a business of buying and selling lands. Business has been defined by S. 2 (4) of the Indian Income-tax Act. "Business includes any trade, commerce, or manufacture or any adventure or concern in the nature of trade, commerce or manufacture." Even a single venture may amount to business, and the profits of such a single venture may be taxable as income arising from business. An isolated transaction of purchase and sale of land, even if it is not business as it is normally understood, may be business within the scope of the definition, an adventure in the nature of trade. An isolated transaction of purchase and sale of land may be a speculation. Every speculation is an adventure; but unless it is an adventure in the nature of trade, the profits therefrom will



not be income assessable to tax. In — *Balgownie Land Trust Ltd. v. The Commissioners of Inland Revenue*, 14 T. C. 684 Lord President Clyde pointed out at page 691:

"A single plunge may be enough provided it is shown to the satisfaction of the Court that the plunge is made in the waters of trade; but the sale of a piece of property — if that is all that is involved in the plunge — may easily fall short of anything in the nature of trade. Transactions of sale are characteristic of trade, but they are not necessarily distinctive of it; much depends on the circumstances."

(10) Where, as in this case, the purchase and resale of landed property constituted an isolated transaction, it is a matter of extreme difficulty to determine whether this was an adventure in the nature of trade. But as Lawrence L. J. pointed out in — *Leeming v. Jones*, 15 T. C. 333; at 354:

"It seems to me that in the case of an isolated transaction of purchase and resale of property there is really no middle course open. It is either an adventure in the nature of trade, or else it is simply a case of sale and resale of property."

(11) The test formulated by Lord President Clyde in — *The Commissioners of Inland Revenue v. Livingstone*, 11 T. C. 538 at page 542 was:

"I think the test, which must be used to determine whether a venture such as we are now considering is, or is not, "In the nature of trade," is whether the operations involved in it are of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made. If they are, I do not see why the venture should not be regarded as "In the nature of trade," merely because it was a single venture which took only three months to complete."

The learned Judge did not obviously formulate this as the sole test or even as a test capable of universal application in answering the question, whether an isolated transaction of purchase and resale constituted an adventure in the nature of trade. It was with reference to the facts of that case, which Lord Sands described as a "novel and difficult one" (see page 545), that the observations of the Lord President have to be considered. The learned Judge himself summed up the facts of that case:

"The respondents (assessee) began by getting together a capital stock sufficient (1) to buy a second-hand vessel, and (2) to convert her into a marketable drifter. They bought the vessel and caused it to be converted at their expense with that object in view, and they successfully put her on the market. From beginning to end, these operations seem to me to be the same as those which characterise the trade of converting and refitting second-hand articles for sale. It may be that, in commercial practice relative to ships, this kind of business is not usually followed separately from the general business of ship builders and ship-repairers. But, even so, I think, it is none the less "in the nature of trade". The profit made by the venture arose, not from the mere appreciation of the capital value of an isolated purchase for resale, but from the expenditure on the subject purchased of money laid out upon it for the purpose of

making it marketable at a profit. That seems to me of the very essence of trade."

That test may not be conclusive in deciding the question at issue in the present case. The conduct of the assessee, Captain Alexander particularly between the date of purchase of the Cottangady group of estates and the date of its resale was no doubt not inconsistent with that of a regular dealer in such plantations. But then some of his conduct at least, e.g. his plans to improve the equipment of the estate and his plans to manure the soil on a long range view was as consistent with his desire to keep the estate for himself as with a desire to make it more attractive for resale.

(12) Nor can the test suggested by Rowlatt J. in — *Graham v. Green*, 9 T. C. 309 really help us in this case. It should be remembered that what that learned Judge had to consider in the case before him was not a case of an isolated transaction. The learned Judge observed at page 312:

".....There is no doubt that if you set on foot an organised seeking after emoluments which are not in themselves profits, you may create, by way of a trade or an adventure or a vocation, subject-matter which does bear fruit in the shape of profits or gains. Really a different conception arises, a conception of a trade or vocation which differs in its nature, in my judgment, from the individual acts which go to build it up, just as a bundle differs from odd sticks. You may say, I think, without perhaps an abuse of language, there is something organic about the whole which does not exist in its separate parts."

At page 313, the learned Judge laid down:

"As I have said, there is no doubt that you might create a trade by making an organized effort to obtain emoluments which are not in themselves taxable as profits, and the most familiar instance of all, of course, is a trade which has for its object the securing of capital increment. A person who buys an object which subsequently turns out to be more valuable, and then sells it, does not thereby make a profit or gain. But he can organize himself to do that in a commercial and mercantile way, and the profits which emerge are taxable profits, not of the transaction, but of the trade."

Those observations must be read in the light of the facts of that case, which failed to prove the organization or the adoption of the commercial and mercantile way referred to by Rowlatt J. The basis of a bet itself or a series of bets was, in the opinion of that learned Judge, an irrational agreement. The organization to do anything in a commercial and mercantile way should obviously have a rational basis.

(13) In — *Smith Barry v. Cordy*, 28 T. C. 250, Scott L. J. laid down:

"Unless ex facie the single transaction is obviously commercial, the profit from it is more likely to be an accretion of capital and not a yield of income."

The learned Judge qualified that statement by pointing out: "But that question is almost necessarily one of fact." That case again did not deal with an isolated transaction; but with a series of transactions which satisfied the test formulated by Rowlatt J. in — *Graham v. Green*, 9 TC 309:

"A person.....can organize himself to do that (buy) in a commercial and mercantile way,



and the profits which emerge are taxable profits, not of the transaction, but of the trade."

This was quoted with approval by Scott L. J. at page 260.

(14) Even in the case of isolated transactions, judicial research and learning both in Great Britain and India have failed to produce any test of universal application, an infallible test. It is really with reference to the facts held proved in each case that the difficult question has to be answered, whether a given transaction was an adventure in the nature of trade.

(15) The Tribunal found that Captain Alexander's intention when he purchased the Cotangady group of estates "was to make a profit by sale which he actually did." No doubt, if the estate had been purchased without any intention then of reselling it at a profit, a sale under changed circumstances would not stamp the transaction of sale with a business character. The sale by itself would not be an adventure in the nature of trade, though the profit motive had actuated the sale. But then, the intention to resell at a profit would not by itself make a transaction of purchase and sale an adventure in the nature of trade. This was clearly laid down in — 'Leeming v. Jones', 15 T. C. 333 by Lord Buckmaster:

"An accretion to capital does not become income merely because the original capital was invested in the hope and expectation that it would rise in value; if it does so rise, its realisation does not make it income."

Viscount Dunedin made it even clearer at page 360:

"The fact that a man does not mean to hold an investment may be an item of evidence tending to show whether he is carrying on a trade or concern in the nature of trade in respect of his investments but per se it leads to no conclusion whatever."

(15a) These principles were accepted by a Full Bench of the Rangoon High Court in — 'Mrs. Sooniram Poddar v. Commissioner of Incometax, Burma', 1939 I.T.R. 470. After referring to — 'Leeming v. Jones', 15 T. C. 333, Roberts C. J. laid down at page 478:

"Stopping there, this means that if a man, outside his regular business, makes a speculative purchase of an article or commodity with a view to its profitable resale, he is not for that reason alone venturing on a trade. To use the words of our Act, it is not necessarily "an adventure or concern in the nature of trade, commerce or manufacture."

A Full Bench of the Lahore High Court, however, took a different view in — 'Behari Lal Jhandu Mal, In Re', 1944 I.T.R. 209, specifically dissenting from the view taken by the Rangoon High Court in — 'Mrs. Sooniram Poddar v. Commissioner of Incometax, Burma', 1939 ITR 470. Munir J. stated at page 225:

"With the greatest respect to the learned Judges, who decided that case, I must say that that case does not appear to me to have been rightly decided."

The facts in the Lahore case were: The assessee, a Hindu undivided family carrying on a moneylending business purchased in 1931, when England went off the gold standard, 1600 tolas of gold and paid the purchase price of Rs. 35,050 in two instalments of Rs. 17,525 each, by withdrawing money from fixed depo-

sits before their maturity and from a firm in which it was a partner and also by borrowing from another firm. In 1936, the assessee sold one fourth of the gold for Rs. 13,800 and thus made a profit of Rs. 5,037, which was assessed by the Income-tax authorities as profits from business under S. 10 of the Indian Income-tax Act. After pointing out that — 'Commissioners of Inland Revenue v. Livingstone', 11 T.C. 538 was not an authority for the position taken up by the assessee, that the profits of the sale of a fourth of the quantity of gold he had purchased did not constitute assessable income, and after explaining the observations of Lord President Clyde in the above case with reference to that learned Judge's observations in the later case of — 'Rutledge v. Commissioners of Inland Revenue', 14 T. C. 490, Munir J. observed at page 225:

"The essential test in my opinion in such cases is whether the purchase of metal was made not with the intention to use it nor with the intention to invest one's capital in it but with the sole object of selling it in future in order to make a profit. If the purchase is with that intention the purchase and the subsequent sale are an adventure in the nature of trade."

Earlier at page 220 Munir J. pointed out:

"If, however, at the date of the purchase the object of the purchaser was not to bring the article in his own use but to sell it at a profit, there can hardly be any doubt that in that case the transaction would be a venture in the nature of trade."

(16) It is not really necessary for the purposes of deciding the case before us to consider whether the Rangoon view or the Lahore view is, in our opinion, the correct one. The observations of the learned Judges in each of those 2 cases have to be construed with reference to the facts of that case. In both cases the learned Judges held that the purchase and resale of gold were outside the scope of the normal trading activities of the assessee, which in each case was a money-lending firm. Suffice it to say Captain Alexander's position was totally different. To that we shall advert later. The learned Judges of the Lahore High Court held that the case before them fell within the scope of the rule in — 'Rutledge v. Commissioners of Inland Revenue', 14 T. C. 490. Even in that case the Lord President himself observed at page 497:

"the crisis of judgment might turn on the particular circumstances."

The Lord President himself did not see any conflict between his views in — 'Commissioners of Inland Revenue v. Livingstone', 11 T. C. 538 and those he expounded later in — 'Rutledge v. Commissioners of Inland Revenue', 14 T. C. 490. On the question whether an intention to resell was a conclusive test in deciding whether a given transaction of purchase and resale was an adventure in the nature of trade, nothing could be more categorical than the observations of Lord Buckmaster and Viscount Dunedin in — 'Leeming v. Jones', 15 T. C. 333, with which we respectfully agree.

(17) Though a dominant or even a sole intention to resell is not by itself conclusive proof, it is certainly a relevant factor in deciding whether the transaction of purchase and resale was an adventure in the nature of trade, and in conjunction with other circumstances including the conduct of the assessee, such an



intention might well establish beyond doubt that the adventure was in the nature of trade.

(18) As we have already pointed out, courts have never treated such a question as one capable of easy solution by the taxing authorities. Our task however, it should be remembered, is more limited in scope. Did the evidence on record justify the finding of the Tribunal, that the purchase and sale of the Cottangady group of estates by the assessee constituted an adventure in the nature of trade.

(19) We have no hesitation in answering that question against the assessee. That it is possible for a different judicial tribunal to arrive at the opposite conclusion — and as Lawrence L. J. pointed out in — ‘Leeming v. Jones’, 15 T. C. 333 there is no middle course open or possible — is no justification for a court acting within the limited scope of S. 66 (1), Indian Income-tax Act, to refuse to accept the finding of the Tribunal.

(20) Captain Alexander sold the Sivalogam estate in August 1942 and was in possession of considerable funds. Judicial notice can be taken of the facts, that there was a real threat of invasion of India by the Japanese a little earlier, and that there were civil disturbances in this country in August 1942, when the Quit India Campaign against the Britishers was intensified. It was a period when planting estates changed hands and Indian purchasers came in. In one of the letters on record in this case, Davidson & Co. pointed out on 12-2-1943 that the Cottangady group of estates had been sold to an Indian purchaser. By August 1942, Captain Alexander had ceased to be in the service of the Burmah Shell Company; and with his connections with the South India Plantations Agency Ltd. and the Southern India Planters Association he was obviously in a better position in August 1942 to look after his estate with his residence at Coonoor. Yet he sold the Sivalogam estate in August 1942. His association with the South India Plantations Agency and the Southern India Planters Association gave him the means of knowing which were the estates the European owners were anxious to sell at that period. Though there was no evidence on the point, when Captain Alexander conceived the idea of leaving India, in fact he did leave India for good in January 1944. It is against this background that the sale of the Sivalogam estate and the evidence regarding the subsequent purchase and sale of estates by Captain Alexander have to be viewed.

(21) We observed earlier that Captain Alexander's position between August 1942 and March 1943 was in no way analogous to that of the assessee in — ‘Mrs. Sooniram Poddar v. Commissioner of Income-tax, Burma’, 1939 I.T.R. 470 and — ‘Behari Lal Jhandu Mal, In Re’, 1944 I.T.R. 209. He was a planter to start with. His main estate he sold in August 1942. At that period he was in the employ of planting associations. Subsequent to August 1942, he bought two sets of estates and sold them, the Cottangady group of estates and the Umbidikhan estate. That was a time when he should have been in a better position than many others to know the market conditions of the plantations which changed from European owners to Indian owners.

(22) Despite the steps taken by the assessee, Captain Alexander, to improve the Cottangady

group of estates, there was certainly sufficient material on record to justify the finding of the appellate tribunal, that the purchase was with a view to resell the estate at a profit. The purchase price was paid and possession of the Cottangady group of estates was taken on 11-11-1942. The agreement of sale to Mr. P. S. George was within a short time i.e. on 3-2-1943. When exactly negotiations for the sale of the estates to Mr. P. S. George commenced, there was no specific evidence to show. The tribunal's comment on that was:

“That almost simultaneously with the negotiations for the purchase of the estate and its improvement, negotiations for its sale were also being carried on by the assessee.”

That might not be strictly accurate in the absence of any specific evidence as to when exactly negotiations for the sale to Mr. P. S. George were commenced. But obviously the negotiations must have commenced sometime before 3-2-1943. Between 11-11-1942 and 3-2-1943, Captain Alexander did not even obtain sale deeds from the previous owners, Mr. Hall and Mrs. Emily Hall. He got the sale deeds from the vendors subsequent to 3-2-1943, obviously only to satisfy the conditions of cl. 7 of the agreement of sale dated 11-2-1943, which Captain Alexander executed in favour of Mr. P. S. George. That condition barred the adoption of the technique of sale of the Umbidikhan estate during the same period. The sale deed in the case of the Umbidikhan estate was executed directly in favour of the vendee from Captain Alexander and his partner by the previous owner, Mr. Mayer from whom Captain Alexander and his partner bought that estate.

(23) To support the contention, that the sale of the Umbidikhan estate was an irrelevant factor in deciding the question at issue, whether the purchase and sale of the Cottangady group of estates constituted an adventure in the nature of a trade, learned counsel for the assessee relied on — ‘Cooksey and Bibbey v. Rednail’, 30 T. C. 514. The facts of that case were: In 1924 Cooksey, a solicitor, and Bibbey, a farmer, purchased jointly a farm within six miles of Birmingham and let it to a tenant. Between 1920 and 1925 the firm in which Cooksey was a partner purchased and developed three housing estates, and from 1930 to 1940 Cooksey and Bibbey in partnership bought and developed five housing estates. It was admitted that these were trading transactions for income-tax purposes. In 1938 Cooksey and Bibbey sold the farm to the Birmingham Corporation and they were jointly assessed to income-tax on the profit realized. Croom-Johnson J. pointed out at page 518 that Bibbey had nothing to do with Thomas Cooksey and Company which carried out the operations referred to above between 1920 and 1925. The learned Judge observed:

“Is it any evidence that another partnership, (Thomas Cooksey and Co.,) which is not this partnership, was engaged in speculation and development of land by building houses between 1920 and 1925? This assessment is raised against these two gentlemen on the basis that they are a partnership, and accordingly it is a separate and distinct assessment. It is that partnership, not some other partnership, which the Crown is seeking to establish was engaged in transactions in the nature of trade. I shall have to look and see what other evidence there is, but, in my



judgment, the evidence — as to the activities of Thomas Cooksey & Co. in transactions dealing with land, in which firm Mr. Bibbey was not a partner, is no evidence upon which anybody could come to the conclusion that a partnership or joint adventure existing between Cooksey and Bibbey can be proved to be established for purposes of trade."

It must be observed that it was not a rule of law that the learned Judge intended to lay down; nor did that learned Judge lay down that evidence of the activities of Thomas Cooksey & Co. of which Bibbey was not a partner was wholly irrelevant. What the learned Judge really held was that the evidence afforded by the activities of Thomas Cooksey & Co. was not evidence that could lead to any definite conclusion. By itself, the sale of the Umbidikhan estate could not conclude the question at issue, whether the purchase and sale of the Cottangady group of estates was an adventure in the nature of trade. But the purchase and sale of the Umbidikhan estate at the same period, though it was in partnership with another, is a relevant piece of evidence to be considered in conjunction with the other pieces of evidence on record.

(24) We feel that there was certainly sufficient evidence for the Tribunal to conclude that the transaction of the purchase and sale of the Cottangady group of estates was an adventure in the nature of trade and that the profits of that transaction in the hands of the assessee Captain Alexander constituted assessable income.

(25) The first question is answered in the affirmative and against the assessee.

(26) The facts necessary for the disposal of the second of the questions referred to us are as follows: During the accounting year, the assessee was in possession of three estates, the Sivalogam estate, the Cottangady group of estates and the Umbidikhan estate. Each of these three estates was managed by agents, the Sivalogam estate by Messrs. Harrison & Crossfield, the Cottangady group of estates by Pierce Leslie & Co., and the Umbidikhan estate by Mysore Coffee Curing Works Ltd. The produce from all these estates was sold in what was then British India by these agents, and the sale proceeds paid into Captain Alexander's account with a bank in British India. The return of income submitted by Captain Alexander for the year of assessment was not placed before us. But it was not disputed that he did not in the first instance include in his return any income from any of these three estates. Eventually, the assessee filed the profit and loss statements furnished to him by his agents with reference to each of these three estates. That the amounts shown as profits in those statements was assessable to tax as income was not in dispute before us. Those profit and loss statements showed fairly large stocks of estate produce unsold at the end of the accounting year. These stocks were sold in the next accounting year. The Income-tax Officer treated the sale price so realised as the value of the stock unsold on 31-3-1943, treated it as income that accrued during the accounting year ending on 31-3-1943, and added the sum so arrived at to the profits as disclosed in the profit and loss statements the assessee received from his agents. No separate accounts were maintained

for any of these three estates by the assessee himself.

On appeal, the Assistant Commissioner held that it was not the sale price of the stock unsold on 31-3-1943 that represented the income but only its cost price. That he worked out by deducting from the price realised by the sales in the succeeding year of account the proportionate working expenses incurred during the accounting year ending with March 1943. The assessee did not dispute the correctness of those figures in the appeal he preferred to the Tribunal. The Tribunal rejected the contention of the assessee, that even the cost price of the stock unsold on 31-3-1943 was not income that accrued during the year of account ending with 31-3-1943 and confirmed the order of the Assistant Commissioner on this point.

(27) The reference was first heard by this Court in March 1951. In calling for a further and better statement of the case from the Tribunal the learned Judges observed:

"If the system adopted by him (the assessee) is a mercantile accountancy system then the value of the produce which remained on hand unsold at the end of the year of account would have to be taken into account as the value of the closing stock. If the system of accounting is on a cash basis then it is only the actual receipts and disbursements that will have to be taken into account in arriving at the assessable profits during the year of account."

(28) It was admitted that the assessee did not maintain any separate accounts of his own for any of these three groups of estates. The income from these estates was not taxed in any year prior to 1942-43; nor apparently was there any scope for any assessment in any subsequent year; Captain Alexander parted with all the three estates before the end of March 1943. After pointing out that the question, whether the estate accounts had been kept by the agents on a mercantile or cash basis, did not come up for consideration in any of the prior years as there was no taxable income from the estates, the Tribunal recorded in their further and better statement of the case the finding:

"It follows in view of the mercantile system adopted by the managing agents all the income from the estates has to be computed by following the closing stock of unsold produce at cost price calculated by taking the proportion of the working expenses relating to the unsold stock."

As we have already observed, the assessee did not maintain any accounts of his own. The return he submitted is not before us; but then the income from the estates was obviously not included in the original return. The Income-tax Officer recorded that the method of accounting on which his assessment was based was mercantile. No objection appears to have been taken before the Assistant Commissioner, that the mercantile basis of accounting should not have been adopted by the Income-tax Officer when the assessee himself did not adopt it. Even before the tribunal, no such specific plea appears to have been taken. In its order the Tribunal recorded:

"The argument of the learned lawyer for the (assessee) appellant seems to be that businesses of this type need not take into consideration, for the purpose of determining their



income from year to year, the value of any stock remaining unsold at the close of their accounting year."

That contention the appellate tribunal rejected.

(29) In view of the observations in the order of this Court, to which one of us was a party, and with which we entirely agree, "If the system adopted by the assessee was a mercantile accountancy system, then the value of the produce which remained on hand unsold at the end of the year of account would have to be taken into account as the value of the closing stock", the only question to be decided now is whether the taxing authorities were right in adopting the mercantile system of accounting as the basis of assessment. S. 13 of the Income-tax Act runs:

"Income, profits and gains shall be computed, for the purposes of sections 10 and 12, in accordance with the method of accounting regularly employed by the assessee:

Provided that, if no method of accounting has been regularly employed, or if the method employed is such that, in the opinion of the Income-tax Officer, the income, profits and gains cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Income-tax Officer may determine."

The section itself should suffice to answer the second question against the assessee. There was no evidence that the assessee had any method of accounting for the income from the three groups of estates, which method he regularly employed. The finding was that he did not maintain any accounts of his own. No doubt, assessee has a statutory right to choose his method of accounting. But before he can claim that his assessable income should be computed on the basis of the system of accounting of his choice, he must satisfy two conditions (1) that it was a method of accounting regularly employed and (2) that it was a method of accounting from which in the opinion of the Income-tax Officer, the income, profits and gains could properly be deduced. If neither of those conditions was satisfied, the proviso to S. 13 gave a statutory right to the Income-tax Officer to determine the basis and manner in which the income should be computed for purposes of assessment. In this case we need not concern ourselves whether the second of these two conditions was satisfied. The assessee did not maintain any accounts. He did not regularly adopt any method of accounting for his income from the estates. So, the provisions of the proviso to S. 13 that had to be invoked were "if no method of accounting has been regularly employed—then the computation shall be made upon such basis and in such manner as the Income-tax Officer may determine." No method of accounting had been employed by the assessee and the Income-tax Officer determined that the computation should be on the mercantile basis. With the exercise of such a statutory right given to the Income-tax Officer, there can be no scope for any interference in the circumstances of this case at this stage. That this was not the approach to the question at issue either by the Assistant Commissioner or by the Tribunal—and it must be remembered the question was not raised in that form before them—does not really affect the determination of that question.

(30) The Tribunal recorded that the method of accounting adopted by the agents of the assessee was mercantile. In view of what we have said above, the question whether the accounts maintained by the agents should be treated as the accounts of the assessee even when he maintained none of his own, does not arise for consideration. Even had those accounts of the agents not been produced, the Income-tax Officer would have had the right to adopt the mercantile basis of accounting for computing the income of Captain Alexander from his estates when he himself had not regularly employed any method of accounting for his income from that source.

(31) As the tribunal observed, the correctness of the computation as finally made by the Assistant Commissioner was not challenged even before the tribunal.

(32) The answer to the second question referred to us is in the affirmative and against the assessee.

(33) As the assessee, now represented by his widow, the legal representative, Mrs. Alexander, has failed, she will pay the costs of the Commissioner of Income-tax—Rs. 250.

B/D.R.R.

Reference answered.

**A. I. R. 1953 MADRAS 173 (Vol. 40, C. N. 54)**  
**SUBBA RAO J.**

V. M. Krishnaswami Mudaliar, Petitioner v. Rahman Baig and another, Respondents.

Civil Misc. Petn. No. 7915 of 1950, D/- 18-7-1951.

**Houses and Rents — Madras Buildings (Lease and Rent Control) Act (15 of 1946), S. 7 (2) (i) — Arrangement between landlord and tenant — Rent of particular month to be appropriated or spent in particular manner — Rent for that month cannot be said to be due within section.** (Para 2)

N. K. Pattabhirama and N. K. Mohanaragam Pillai, for Petitioner; M. Natesan and V. Ramaswami Iyer, for Respondents.

**ORDER:** This is an application for issuing a writ of certiorari and for quashing the order of the Subordinate Judge of Vellore made in appeal against the order of the Rent Controller, Vellore.

(2) The petitioner is the owner of the building. He rented it out to the respondent on a monthly rental of Rs. 16-8-0 in the year 1944, and he had taken an advance of Rs. 33. For the month of March 1949 the tenant did not pay the rent before the last day of April, but on 31st May 1949 he sent a sum of Rs. 33 towards the rent for those two months. The petitioner filed the application before the Rent Controller for evicting the respondent on the ground amongst others that he did not pay the rent for the month of March before the end of April. Among other contentions the respondent raised the plea that the petitioner consented to certain alterations to the house to be made by the respondent by spending the money from and out of the rent payable by him, and that pursuant to that arrangement he was taking steps for getting the repairs done. Later on, having come to know that the respondent was taking steps to evict him, the respondent sent the money before the end of May.

The learned Subordinate Judge on the materials placed before him found that because of



that arrangement the respondent kept the rent for one month and that when he found a change in the attitude of the landlord he remitted that amount. If there was an arrangement between the landlord and the tenant in and by which the rent of any particular month was to be appropriated or spent in a particular manner, it cannot be said that the rent for the month was due within the meaning of S. 7. I cannot therefore say that there is an error of law apparent on the record or that the Subordinate Judge acted without jurisdiction.

(3) The application is therefore dismissed but in the circumstances of the case without costs. B/V.R.B. Application dismissed.

**A.I.R. 1953 MADRAS 174 (Vol. 40, C. N. 55)**  
**SUBBA RAO J.**

Dasari Janakiramayya and another, Petitioners v. Nune Ranganayakamma, Respondent.

Civil Revision Petition No. 1326 of 1950, D/- 29-11-1951.

**(a) Debt Laws — Madras Agriculturists' Relief Act, (4 of 1938), S. 4(h) — Object of — Tests for applicability — Due and own — Meaning — Value of property of life estate holder — Held, exemption applied — (Words and Phrases — 'Due and own' — Meaning).**

The object of the exemption under S. 4 (h) is to protect women of slender means from the consequences of the drastic provisions of the Act.

The legislature intended to provide for two tests for the application of the exemption which are: (i) whether the debt is due to a woman and (ii) whether the value of property owned by her, whether as life estate holder or as absolute owner, did not exceed Rs. 6000.

The first question depends upon the meaning of the word "due". Ordinarily, it means 'payable'. As a noun, it connotes an existing obligation. As an adjective, it means capable of being justly demanded, claimed as of right, payable. Thus where a debt is certainly payable to the life estate holder and she can claim to recover it as of right and if the debtor pays her, he gets a full discharge, the debt is 'due' to a life-estate-holder who is a woman.

As to the second question the dictionary meaning of the word "own" is to have a good legal title to, or to hold as a property. The owner of a property is one, who has an absolute dominion over it and in regard to which he has a right to do as he pleases. In that sense, ownership of a life-estate-holder in a property is only confined to her life interest in the said property. Where therefore certain debt is due to a woman, who happens to be a life-estate-holder, the value of her property for the purpose of exemption under S. 4(h) is the value of her interest in the property:

Held that as the value of the property owned by the life estate holder did not exceed Rs. 6000, the exception under S. 4(h) applied to the debt in question. (1940) 2 MLJ 342 Distinguished. (Paras 3 to 7)

**(b) Interpretation of Statutes — Duty of Court.**

The Court cannot rely upon the hidden meaning of the legislature but must give effect to its express intention and must be

guided only by the plain meaning of the express words used in the section.

(Para 3)

Anno: Civil P. C., Pre. N. 7.

V. Subramaniam and M. Ramakrishna, for Petitioners; K. Kotayya, for Respondent.

**JUDGMENT:** The only question in this revision is whether the debt due to the respondent is exempted under S. 4(h) of the Madras Agriculturists Relief Act (Act 4 of 1938).

(2) The facts are simple and are not in dispute. The first petitioner and his father executed a promissory note Ex. B 1 dated 25-4-1929, in favour of one Subbarayudu for a sum of Rs. 200. After some renewals of the debt in favour of Subbarayudu and after his death, petitioners executed a promissory note dated 16-2-1936 for a sum of Rs. 378-4-6 in favour of Perindevamma, wife of Subbarayudu. On 21-2-1926, Subbarayudu executed a Will, whereunder Perindevamma was given a life-estate in all his properties and the vested remainder was given to his daughter, Ranganayakamma, the respondent herein. Though the definite date of the death of Perindevamma is not known, it is clear from the evidence that she died only subsequent to 24-7-1938. Ranganayakamma filed S. C. No. 154 of 1944 on the file of the Court of the Subordinate Judge of Guntur for recovery of the amount due under the promissory note and obtained a decree therein. The petitioners filed an application under S. 19 of the Act for scaling down the debt. The learned Subordinate Judge held that the petitioners were agriculturists but they were not entitled to have the debt scaled down as the debt was due to Perindevamma, a woman, on 1-10-1937 and the value of her life estate did not exceed Rs. 6000. He dismissed the petition. The petitioners have filed the above revision against that order.

(3) The learned Counsel for the petitioners contended that Perindevamma was only a life-estate holder and, therefore, only that portion of the debt, which she could appropriate for herself as a life estate holder, is only liable to be exempted. The relevant provision of S. 4 reads:

"Nothing in this Act shall affect debts and liabilities of an agriculturist falling under the following heads:

(h) any debt or debts due to a woman on the 1st October 1937 provided that the value of the property owned by her on that date including the principal amount of the debt or debts so due did not exceed Rs. 6000."

The object of this exemption is to protect women of slender means from the consequences of the drastic provisions of the Act. If the contention of the learned counsel is accepted, not only will it lead to many complications but, in some cases, the protection intended to be given under this section may become illusory. A creditor on 1-10-1937 may be a man and the remainderman may be a woman or vice versa. The remainder may be vested or contingent. Courts would have to value the life estates and remainders vested or contingent. Proportional values will have to be fixed on complicated calculations. The nature of the woman's estate would have to be ascertained, viz., whether it is a life-estate, absolute estate, woman's estate, or a woman's estate with an absolute power of alienation conferred on the holder of that estate. I do not think that the legislature contemplated by enacting the aforesaid simple clause, to comprehend all the aforesaid questions. It obviously intended to provide for two tests for the application of that exemption, (i) whether



the debt is due to a woman and (ii) whether the value of property owned by her, whether as life estate holder or as absolute owner, did not exceed Rs. 6000. It cannot rely upon the hidden meaning of the legislature but must give effect to its express intention. I must be guided only by the plain meaning of the express words used in the section.

(4) Then two questions arise for consideration:

(i) What is the debt to a woman, who is a life-estate holder?

(ii) What is the value of the property owned by her?

(5) The first question depends upon the meaning of the word "due". Ordinarily, it means payable. As a noun, it connotes an existing obligation. As an adjective, it means capable of being justly demanded, claimed as of right, payable (Ramanatha Aiyar's Law Lexicon). The debt is certainly payable to the life estate holder and she can claim to recover it as of right. If the debtor pays her, he gets a full discharge. If he does not, she can file a suit and recover the amount. It is not open to the debtor to raise the plea that there is an outstanding vested remainder and, therefore, the entire debt is not due to the life-estate-holder. Giving the ordinary meaning to the word "due" I hold that the entire amount payable under the promissory note was due to the life-estate holder, who was a woman on 1-10-1937.

(6) The next question is what is the value of the property owned by her. The dictionary meaning of the word "own" is to have a good legal title to, or to hold as a property. The owner of a property is one, who has an absolute dominion over it and in regard to which he has a right to do as he pleases. In that sense, ownership of a life estate-holder in a property is only confined to her life interest in the said property. The life estate holder cannot mortgage, alienate or otherwise do anything to destroy or affect the interest of the remainderman. The property owned by such a life estate holder is only her or his interest in that property. For the purpose of this section therefore, the value of the interest owned by a life-estate-holder shall be ascertained for applying the provisions of the Act. So construed, the position is this. The entire debt is due to a woman, though she happens to be a life-estate-holder. The value of her property for the purpose of exemption is the value of her interest in the property. This conclusion may appear inconsistent but this is in accord with the express words used and it also gives ample protection to a woman of slender means holding only a life estate in a property.

(7) The learned counsel for the petitioners relied upon the judgment of Wadsworth J. in — 'Bhadrachalam v. Nagarupavattamma', 1940-2 MLJ 342. There an agriculturist was indebted jointly to two women. The learned Judge held that the debt as well as the assets of each woman must be separately ascertained for the application of S. 4(h) of the Act. It is not necessary to express my view on that decision, as the situation in the present case is radically different. That decision is not of any help in this case. As the learned Subordinate Judge found that the value of the life-estate does not exceed Rs. 6000, the petitioners are not entitled to relief under the provisions of the Act. The revision petition fails and is dismissed with costs.

B/D.R.R.

Revision dismissed.

A.I.R. 1953 MADRAS 175 (Vol. 40, C. N. 56)

SUBBA RAO J.

Panchayat Board, Kudaravalli Gudiwada Taluk, Krishna District, represented by its President, Sanka Gopala Rao and others, Petitioners v. Inspector of Municipal Councils and Local Boards, Madras and another, Respondents.

Civil Misc. Petn. No. 260 of 1951, D/- 22-8-1951.

Madras Local Boards Act (14 of 1920), S. 45 A (1) — Order under — Reasons for — Necessity.

In the interests of public institutions in this country, an officer, however competent and otherwise honest, cannot be entrusted with drastic powers without the elementary safeguard that he should give reasons for his action. But it is for the Legislature to amend the Act suitably having regard to the changed circumstances after this country has become independent. Though the Inspector has got to exercise his functions judicially, the section does not impose on him a duty to give reasons for his action. An order under S. 45 A (1) will not be bad because it does not disclose any reasons: W. P. No. 171 of 1951, Disting.

(Para 4)

D. Narasaraaju and K. B. Krishnamurthy, for Petitioners; The Govt. Pleader and A. Sambasiva Rao, for Respondents.

ORDER: This application is for quashing the order of the Inspector of Municipal Councils and Local Boards dated 20th December 1950 superseding under S. 45-A (1) of the Madras Local Boards Act the Kudaravalli Panchayat Board for a period of one year. On 12th October 1950 the Inspector of Municipal Councils and Local Boards issued a notice to the Panchayat Board calling upon them to show cause within 15 days from the date of the receipt of the notice why the Panchayat Board should not be superseded under S. 45-A (1) of the Madras Local Boards Act. In that notice, the Inspector stated the following reasons for the proposed action: (1) For the year 1949-50, the Panchayat Board realised a large amount from the proceeds of the grass sales but only credited a sum of Rs. 164; (2) No amenity worth the name has been provided by the Panchayat Board and that they have not kept the fresh water tank in a sanitary condition; (3) the Panchayat Board has not checked the President or reported to the higher authorities the following irregularities; (a) the President has been keeping large cash balance on hand but the Board failed to pull up the President; and (b) the President failed to serve notice of meetings with agenda to the members.

To this notice the Panchayat Board filed a statement explaining the charges made against the President and also the members of the Panchayat Board. The Inspector of Municipal Councils and Local Boards considered the reports of the subordinate officers and the explanation of the Panchayat Board together with the remarks made by the District Panchayat Officer and was satisfied that action should be taken against the Panchayat Board under S. 45-A (1). On 20th December 1950 the Inspector of Municipal Councils and Local Boards passed an order superseding the Panchayat Board.

(2) The learned counsel for the petitioner raised before me three points: (1) the order of the Inspector was based upon non-existing facts; (2) the order was made mala fide having regard to extraneous circumstances and (3) the order



does not disclose the reasons as a judicial order should do.

(3) The petitioner has filed a long affidavit before me canvassing the various reasons disclosed in the notice issued by the Inspector for the action taken by him. After going through the affidavit in some detail, though there is the possibility of another tribunal coming to a different conclusion, I cannot say that there is no material on which the Inspector could have come to the conclusion which he did. Nor am I satisfied by the allegations made in the affidavit that the proceedings were started not in the interests of the Board but for other extraneous reasons. There is also no materials to hold that the Inspector acted mala fide in the exercise of his jurisdiction.

(4) Mr. Narasaraju then argued that drastic power in the hands of an Officer is susceptible of abuse if he is not bound to give reasons for his satisfaction. In support of his argument he relied upon my order in — 'W. P. No. 171 of 1951'. There I held that the Government in setting aside the orders of inferior tribunals under S. 64 A of the Motor Vehicles Act should disclose the reasons in their order. But the Government in exercising the power under S. 64-A of the Motor Vehicles Act is exercising revisional jurisdiction, whereas in the case of an Inspector, though he has got to exercise his functions judicially, the section does not impose on him a duty to give reasons for his action. I agree with Mr. Narasaraju that in the interests of public institutions in this country, an officer, however competent and otherwise honest, cannot be entrusted with drastic powers without the elementary safeguard that he should give reasons for his action. But it is for the Legislature to amend the Act suitably having regard to the changed circumstances after this country had become independent. But on the section as it stands I am not prepared to extend the principle laid down by me in — 'W. P. No. 171 of 1951' to an order under S. 45-A (1) of the Madras Local Boards Act. This petition is dismissed with costs, one set. Advocate's fee Rs. 100.

B/D.H.

Petition dismissed.

**A.I.R. 1953 MADRAS 176 (Vol. 40, C. N. 57)**

GOVINDA MENON

AND KRISHNASWAMI NAYUDU JJ.

Dhanam alias Dhanalakshmi Ammal and another, Appellants v. Varadarajan, Respondent.

Appeal No. 732 of 1948, D/- 31-3-1952.

(a) **Madras Hindu Women's Rights to Property (Extension to Agricultural Land) Act (26 of 1947)** — Widow in Madras is not entitled to share in agricultural land left by her deceased husband, when the Act had not come into force at the time of her husband's death — (Hindu Women's Right to Property Act (1937), S. 3): 1941 FCR 12 and 1942 FCR 52, Rel. on. (Para 1)

Anno: Hindu Women's Right to Property Act, S. 3 N. 1.

(b) **Hindu Women's Right to Property Act (1937)**, before its amendment by Madras Act (26 of 1947), S. 3 — Agricultural land — Leases and mortgages of agricultural land — Widow of deceased cannot claim share in it — Such interest is interest in agricultural land — Similarly are the arrears of rent due from tenants in agricultural lands and are excluded from operation of Act: ILR 1945 Mad 777 and ILR

1945 Mad 781, Rel. on; 1951-1 MLJ 364, Overruled. (Paras 9, 11)

Anno: Hindu Women's Right to Property Act, S. 3 N. 1.

G. R. Jagadeesa Iyer, for Appellants; S. Thiagaraja Iyer, for Respondent.

GOVINDA MENON J.: The plaintiffs, who were the 2nd and 3rd wives of Dr. Srinivasa Mudaliar, who died on 15-12-1943, filed O. S. No. 37 of 1944 on the file of the Subordinate Judge's Court, Vellore, for partition and recovery of possession of their share of the properties left by the deceased Srinivasa Mudaliar. The suit was based on the ground that according to Act 18 of 1937, the Hindu Women's Right to Property Act, the widows are entitled to a share of the properties of the deceased husband in equal rights with those of any sons left behind by the deceased. As Madras Act 26 of 1947 which enables the widows to claim their rights in agricultural lands as well had not come into force, when Srinivasa Mudaliar died and when this suit was filed, in accordance with the decisions of the Supreme Court — 'In Re a Special Reference under S. 213 of the Government of India Act, 1935', 1941 F. C. R. 12 and — 'Meghraj v. Alla Rakhia', 1942 F. C. R. 52, the plaintiffs are not entitled to claim a share in the agricultural lands as legislation with regard to such lands can be undertaken after the coming into operation of the Government of India Act, 1935, only by the Provincial Legislature. Since Act 17 of 1937 was by the Central Legislature, it cannot affect proprietary rights so far as agricultural lands are concerned. So the lower court had to give a decree to the plaintiffs only with regard to properties other than agricultural lands.

(2) But the dispute centred round certain items mentioned in C. 2 and C. 4 schedule as well as items 1 to 4 in the D schedule. C. 2 schedule related to certain mortgages executed in favour of Srinivasa Mudaliar, both simple as well as usufructuary, and the plaintiffs claimed their shares on those mortgages. These mortgages were over agricultural lands. C. 4 schedule related to arrears of rent due to Srinivasa Mudaliar from tenants of agricultural lands let into possession by him. Items 1 to 4 of D schedule related to certain moveables. The learned Subordinate Judge relying upon two decisions of this court in — 'Kotayya v. Annapurnamma', ILR 1945 Mad 777 and — 'Ramaswami v. Murugayyan', ILR 1945 Mad 781, as well as an unreported decision in — 'A. S. No. 2 of 1944' held that the plaintiffs are not entitled to a share because leases of agricultural lands and mortgages of agricultural lands came within the definition of interest in agricultural property within the meaning of entry 21 in the 7th schedule to the Act and could not be divided. It is against that decree that the plaintiffs have appealed.

(3) We are now concerned with such of the items in the C. 2 schedule which relate to leases of agricultural property and mortgages over agricultural property. It is clear from the various exhibits filed in the case that the deceased Srinivasa Mudaliar was a mortgagee; some of the mortgagees were simple and the others usufructuary of some of the properties in the C. 2 schedule. He had also leased out to various tenants properties, the rents of which have been mentioned in C. 4 schedule.



(4) In — '*Kotayya v. Annapurnamma*', ILR 1945 Mad 777, a Bench of this court held that Hindu Women's Rights to Property Act, 1937 does not confer upon a widow of a deceased Hindu coparcener any interest in a lease of agricultural lands obtained by the joint family. The same learned Judges held in — '*Ramaswami v. Murugayyan*', ILR 1945 Mad 781 that the Hindu Women's Rights to Property Act, 1937, does not confer on a Hindu widow any right to or interest in a simple mortgage of agricultural land executed in favour of her husband. To the same effect is the decision in A. S. No. 2 of 1944 where the same learned Judges reaffirmed and reiterated what they had already laid down in the decisions aforesaid. They also referred to the decision of the Federal Court, in — '*In Re a Special Reference under S. 213 of the Government of India Act 1935*', 1941 F. C. R. 12, and held that the judgment of the Federal Court would apply equally to corporeal and incorporeal rights in land, which meant that a Hindu widow was not entitled to any share in a mortgage on agricultural land.

(5) This case comes before us on account of apparent conflict between the decisions above-mentioned and the judgment of our learned brother Subba Rao J. in — '*Veerayamma v. Venkanna*', 1951-1-M. L. J. 364. In that case the learned Judge held that since a mortgage debt apart from the security can be transferred, a suit by a Hindu widow for a share in a mortgage debt under the Hindu Women's Rights to Property Act, before it was amended by Madras Act 26 of 1947 is maintainable. The learned Judge referred to the decisions in — '*Imperial Bank of India v. Bengal National Bank*', 59 Cal 377 P. C. and — '*Fanny Skinner v. Bank of Upper India*', 57 All 314 P. C. In those decisions the Privy Council has held that apart from the security the debt as such can be transferred. The attention of the learned Judge was not invited to the two Bench decisions of this court referred to. It seems to us that even if it is possible to consider the debt as differentiated from the security, still the interest in agricultural lands in the debt does not cease as such.

(6) Our attention was also invited to another unreported judgment in — '*A. S. No. 142 of 1945*'. In that case Leach C. J. and Kuppuswami Aiyar J. have held that the Hindu widow was not entitled to a partition of mortgages because the Central Legislature had no power to legislate with regard to agricultural lands. But the learned Judges also held that the widow is entitled to a share of the mortgage debt if it had already been realised before the filing of the suit that is, if the mortgage debt had been collected and the money has come into the hands of the coparcener as such, then the interest in agricultural lands has already ceased, and such being the case, what was once a mortgage debt having become money in the hands of the coparcener is liable to be divided.

(7) Mr. G. R. Jagadisa Aiyar for the appellants also relied upon the decision of the Federal Court in — '*Mt. Parkasa Kaur v. Mt. Udham Kaur*', 1947-1-M. L. J. 127. We do not find that that decision can be of any help to the appellants, because Zafrullah Khan J. after referring to the decision of the Privy Council in — '*Imperial Bank of India v. Bengal National Bank*', 59 Cal 377 and quoting a passage from it, says that that decision cannot apply because the property in the case before the Federal

Court related to usufructuary mortgage for a term without any personal covenant for payment.

(8) In our opinion the decision of this case depends on the principles enunciated in — '*Kotayya v. Annapurnamma*', ILR 1945 Mad 777 and — '*Ramaswami v. Murugayyan*', ILR 1945 Mad 781. In one of the cases it has been held that the leasehold interest in agricultural land is not liable to be divided, and in the other that the mortgage interest in agricultural land cannot be divided. We find great difficulty in distinguishing that case from the facts of the present case.

(9) In — '*Veerayamma v. Venkanna*', 1951-1-M. L. J. 364 Subba Rao J. after referring to the decisions in — '*Imperial Bank of India v. Bengal National Bank*', 59 Cal 377 and — '*Fanny Skinner v. Bank of Upper India Ltd.*', 57 All 314 P. C. states as follows:

"From the aforesaid two judgments it is clear that a debt, apart from the security, can be transferred though the debt could be realised by enforcing the security by the mortgagee or assignee from him. If it is assignable as a debt '*simpliciter*' it is equally partible."

The fact that a debt can be assigned apart from the security would not make the mortgage any the less interest in agricultural land. The learned Judge has not stated that the method of transferring the debt apart from the security would take it away from the category of interests in agricultural property. In — '*Megh Raj v. Allah Rakhia*', 1942 F. C. R. 52 it has been held that land comprises both corporeal and incorporeal rights and interests. That is in cases where the agricultural land has been subject to mortgage or leases it would include both corporeal and incorporeal rights and as such would not come within the Hindu Women's Rights to Property Act. We are therefore of opinion that the learned Subordinate Judge was right in refusing to allow partition of the leasehold and mortgage interest in agricultural lands in C. 2 schedule to the plaint.

(10) Mr. Jagadisa Aiyar wants us to make it clear that the mortgage over agricultural lands referred to in C. 2 schedule would not comprise items 2, 4, 5, 11, 12, 14, 15 & 16 because the 1st defendant in his written statement has admitted that these mortgages are over non-agricultural lands. This position is not disputed by Mr. Thyagaraja Aiyar for the respondent.

(11) With regard to the arrears of rent due from the tenants in agricultural lands in C. 4 schedule the matter stands on a similar footing. As laid down in — '*Kotayya v. Annapurnamma*', ILR 1945 Mad 777 rent due from such lands is interest in agricultural lands and therefore that also has to be excluded from the operation of the Hindu Women's Rights to Property Act.

(12) The only other question that remains to be considered is with regard to items 1 to 4 in D schedule. Mr. G. R. Jagadisa Aiyar contends that these items have been entrusted to one Subramaniam, the guardian of the first defendant, after an inventory had been taken. According to the inventory, it is stated that certain items have been exclusively given over to the plaintiffs and certain other items have been given over to the 1st defendant through his guardian. No mention has been made of those items as to whom these should go and since they have been handed over to the guardian of the 1st defendant, learned counsel contends that



they are liable to be partitioned. We do not find any justification for this argument. It is not shown that the movable properties handed over to the guardian are not those which have been specifically and definitely allotted and given over to him. We do not think that there is any point in this contention as well. The appeal therefore fails and is dismissed with costs. B/R.G.D. Appeal dismissed.

**A.I.R. 1953 MADRAS 178 (Vol. 40, C. N. 58)**  
SOMASUNDARAM J.

The Public Prosecutor, Appellant v. Kuncham Venkateswarulu, Respondent.

Criminal Appeal No. 459 of 1951, D/- 1-4-1952.

**Sales Tax — Madras General Sales Tax Act (9 of 1939), Ss. 2(g-1), 8-A, 9, 13 and 15(h) — Prosecution under S. 13 — Burden of proof — No proof that accused is registered dealer — Accused cannot be prosecuted.**

For an offence under S. 13, the prosecution must prove that the accused is a registered dealer within the meaning of the Act. If an assessee has not registered himself he may be punishable for that; but not for not maintaining correct accounts, which is an obligation cast on registered dealer only. In the absence of the proof that the accused is a registered dealer he cannot be prosecuted under S. 13 read with S. 15(h).

(Para 3)

Adavi Rama Rao, for Accused; The Public Prosecutor on behalf of the State.

**JUDGMENT:** This is an appeal by the State against the acquittal of the respondent by the Additional First Class Magistrate of Kakinada. The respondent was charged for an offence under Sec. 13 read with Sec. 15(h) of the Madras General Sales-tax Act.

(2) The accused is having a rice shop and a visit was made by the Assistant Commercial Tax Officer on 17th May 1949. There he found one Badam Anjaneyalu sitting in the shop and he saw something underneath the gunny bag on which the said Anjaneyalu was sitting. When he was asked about it, Anjaneyalu picked up the book and tried to run away with it. But he was soon caught hold of and one B. Venkatachalam took the book from Anjaneyalu and gave it to the witness. This is Ex. P. 3. It appears to be an account book, and according to the evidence, it is in the handwriting of D. W. 1, the clerk of the accused. This was compared with the regular accounts maintained by the accused and submitted to the Commercial Tax Officer for purpose of assessment. All the entries found in the regular account books were found in this and there were some more entries in this book Ex. P. 3 for which there was no corresponding entry in the original accounts which are filed as Exs. P. 6 and P. 13. P. W. 2 who is the Commercial Tax Officer speaks to the fact that the person who wrote Exs. P. 6 and P. 13, the accounts submitted to the Commercial Tax Office, is the person who has written Ex. P. 3. This evidence has not been challenged in cross-examination.

But it is only in defence that the clerk comes forward and says that Ex. P. 3 is not in his handwriting. His evidence is not of much value in as much as his evidence is interested and the evidence given by P. W. 2 was not challenged in cross-examination. I am satisfied on the evidence that Ex. P. 3 is another account maintained by the accused apart from Exs. P. 6 and P. 13 which

he has submitted to the authorities for purposes of assessment. The Magistrate below acquitted the accused on the ground that the entries in Ex. P. 3 which are not to be found in Exs. P. 6 and P. 13 have not been proved because none of the purchasers or sellers relating to the entries has been examined. He also stated that the account book Ex. P. 3 was seized from the possession of Anjaneyalu and not from the possession of the accused or his clerk. He therefore acquitted the accused.

(3) If the case is to be decided merely on this point I would certainly have reversed the decision of the lower court as in my opinion it has been satisfactorily proved that the books of account not only belong to the accused but that they were in the possession of the accused. But a certain point which has been overlooked in the conduct of the prosecution in the lower court has been brought to my notice by the learned advocate Mr. Rama Rao, who appears for the accused. The prosecution as already stated, is for an offence under S. 13 read with S. 15(h). Sec. 13 casts an obligation on every registered dealer and every person licensed under the Act to keep and maintain a true and correct account. A "registered dealer" has been defined as a dealer registered under the Act. A "dealer" has been defined as any person who carries on the business of buying or selling goods. This complaint can therefore be laid against the accused only if he is a registered dealer within the meaning of the term in (g) (1) of S. 2, General Sales-tax Act.

It is pointed out by Mr. Rama Rao that the complaint laid in this case refers to the accused as a dealer. In two places he is referred to only as a dealer. In the evidence also of P. W. 1, he simply states that the accused is a dealer under the Madras General Sales-tax Act. If an expression such as a "dealer" is used by the Officer concerned, he must be deemed to have used it in the sense in which it is used in the Act. The Act undoubtedly makes a distinction between a dealer and a registered dealer. Under S. 8(a) which is an amended section, every dealer whose turnover in any case is not less than Rs. 7500 shall and any other dealer may get himself registered under the Act. An obligation is therefore cast upon every dealer whose turnover is more than Rs. 7500 to get himself registered under the Act. It is only then that he can collect any amount by way of sales tax under this Act and a dealer who has not registered himself shall not collect any such amount.

Under Sec. 13, it is a registered dealer who should keep and maintain true accounts. It is therefore clear from the reading of the sections that for an offence under S. 13 the prosecution must prove that the accused is a registered dealer within the meaning of the Act. Such proof in my opinion is lacking in this case. It is pointed out by the learned Public Prosecutor that this accused is an assessee and that an assessee is one whose turnover is Rs. 10,000 or more and therefore he must be deemed to be a registered dealer. It is true that under Sec. 9(1) every dealer whose turnover is ten thousand or more in a year shall submit such return or returns relating to his turnover in the manner prescribed by the Act and then if his accounts are accepted he is assessed. Although an obligation is cast under Sec. 8(a) on every dealer whose turnover is more than Rs. 7500 to get himself registered, still the expression that is used in Sec. 9 is not a "registered dealer" but a "dealer" which will be construed in the sense in which it is used in Sec. 2(b).



It appears to me that when the amendment was introduced, the Legislature overlooked this. Every assessee has to be a registered dealer and the expression in Sec. 9 should be a registered dealer & not dealer. If an assessee has not registered himself he may be punishable for that; but not for not maintaining correct accounts, which is an obligation cast on registered dealers only. On the facts of the case, as stated already, no proof has been let in that this accused is a registered dealer within the meaning of the term of Sec. 2(g) (1) of the Act. In the absence of such proof he cannot be prosecuted under S. 13 read with S. 15(h) of the Act. I must say that the credit of taking this point goes to Mr. Rama Rao who appears for the accused. In the result the appeal is dismissed. B/V.R.B. Appeal dismissed.

**A.I.R. 1953 MADRAS 179 (Vol. 40, C. N. 59)**  
**MACK AND BASHEER AHMED SAYEED JJ.**

In re Molagan alias Same Goundan and another, Appellants.

Criminal Appeals Nos. 363 and 366 of 1951, D/- 4-4-1952.

(a) Criminal P. C. (1898), S. 172 (2) — **Defending counsel is not entitled as of right to see case diary of police — But there is no prohibition against the Court permitting in its discretion defending counsel to see portions thereof, which the Court considers that in the interest of justice, he should see and use in the defence of the case — The appropriate court is the committing Court and not the Sessions — (Case held fit one when the committing Court should have shown such portions to the defence counsel, to verify what the accused told the police as recorded there before formulating his defence): Case law Ref. (Para 17)**

Anno: Cr.P.C., S. 172 N. 5.

(b) Criminal P. C. (1898), S. 162 — **Defence cannot put question even in cross examination to police what accused told during investigation — It is however duty of Court, which has seen the police diary, to put such question to police, under its wide powers under S. 165, Evidence Act, if it thinks that the answer would benefit the accused in his defence — (Evidence Act (1872), S. 165). (Para 18)**

Anno: Cr.P.C., S. 162 N. 4; Evi. Act, 165 N. 1.

V. Rajagopalachari, E. Subramaniam and S. Chellaswami (*Amicus Curiae*), for Appellants; The Asst. Public Prosecutor, for the State.

**MACK J.:** (Cr. Ap. No. 363 of 1951): The first appellant (A. 1) is a widow aged over 45. She and her two younger brothers (A. 2 and A. 3) have been found guilty under S. 302 I. P. C. of the murder of one Srinivasa Asari, who was hacked with an aruval in several places in their village street at about 2 p.m. on the 6th of November 1950. A sister of the appellants, one Chinnammal (A. 4) was also charged with this murder but acquitted.

(2) The case is rather remarkable as this widow (A. 1), at her sessions trial, took full responsibility for cutting Srinivasa Asari with a bill-hook (M. O. 1). She appeared with this blood stained weapon at the Dharmapuri Police station 20 miles away, at 10 a.m. the following morning, where she made a statement and surrendered herself. At Dharmapuri before she appeared at the police station, she went at 8 a.m. to the house of a Brahmin lady (P. W. 4), whom there is no reason to disbelieve. She knew A. 1 very well as she used to do

cooly work in her house and other houses for several years when she was in Elumichenpatti, her native village. According to P. W. 4, A. 1 seemed very upset and told her that she had killed the man, who had murdered the husband and son of her younger sister A. 4. The Sub-Inspector enquired P. W. 4 the following day.

(3) In the meantime, Srinivasa Asari's wife (P. W. 1) made a complaint Ex. P. 1 to the village Magistrate (P. W. 3) who lived only 70 yards from the scene of murder. That was to the effect that at about 2 p.m. her husband went from their house into the street and that, immediately after he left, she heard cries and on rushing up, she found A. 1 holding her husband down by his head, while A. 2 and A. 3 cut him several times with a bill-hook. When she raised an alarm, they threatened to cut her also. P. W. 3 was sitting on his pial when, according to him, P. W. 1 came there weeping and told him about the offence. There is no reference in Ex. P. 1 to A. 4.

(4) The prosecution case against A. 1 to A. 4 rested entirely on the evidence of P. W. 1 and another eye-witness (P. W. 2) a ten-year old boy, who claims to have been by himself in his father's sundry shop and to have witnessed the tragedy. According to him, A. 1 suddenly came behind the deceased and cut him with this bill-hook on the left shoulder. Then A. 2, came running, took M. O. 1 and cut him on the head and right shoulder. Then A. 3 came from the house of A. 4, took the bill-hook from A. 2 and cut deceased on his neck and again on the abdomen. Then last came A. 4 running from her house saying "life is not yet extinct, give two more blows." P. W. 1 says when she rushed out she saw A. 1 holding the deceased by his tuft and bending his head backwards, that A. 2 took the bill-hook and cut the deceased on the head and on the right shoulder. Then A. 3 took the bill-hook and cut the deceased twice on the neck and then last A. 4 came running from her house exhorting to give two more cuts. Thereupon, A. 3 cut the deceased on the abdomen after he fell down. Then, according to her, A. 1 took the aruval from A. 3 and all went away. This witness explains her omission to say anything about A. 4 in Ex. P. 1 as being due in confusion and distress.

(5) The motive-background in the case is this. The deceased Srinivasa Asari was charged with the murder of A. 4's husband and their young son and of attempting to murder A. 4 herself by administering aconite poison, the accusation in that case being that he attempted in fact to poison the whole of A. 4's family. The deceased was acquitted on 5th September 1950 by the Sessions Judge of Salem in S. C. No. 85 of 1950. The judgment in that case shows that A. 4, who was P. W. 2 in that case, deposed that she had been on illicit intimacy with Srinivasa Asari for about three years but, when her husband came to know of it, she terminated it and would have nothing further to do with the deceased, who lived in a house, according to the plan Ex. P. 9, next to the house in which A. 4 lived along with her widowed sister A. 1. A. 1 appears to have been a widow for many years and to have been depending on the charity and bounty of her sister, A. 4 and her poisoned husband. It was less than two months after the acquittal of the deceased in that poisoning case that he was done to death in broad day light a few yards from his house. A. 2 and A. 3 lived in separate houses, marked J and H in



the plan, from where the scene of offence could not have been visible, in a separate lane and with several houses intervening.

(6) A significant fact is that A. 4 who was examined by the Sub Inspector at the inquest, had an incised wound  $1\frac{1}{2}'' \times \frac{1}{2}'' \times \frac{1}{2}''$  on the lower third of her right fore-arm according to her wound certificate, Ex. P. 5. She had quite clearly been mixed up in the tragedy. Unfortunately she was, on the basis of the evidence of P. Ws. 1 and 2, put into the position of an accused person and in both courts took refuge in a complete denial of knowledge. In the Sessions Court, she said that she got this cut on her hand while she was cutting fuel with this bill-hook. According to the evidence of P. W. 1, A. 2, A. 3 and A. 4 were in the village and readily came to the scene when called after the arrival of the Police, though A. 1 had disappeared. Unfortunately, we have the Sub Inspector (P. W. 12) saying in evidence in chief that he searched for Accused 1 to 3 during the night of 6th November 1950 but found all of them not available and that he arrested A. 2 and A. 3 at Dhandakarampatti on 12th November 1950. It is most regrettable that the Sub Inspector should have given his evidence in this misleading sequence, as on looking into the case diary, we find that he actually examined A. 2 and A. 3 and made a note of their statements to him on 6th November 1950 itself, bearing out the testimony of P. W. 1 that these two accused readily came after the arrival of the Police. It would appear from a letter, Ex. D. 5 written by the Sub Inspector Sri P. S. Krishnamurthi (P. W. 12) that he referred the case for instructions to his superior officers and only after the receipt of them arrested A. 2 and A. 3 presumably on the basis of the evidence of P. Ws. 1 and 2.

(7) The learned Sessions Judge was greatly impressed by the evidence of P. Ws. 1 and 2 and bases his conviction of A. 2 and A. 3 on their testimony, holding it was very improbable that this widow A. 1 by herself could have caused all these fatal injuries on Srinivasa Asari. The deceased was cut in ten places on the head, neck, shoulders and abdomen and also in the left hand in the region of the fingers. We find ourselves unable to accept the evidence of these two eye witnesses, P. Ws. 1 and 2. It does not explain the injury A. 4 had on her forearm and the omission of A. 4 by P. W. 1 from Ex. P. 1. It is quite possible that this boy (P. W. 2) saw something of the offence and a possible encounter between Srinivasa Asari and A. 4 which culminated in A. 1 attacking him with the bill-hook she had in her hand. The evidence of P. W. 1 suggests that the whole of this family were waiting for her husband in the street that afternoon with murderous intent and that all set upon him and killed him as soon as he emerged. Even according to the prosecution, only one bill-hook was used and it was passed from one accused to the other till, for reasons which are quite inexplicable, after A. 3 dealt with the final fatal cuts, it was handed back to A. 1 who went away with it to Dharmapuri Police station.

(8) A. 1 in the committing Magistrate's court denied having cut Srinivasa Asari, though she admitted that she appeared at the police station with the bill-hook. She said she found it lying on her way and she took it with her. In the Sessions Court, however, she took the sole responsibility for cutting the deceased, saying that

it was he who had killed her sister's husband and son, who had been maintaining and protecting her after her husband died. She further said that the deceased had been proclaiming in the village that he would file a suit for damages for malicious prosecution in the poison case in which he was acquitted. There can be no doubt that this widow has been most reluctant even to attribute anything to A. 4 who was undoubtedly present at the time of this attack on the deceased, as evidenced by the injury on her hand. We are inclined to the view that the deceased when he came out of his house met A. 4, and it was during the passage of abuse between them that A. 1 rushed out with an aruval and later hacked him. We do not think there is anything improbable in A. 1 having caused all the fatal injuries on the deceased with M. O. 1, which she may have had in her hands cutting fuel, as she stated in the committing court.

(9) A. 1 had a very powerful motive for hatred against the deceased, whom she doubtless held responsible, despite his acquittal, for the murder of her sister's husband, who had been supporting her. After his death, these two widowed sisters lived together unfortunately in a house very near that of the deceased and after his return from jail, A. 1's feelings towards him were doubtless, as she has described, very strong indeed. We can see nothing improbable in A. 1 losing all control over herself with this aruval in her hand, on probably seeing the deceased engaged in some altercation with A. 4, seeing red and then hacking him to death. We are unable to accept the Sessions Judge's appreciation of the evidence of P. Ws. 1 and 2, which seems to us extremely artificial and designed to bring in A. 1 to A. 4 and to give them each some unnatural part. That A. 1 appeared at the Dharmapuri police station 20 miles away with this blood-stained aruval and there presumably made a confession, which unfortunately is not admissible in evidence is an outstanding feature in this somewhat remarkable case.

(10) We have no hesitation in setting aside the convictions of A. 2 and A. 3, who, we are satisfied, had nothing to do with the attack on the deceased. The evidence shows that the investigating Sub Inspector himself was very doubtful about charging A. 2 and A. 3 and all we can say is that it is very unfortunate that he was instructed to lay the charge-sheet against all the four accused. After perusing the case diary, we have no hesitation in expressing the view that A. 4, who gave evidence at the inquest, should have been a prosecution witness and not in the dock.

(11) The conviction of A. 1 under S. 302, I. P. C., is however correct and is upheld. There can be no doubt, as she has pleaded at her trial that it was she who caused all these injuries on Srinivasa Asari with this bill-hook (M. O. 1). In the state of the legally admissible evidence, it is quite impossible for us to find exactly the true circumstances under which A. 1 lost all control and attacked the deceased. No plea of grave and sudden provocation has been taken, with the exclusion of A. 4 from the witness box and her being quite unjustly put into the dock as one of the accused.

(12) Before dealing with the question of sentence, now that the conviction has been dealt with on the evidence legally admissible, we would like to consider from the revelations in this concrete case the present practice based it



is said on existing law of withholding from defending Counsel copies of the statements made by accused persons in the course of investigation. We would like to extract here the record in the case diary of what A. 4 examined as P. W. 8 at the inquest said.

"P. W. 8 came to the spot at the time of inquest and I examined her and she stated that while she was in the street, the deceased who came from north abused her. She also abused him. In the meanwhile A. 1 who was in her house to start for bringing fuel with a bill-hook came there and gave a cut on the shoulder of the deceased. The deceased Srinivasa Asari caught hold of the bill-hook and she attempted to snatch the same and due to that she sustained injury on hand. Then A. 1 her elder sister, snatched the bill-hook and cut the deceased on his head, stomach, neck etc., places and then A. 1 went towards the south with the bill-hook. She (P. W. 8) went to her house."

Then again, there is the following extract from the case diary also dated 6th November 1950.

"I sent for A. 2 and A. 3 noted in the margin and they came to the spot.

I questioned A. 2 and he denied the offence and added that he was grazing his cattle in the fields and learnt about the occurrence and ran to the spot and found the deceased, and learnt that A. 1 cut the deceased with a bill-hook and that he (deceased) died.

A. 3 denied the offence and said that while he was grazing the cattle in the field he learnt about the occurrence at about 4 p.m. and came to the spot and found the deceased, learnt that A. 1 cut the deceased with a bill-hook and that the deceased died.

(13) There can be no doubt, in our opinion, that the defence in this case has been greatly handicapped for want of knowledge by defending counsel as to precisely what A. 2, A. 3 and A. 4 told the police when they were questioned. Mr. Rajagopalachari was in complete ignorance of these diary extracts when he read them out to him &, after recovering from his initial surprise, had no hesitation in saying that a wholly different line of defence should have been adopted in this case, both in the committing court and in the sessions court. We have heard arguments by Mr. Rajagopalachari and also the learned Public Prosecutor on the expediency, in the light of the revelations in this case and also in other cases of which we have had recent experience, of furnishing defending counsel, on request, with copies of statements made by accused persons to the investigating police, as recorded in the case diary.

(14) Our attention has been drawn to a Full Bench decision of four Judges — 'Queen Empress v. Arumugham and others', 20 Mad 189 which considered in 1897 the question whether an accused person was entitled, while on remand, to a copy of the Police charge-sheet. Collins C. J. and Benson J. held that charge sheets were not public documents within the meaning of S. 74, Evidence Act, and that an accused person is not entitled before trial to copies. Collins C. J. however specifically said that he expressed no opinion whether an accused can call for police reports and the charge sheet during the progress of the trial. Shephard J. who made the reference to the Full Bench with Subramania Aiyar J. held that an accused per-

son was entitled to a copy of the charge sheet before the trial but not of other police reports. Subramania Aiyar J. was of the opinion that an accused was entitled not only to copies of the charge sheet but of all police reports also, before the trial began. It was not however till the year 1921 that is 24 years later that an accused person became entitled to copies of charge sheets before the trial began, by the enactment of S. 173(4) of the Cr. P. C. which gave an accused person this statutory right.

(15) The record in the case diary containing the substance of what each accused said to the Police when first interrogated is beset with a special difficulty in view of the Full Bench decision in — 'In re Syamo Maha Patro', 55 Mad 903 (FB) which brought within the ambit of S. 162 Cr. P. C. statements made by accused persons to the police in the course of an investigation. Reilly J. delivering the judgment of the Full Bench of three learned Judges by which we are bound, gave expression to the sharp differences of opinion on this point between Judges in our own High Court and also other High Courts. At p. 918 he observed that of the six Judges of the Madras High Court, who held the view that S. 162 Cr. P. C. applied to statements of accused persons, Waller J. had since altered his view. There is reference in the judgment of Reilly J. to a wealth of case law, much of it conflicting. He referred to the Full Bench decision of five Judges of the Rangoon High Court, in — 'King Emperor v. Maung Tha Din', 4 Rang. 72 F. B. which held that S. 162, Cr. P. C. applied to oral as well as written statements. In considering the decision in — 'Jagwa Dhanuk v. King Emperor', 5 Pat 63, a Bench decision by Mullick J. and Jwala Prasad J., which took the view that S. 162, Cr. P. C. did not prohibit the admission of statements made by accused persons to the Police, provided they were not confession, Reilly J. considered the arguments pro and contra. One argument that the application of S. 162, Cr. P. C. to a statement made by accused persons would seriously prejudice them by shutting out evidence that they had made exculpatory statements to the Police at a very early stage, Reilly J. met as follows.

"I think it is enough to say that the learned Judge in his anxiety to prevent evidence of statements which may be of help to the accused from being shut out has forgotten how often statements made by the accused to the Police may tell most seriously against them, which is the reason why the prosecution wishes to use the statements of the accused in the present case."

In the great majority of cases, which took the view that statements made by accused persons to the Police were shut out in evidence by S. 162 Cr. P. C. it was the prosecution who wanted such statements to be admitted which while not amounting to confessions nonetheless supplied evidence against the accused. No doubt, as Reilly J. has observed, a larger number of accused would be benefited by the total exclusion of such evidence, and it would only be a comparatively small number of accused persons who in particular cases will derive some benefit by the elucidation of what they told the Police in the first instance.

(16) The present state of the law as laid down in the Full Bench decision lays a heavy



responsibility on trial courts, and as it appears to me justice can only be done in cases such as the present case by resort to S. 172(2) Cr. P. C. which gives full discretion to a criminal court to call for police diaries which they "may use .....not as evidence in the case, but to aid it in such inquiry or trial". Under this section also "neither the accused nor his agents shall be entitled to call for such diaries nor shall he or they are entitled to see them merely because they are referred to by the court". The accused, therefore, are not entitled as of right to see any portion of the diaries that they may wish to see. If however a court on a perusal of the diary finds something there, which helps the accused to establish his innocence or to mitigate his offence, what is a court to do? The answer is by no means easy, and procedure will have, in the interests of justice, to depend on the facts of each case. I have myself, in about 20 years experience as a trial Judge in murder cases, never hesitated on perusing a case diary and finding there something helpful to an accused person in showing that portion of the diary to the defending counsel. The learned Public Prosecutor, Mr. Rangaswami Aiyangar, who has had a great deal of experience in defending criminals, has frankly stated that he has also been afforded a similar courtesy by some Judges before whom he has appeared, but he is unable to point to any specific section of law under which that indulgence, if it may be called so, has been shown. I have myself justified that practice on grounds of simple and natural justice, as a proper user of the case diary as an aid in the enquiry or trial under S. 172(2) Cr. P. C. Personally, I am quite unable to see how anything favourable to the accused discovered in a case diary can be utilised by the court without disclosure to defending counsel. He is not entitled as of right to see the case diary but, as I read S. 172(2) there is no prohibition contained therein against the court permitting in its discretion defending counsel to see any portion of the case diary, which the court considers in the interest of justice he should see and use in the defence of the case.

(17) In a number of cases, which have come up before us, and the present is a concrete one, we have found defences formulated in the committing court more often than not, instructed by village lawyers and intermediaries who, in the unfortunate conditions prevailing in rural areas unserved by any channel of controlled legal service, allow their imaginations to run riot, a process which often continues in the Sessions court and sometimes even up to this Court, without any regard to the statement made by the accused when first questioned by the Police. There is an ordinary presumption that an accused person will tell his lawyer what he told the Police in the first instance. But in prevailing conditions, the defending advocate is often completely in the dark and is far from sure what exactly his client has told the Police in the first instance. An accused person in the state of the law, as it stands, has no right 'per se' to obtain copies of his statements to the Police until the law is amended. But we can see no legal impediment to the committing court permitting in its discretion and in appropriate cases defending counsel at his request to look into a case diary to verify what the accused told the Police as recorded there, before formulating his defence, under S. 172(2) to aid the court in the enquiry or trial. It must

be made clear that such a permission cannot be claimed by the accused as a matter of right. It is of comparatively little use for defending Counsel being permitted by the Sessions Judge to look into the case diary at a belated stage of the trial only when the learned Judge himself on a perusal of it finds something of great use to the accused. It is necessary for responsible defence from the start that in cases such as the present, defending counsel should know what the accused told the Police in the first instance. We have not come across any more appropriate concrete case than the present in which this course should have been 'ab initio' adopted.

(18) There is a further aspect of this matter, viz., how a statement made by an accused person to the Police, if to his advantage, can be used in the trial. It does not appear possible in view of the Full Bench decision in — 'In re Syamo Maha Patro', 55 Mad 903 F. B. for a defending advocate even in cross-examination to ask a Police officer whether an accused at the very outset told him something self-exculpatory or for instance set up an alibi which may prove his innocence. Reilly J. referred to the decision in — 'Sheik Kalesha in re', in which Jackson and Cornish JJ. held that a statement made by an accused to a police officer on which the defence wished to rely was shut out by S. 162, Cr. P. C. In these rare cases, a court which has a case diary in its possession, at the request of the defending counsel, would we think be perfectly justified in putting a question to a Police officer to elicit what an accused told him purely in the interests of the accused, within its very wide powers under S. 165 of the Evidence Act, which permits a Judge to ask any question he pleases, in any form, at any time, of any witness about any fact relevant or irrelevant. There is in the present state of the law as regards the admissibility of statements made by accused persons to the Police, a heavy responsibility on courts in the user of case diaries under S. 172(2), Cr. P. C. and on public prosecutors to bring to the notice of the trial Judge anything in the case diary favourable to the accused. Had the learned Sessions Judge perused the case diary in the present case, we have no doubt that he would have cleared up a regrettable and misleading obscurity consequent upon the Sub Inspector (P. W. 12) deposing to his inability to find A. 2 and A. 3 that night and his not disclosing the fact that he had already examined them earlier that day. We must also express our great surprise that A. 4 in both the committing court and the trial court adopted the line of defence that she knew nothing at all in view of the record of her evidence as P. W. 8 at the inquest.

(19) Taking all circumstances into consideration in the matter of sentence, we consider it a fit case, while confirming the sentence of transportation for life passed on this widow (A. 1) really on her plea of guilty, we would be justified in making a recommendation to Government for commutation of her sentence to seven years' rigorous imprisonment under S. 401, Cr. P. C. satisfied as we are that, though she inflicted these fatal injuries on Srinivasa Asari, she and her family had sustained very grave and sustained provocation at his hands and that he gave her sister A. 4 also grave provocation in an altercation with her that afternoon.



(20) We directed the release of accused 2 and 3 on 25th March 1952 at the conclusion of arguments.

B/R.G.D.

Order accordingly.

A.I.R. 1953 MADRAS 183 (Vol. 40, C. N. 60)

SUEBA RAO J.

Doddi Dorayya, Appellant v. Bathula Adinarayana, Respondent.

Second Appeal No. 167 of 1950, D/- 10-4-1952.

**Debt Laws — Madras Agriculturists' Relief Act (4 of 1938), S. 28 — Rules under — Rr. 2, 4, 7, 9 and 10 — Proceedings under R. 2 are not of summary nature but are in nature of suit — Order therein that person is not agriculturist — Order operates as res judicata in subsequent suit by such person for possession alleging that he was an agriculturist — (Civil P. C. (1908), S. 11) — ILR 1946 Mad 566 Foll. (Para 3)**

Anno: C. P. C., S. 11 N. 28.

S. Ramamurti, for Appellant; E. Venkatesam and E. L. Bhagiratha Rao, for Respondent.

**JUDGMENT:** This second appeal arises out of O. S. No. 68 of 1947 on the file of the District Munsif's Court, Vizagapatam, a suit filed by the appellant to direct the defendants to put him in possession of the plaint schedule property and for a declaration that the entire amount due under the usufructuary mortgage dated 22nd July 1873 was completely discharged.

(2) To appreciate the contentions of the parties, it is enough to state the relevant facts. The plaintiff, alleging to be the owner of the equity of redemption and also the purchaser of two-thirds of the mortgage interest in the aforesaid mortgage, filed the said suit for redemption and for possession of the plaint schedule properties. The plaintiff's case is that he is an agriculturist and that, if the provisions of the Madras Agriculturists' Relief Act are applied to the debt, the debt would be discharged. The defendants contended, inter alia, that the plaintiff is not an agriculturist and that the suit is premature. They also pleaded that the plaintiff is precluded from raising the plea that he is an agriculturist by reason of the order in the application taken by him under the provisions of the Madras Agriculturists' Relief Act.

The learned District Munsif held that the decision in the earlier proceedings would not be a bar for the maintainability of the suit as, according to him, the plaintiff's right to file a suit was expressly reserved. The learned District Munsif and the learned District Judge in appeal held that the order in the earlier proceedings would operate as res judicata. They also held that the suit would be premature as, if the debt was not scaled down, the mortgage debt would not be discharged. The plaintiff preferred the above second appeal.

(3) Mr. Ramamurthi, learned counsel for the appellant, contended before me that the view of the courts below on the question of res judicata is unsound. To appreciate his contention, it is necessary to notice the scope of the previous proceedings and the order made therein. As aforesaid, the plaintiff filed O. P. No. 43 of 1941 on the file of the Court of the District Munsif, Vizagapatam, for a declaration of the debt due by him. The said application was filed under Rule 2 of the rules relating to ap-

plications to civil courts for scaling down of non-decreed debt. The District Munsif raised the following issues:

1. Whether the petitioner and his vendor are agriculturists?
2. Whether the properties mortgaged in 1873 and those purchased by the petitioner are the same?
3. Whether this petition is in time?
4. Whether the debt is not liable to be scaled down? and
5. If the debt is liable to be scaled down, what amount, if any, is due thereon?

The learned District Munsif held on issue 1 that the petitioner and his vendor were agriculturists, on issue 2 that the properties mortgaged in 1873 and those purchased by the petitioner are the same, on issue 3 that the petition was in time, on issue 4 that the debt was liable to be scaled down and on issue 5 that the amount due to the respondent was only a sum of Rs. 112-4-0 with interest at 6½ per cent per annum from 1st October 1937 till payment. The respondent preferred an appeal to the District Court, Vizagapatam. The learned District Judge definitely held that he was not prepared to hold on the evidence that the petitioner was an agriculturist entitled to present the petition and expressed the view that on that short ground the petition should have been dismissed. In regard to the other question raised in that petition he also expressed the view that that matter could only be decided in a regular suit. The appellant preferred an appeal against the order of the District Judge to the High Court in A. A. A. O. No. 361 of 1943. Wadsworth J. dismissed the appeal. But in dismissing the appeal he observed as follows:

"The appellant has not satisfied the lower appellate court either that he is an agriculturist or that he is the owner of the whole of the mortgagor's interest. It does not appear to have been either averred or proved that the persons, who were the titular mortgagors when Madras Act IV of 1938 came into force were agriculturists ..... In such a case, the claimant should be required to prove strictly his right to the relief which he seeks. The appeal is dismissed with costs."

On a perusal of the judgments of the District Judge and of Wadsworth J., I find it very difficult to accept the contention of the learned counsel for the appellant that the District Judge as well as Wadsworth J. left open the question whether the plaintiff is an agriculturist or not to be decided in a regular suit. The District Judge specifically held that the plaintiff was not an agriculturist. Wadsworth J. agreed with him and pointed out that it was not averred or proved that the persons who were the titular mortgagors when Madras Act IV of 1938 came into force were agriculturists. In dismissing the appeal, the learned Judge did not expressly reserve the other questions to be decided in a suit. But it is not necessary to decide whether the courts on the previous occasion reserved questions other than the question whether the plaintiff is an agriculturist or not to be decided in a regular suit. It is manifest that the question whether the plaintiff is an agriculturist has been finally decided against the plaintiff.

In those circumstances, the next question that arises is whether the said finding would operate as res judicata in the present proceedings. The question viz., under what circumstances the decision in a petition would ope-



rate as *res judicata* in a regular suit has been decided by Somayya and Yahya Ali JJ. in — 'Arikapudi Balakotayya v. Yadlapalli Nagayya', ILR 1946 Mad 566. There, the question was whether a decision of a District Court under S. 84(1) of the Madras Hindu Religious Endowments Act negating the contentions of the applicants that they and their forefathers were hereditary trustees of the temple, would be *res judicata* in a suit filed by them for a declaration that the office of trusteeship was hereditary in their family.

The learned Judges held that the doctrine of *res judicata* is not confined to decisions in suits but applies even to decisions rendered in proceedings, which are not suits. To ascertain whether a proceeding is summary or not, they have laid down various tests and held that if the proceeding is not a summary one, a decision therein would be *res judicata* if the conditions laid down in S. 11 C. P. C. are complied with. They negatived the contention that a proceeding under S. 84(1) of the Madras Hindu Religious Endowments Act is summary in nature. The fact that the District Court is bound to take evidence, should act on the materials placed before it by parties, should decide substantial questions affecting rights of parties and similar characteristics were considered as indicating that the proceedings were not summary in their nature.

In the present case, the object of the rules relating to applications to civil courts for scaling down of non-decreed debts is apparent. They were intended to provide for an expeditious cheaper remedy for ascertaining the debt due to the creditor. The rules would enable the creditor to institute a suit for recovery of the amount declared due to him and thereby to avoid excessive court fees and invite objections from the debtors. The rules also would enable a debtor to pay off the debt scaled down instead of involving himself in unnecessary and costly litigation. To effectuate this purpose, the rules provide for an enquiry wherein the parties are enabled to adduce the entire evidence available to them. The particulars that are to be given under rule 4 of the rules are those that are found in a plaint.

Under rule 7, on the date originally fixed under rule 6, or on any subsequent date to which the application may be adjourned by the court, the court shall after taking such evidence or making such enquiry as it may consider necessary, pass such order on the application as it thinks fit. This rule, therefore, enables parties to adduce necessary evidence. Rule 9 says that the order of the court declaring the amount of the debt under rule 7 shall be subject to appeal and second appeal as if it were a decree in an original suit. Under rule 10, the courts having jurisdiction under these rules shall be the courts which would have jurisdiction to entertain suits for the recovery of the debts as unscaled.

It is therefore clear from the aforesaid rules that they provide for pleadings, prescribe the same form in which a suit would have to be filed, enable the parties to adduce evidence and provide for an appeal, and second appeal as if the order made was a decree. I cannot hold that the proceedings are of a summary nature. I therefore hold following the decision in — 'Arikapudi Balakotayya v. Yedlapalli Nagayya', ILR 1946 Mad 566 that the order made in A. A. A. O. No. 361 of 1943 would operate as *res judicata* and preclude the plaintiff from raising the plea that he is not an agri-

culturist over again. No other point was argued.

(4) In the result the appeal fails and it is dismissed with costs. No leave.

B/V.R.B.

Appeal dismissed.

# A.I.R. 1953 MADRAS 184 (Vol. 40, C. N. 61)

PANCHAPAKESA AYYAR J.

Nagu Thevar and others, Petitioners v. Periakaruppa Thevan, Respondent.

Criminal Revn. Case No. 1145 of 1950 and Cri. Revn. Petn. No. 1074 of 1950, D/- 10-8-1951.

**Criminal P. C. (1898), S. 203 — 'Sufficient ground for proceeding' — Complaint prima facie disclosing offence of cheating — Dismissal under S. 203 is not proper.**

The complainant alleged that the accused had cheated him by asking to admit payment of the consideration before the Sub-Registrar on a promise to pay the consideration at once as soon as the document was registered and in pursuance of it he made the statement and got the document registered and parted with valuable properties which he would not have done but for such deceit. The magistrate dismissed the complaint under S. 203, Criminal P. C., as disclosing a civil matter.

Held that the order of dismissal under S. 203 was not justified as it was not a mere case where the consideration was promised to be paid later on, but finally not paid. The order of dismissal should, therefore, be set aside and the complaint inquired into in the interests of justice: 43 MLJ 535 and Cr RC No 925 of 1946 Dist. (Para 1)

Anno: Cr. P. C., S. 203 N. 5.

T. S. Vaidyanatha Iyer, for Petitioners; C. K. Venkatanarsimham, for Respondent; The Public Prosecutor, for State.

**ORDER:** This is certainly not a case for my interfering in revision with the learned Sessions Judge's order setting aside the order of dismissal by the Magistrate. Here a deceit was alleged by the complainant, namely, that he was asked by the accused to admit payment of the consideration before the Sub-Registrar on a promise to pay the consideration at once as soon as the document was registered and that he registered it and made that statement and parted with valuable properties which he would not have done but for such deceit. It is not a mere case where the consideration was promised to be paid later on, but finally not paid. This postponement of payment in this case relates to the payment promised at a panchayat subsequent to the alleged cheating. So the witnesses regarding the alleged cheating ought to have been heard, and it was not a case for dismissal under S. 203, Cr. P.C. as a civil matter. The learned counsel for the petitioner relied on the rulings in — 'Krishna Pillai and others', 43 MLJ 535, and in — 'Cr. R. C. No. 925 of 1946. I have looked into them. They will not apply to a dismissal of a case under S. 203, Cr. P. C. in a case like this. Certainly where an alleged cheating by a representation as in this complaint, has not been properly understood and gone into by the trial Magistrate, the interests of justice and public interests require that it be gone into. So the learned Sessions Judge's order was perfectly



correct. This petition deserves to be and is hereby dismissed.

B/K.S.

Revision dismissed.

**A.I.R. 1953 MADRAS 185 (Vol. 40, C. N. 62)**

**RAJAMANNAR C. J. AND VENKATARAMA AYYAR J.**

Sri Ravu Janardhana Krishna Ranga Rao Bahadur, Petitioner v. The State of Madras, represented by the Collector of Srikakulam district at Srikakulam and others, Respondents.

Civil Misc. Petn. No. 6554 of 1951, D/- 14-4-1952.

**Tenancy Laws — Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), Ss. 3, 41, 50 — Impartible estates — Compensation paid under Ss. 41 and 50 — Right of co-parceners to share — (Hindu Law — Impartible Estates) — (Madras Impartible Estates Act (2 of 1904), S. 9).**

In the case of an estate to which the incident of impartibility attaches by custom, custom supersedes the general Mithakshara law excepting in the matter of devolution of the property by right of survivorship. The rights which a coparcener acquires by birth in the joint family cannot be claimed in the estate and the estate remains clothed with the incidents of separate and self-acquired property of the holder. The estate is not held as a coparcenary property. (Paras 7, 9)

When such an estate is acquired by the Government and compensation is paid the compensation received retains the incident of impartibility. It is not correct to say that the customary incident of impartibility attached to the estate lasts only so long as it remains in the form of immovable property. The principle that conversion would not alter the nature of the estate is universal. (Paras 6, 12)

The fact that the estate has been included in the Schedule to the Madras Impartible Estates Act, 1904 only means that its customary incident of impartibility is recognised and not that it has become an impartible estate by virtue of such inclusion and therefore the repeal of that Act cannot, in any way, affect its character. (Para 6)

Since only persons who have an interest in the property which is acquired are entitled to a share in the compensation paid on the acquisition of the property by the Government the coparceners who have no right either to the estate or the compensation paid on acquisition cannot claim a share in the compensation paid under Ss. 41 and 50 of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948. (Paras 7, 10)

In any event, the material time for the purpose of determining the rights of parties would be the date of the notification by virtue of which the estate is statutorily transferred to the Government. On that date the coparceners cannot be deemed to have a subsisting and real interest in the estate, as their right to get maintenance according to the custom embodied in S. 9, Madras Impartible Estates Act is not attributable to any present interest in the estate and their right to succession in certain contingencies cannot be considered as

a right to share in the property during the life time of the holder. Therefore where they have no right to a share in the corpus of the estate on the date of notification under this Act, they cannot claim that they will have such a right after the notification and after the estate had vested in the Government. Case law referred.

(Para 13)

K. Rajah Ayyar, D. Srinivasa Sarma and C. H. Suryanarayana Rao, for Petitioner; The Advocate General for the Government Pleader, N. Rajagopala Iyengar and A. Kupuswami, for Respondents.

**ORDER:** The petitioner is the younger brother of the Zamindar of Bobbili, the third respondent. In the affidavit filed in support of the petition he states that he is a junior coparcener of the joint family which owned the ancient and impartible estate of Bobbili which was notified under the Madras Estates (Abolition and Conversion into Ryotwari) Act of 1948 with effect from 7th September 1949, that on the date when this estate was so notified the joint family consisted of the petitioner, the third respondent, the fourth respondent the son of the third respondent and the male descendants of the petitioner himself, that after the estate was taken over by the Government the Government deposited in the office of the Estates Abolition Tribunal, Vizianagaram (second respondent) on 30th March 1950 a sum of Rs. 8,17,445 towards advance compensation under S. 41 of the Act and a further sum of Rs. 58371 under S. 50 of the Act on 14th July 1950, that on and from the notified date the Madras Impartible Estates Act, 1904, should be deemed to have been repealed in its application to this estate under S. 66 of the Act, and that having regard to the rights of the parties and applying the general law ignoring the rule of impartibility and the rule of primogeniture which is incidental thereto he is entitled to a half share of the compensation money remaining after the satisfaction of the claims, if any, of the genuine creditors of the estate and of the maintenance holders.

(2) The petitioner impugns the validity of the Act providing for a distribution of the compensation amount in the case of certain impartible estates. The following are such provisions:

"45(1) In the case of an impartible estate which had to be regarded as the property of a joint Hindu family for the purpose of ascertaining the succession thereto immediately before the notified date, the following provisions shall apply.

(2) The Tribunal shall determine the aggregate compensation payable to all the following persons, considered as a single group —

(a) the principal landholder and his legitimate sons, grandsons and great grandsons in the male line living or in the womb on the notified date including sons, grandsons and great grandsons, adopted before such date (who are hereinafter called 'sharers'); and

(b) other persons who, immediately before the notified date, were entitled to maintenance out of the estate and its income either under S. 9 or 12 of the Madras Impartible Estates Act, 1904, or under any decree or order of a court, award, or other instrument in writing or contract or family arrangement which is binding on the principal landholder (who are hereinafter called 'maintenance-holders').



Provided that no such maintenance-holder shall be entitled to any portion of the aggregate compensation aforesaid, if, before the notified date his claim for maintenance or the claim of his branch of the family for maintenance, has been settled or discharged in full ...

(4) The portion of the aggregate compensation aforesaid payable to the maintenance holders shall be determined by the Tribunal and notwithstanding any arrangement already made in respect of maintenance whether by a decree or order of a court, award or other instrument in writing or contract or family arrangement, such portion shall not exceed one fifth of the remainder referred to in sub-sec. (3), except in the case referred to in the second proviso to S. 47, sub-sec. (2).

(6) The balance of the aggregate compensation shall be divided among the sharers, as if they owned such balance as a joint Hindu family and a partition thereof had been effected among them on the notified date.

47(1). Every maintenance-holder entitled to a portion of the compensation under S. 45 shall also be entitled to the grant of a ryotwari patta in respect of a portion of the lands referred to in S. 12 or 14, as the case may be.

(2) The Tribunal shall determine the total extent of the lands in respect of which ryotwari pattas may be granted to the maintenance-holders and divide the same among them, and in doing so, the Tribunal shall, unless for reasons recorded in writing it considers that it is inappropriate to do so, having regard to the considerations set forth in S. 45, sub-sec. (5) and the manner in which the compensation payable to the maintenance-holder has been or may be apportioned among them under that sub-section:

Provided that the total extent of the lands granted to all such maintenance-holders shall not exceed one-fifth of the extent of the lands in respect of which a ryotwari patta may be granted under S. 12 or 14:

Provided further that where it is found to be inconvenient or impracticable to grant any such lands, or to grant any such lands to the full extent to which the maintenance-holder may be regarded as entitled, whether on the ground that such a grant will result in the creation of an uneconomic holding or for any other reason, the share of the compensation awarded to the maintenance-holder may be increased by such amount as the Tribunal may consider reasonable;

(3) The lands in respect of which a ryotwari patta may be granted under S. 12 or 14, after excluding any lands which may be granted to maintenance holders under sub-sec. (2) shall be divided among the sharers, as if they owned such lands as a joint Hindu family & a partition thereof had been effected among them on the notified date."

(3) S. 50 provides for interim payments.

(4) The validity of these sections is impeached on several grounds, viz., that it was not competent of the Provincial legislature to pass any law on that subject-matter, because it is not covered by any entry in the State Legislature List, or Concurrent List that these provisions are on the basis of an arbitrary classification offending against Art. 14 of the Constitution and that the scheme of distribution

interferes with the vested rights of the other members of the family like the petitioner. Mr. Rajah Aiyar, however, pressed upon us at the outset the position that the compensation amount represents the equivalent of an ancestral estate to which the incident of impartibility can no longer attach after its conversion into money and after the repeal of the Madras Impartible Estates Act. Having taken the place of ancestral property and having lost the special feature of impartibility the compensation amount would be partible as between the persons having the right of survivorship based on the right by birth. So the argument ran. It is on this point we heard the matter fully, and in our opinion the petition can be disposed of on the decision which we have arrived at on this point.

(5) The argument of Mr. Rajah Aiyar, learned counsel for the petitioner, was that with the taking over of the estate by the Government and the repeal of the Impartible Estates Act so far as this estate is concerned and the conversion of the immovable property which constituted the impartible estate into money, namely, the compensation payable by the Government, the incident of impartibility which attached to the estate should be deemed to have ceased and therefore the compensation amount should be treated as the property of the joint family consisting not only of the third respondent and his son, the fourth respondent, but also the petitioner and his male issue.

(6) We are unable to follow his argument that the repeal of the Madras Impartible Estates Act brought about an extinguishment of the incident of impartibility. So far as the Bobbili estate is concerned, it does not become an impartible estate by virtue of its inclusion in the schedule to Madras Act II of 1904. It was an ancient impartible estate and the utmost that could be said of its inclusion in the schedule is that its impartibility was recognised. Nor are we able to appreciate his argument that the custom of impartibility which admittedly attached to the Estate lasted and could last only so long as the estate was in the shape of immoveable property, and in particular landed property, and that as soon as the estate or a part of it is acquired by the Government the compensation amount payable for such acquisition must be deemed to be not impressed with the custom of impartibility. Learned counsel was unable to cite any authority even remotely bearing on the question.

(7) It is obvious that only persons who have an interest in the property which is acquired are entitled to a share in the compensation awarded on the acquisition of the property by the Government (See Halsbury's Laws of England, 2nd Edn, Vol VI at page 39). The real question in this case is whether the petitioner and persons like him can be said to have any interest in the estate since acquired. The nature and incidents of an impartible estate have come up for discussion and authoritative exposition by their Lordships of the Judicial Committee on several occasions. It suffices to refer to the statement of the law by Sir Dinshaw Mulla in — '*Shiba Prasad Singh v. Prayagkumari Debee*', 59 Cal 1399 P. C.

"Impartibility is essentially a creature of custom. In the case of ordinary joint family property, the members of the family have (1) the right of partition, (2) the right to restrain alienations by the head of the family except for necessity, (3) the right of main-



tenance, and (4) the right of survivorship. The first of these rights cannot exist in the case of an impartible estate, though ancestral, from the very nature of the estate. The second is incompatible with the custom of impartibility as laid down in 'Satraj Kuari's case', 10 All 272 P. C. and the first Pittapur case, 22 Mad 383 P. C. and so also the third as held in the — 'Second Pittapur case', 41 Mad 778 PC. To this extent the general law of the Mitakshara has been superseded by custom and the impartible estate, though ancestral, is clothed with the incidents of self-acquired and separate property. But the right of survivorship is not inconsistent with the custom of impartibility. This right, therefore, still remains, and this is what was held in — 'Bajinath's case', 43 All 228 PC. To this extent the estate still retains its character of joint family property, and its devolution is governed by the general Mitakshara law applicable to such property. Though the other rights, which a coparcener acquired by birth in joint family property no longer exist, the birth right of the senior member to take by survivorship still remains."

(8) Subsequent to this statement of the law there were certain observations made by the Privy Council in — 'Collector of Gorakhpur v. Ram Sundar Mal', 56 All 468,

"One result is at length clearly shown to be that there is now no reason why the earlier judgments of the Board should not be followed, such as for instance the — 'Chellapalli case, Raja Yarlagadda Mallikarjuna Prasada Nayudu v. Raja Yarlagadda Durga Prasada', 24 Mad 147, which regarded their right to maintenance, however limited, out of an impartible estate as being based upon the joint ownership of the junior member of the family, with the result that these members holding zamindari lands for maintenance could still be considered as joint in estate with the zamindar in possession."

(9) In a later case, namely, — 'Commissioner of Income-tax Punjab v. Krishna Kishore', 23 Lah 1, their Lordships, after an elaborate review of all the important decisions of the Board bearing on the point, observed that the law as declared in — 'Shibprasad Singh v. Prayag-kumari Debee', 59 Cal 1399 PC, had not been unsettled by the decision in — 'Collector of Gorakhpur v. Ram Sundarmal', 56 All 468. In — 'Anant Bikappa v. Shankar Ramchandra', ILR 1944 Bom 116, their Lordships said:

"Now an impartible estate is not held in coparcenary (— 'Rani Satraj Kuari v. Deoraj Kuari', 10 All 272 PC) though it may be joint family property. It may devolve as joint family property or as separate property of the last male owner. In the former case it goes by survivorship to that individual, among those male members who in fact and in law are undivided in respect of the estate, who is singled out by the special custom, e.g., lineal male primogeniture. In the latter case jointness and survivorship are not as such in point; the estate devolves by inheritance from the last male owner in the order prescribed by the special custom or according to the ordinary law of inheritance as modified by the custom."

(10) In view of the above pronouncements of the Privy Council learned counsel for the petitioner could not succeed in convincing us that the petitioner had any right to the impartible

estate or the compensation paid on its acquisition. The petitioner undoubtedly is entitled to maintenance both according to the custom and according to the statutory provisions embodied in S. 9 etc., of the Madras Impartible Estates Act. But his right to maintenance is not attributable to any present interest in the estate.

(11) Mr. Rajah Aiyar was unable to cite any authority for the position that the custom of impartibility with all its incidents will cease to apply once the estate is converted into money. On the other hand, when proceedings under the Land Acquisition Act have been taken to acquire a part of an impartible estate the proceeds have been regarded as money belonging to a person not capable of alienating the land acquired (see — 'Special Deputy Collector, Ramnad v. Rajah of Ramnad', 58 Mad 442). It is difficult to follow the argument that the nature of an estate in any immovable property is changed once it is converted into money.

(12) Taking the obvious case of a Hindu widow holding immovable property with the limitations of a widow's estate, it cannot be said that if the Government acquired that property the compensation paid therefor would not be subject to the limitations of a widow's estate and that the widow will have a right of absolute disposal over the compensation. In — 'Ramachandrarao v. Ramachandrarao', 45 Mad 320 PC, their Lordships of the Judicial Committee refer to the land acquired by Government for which compensation had been deposited as a "piece of land represented by a sum of money paid into court". The principle that conversion would not alter the quality or nature of the estate is of universal application. In England when money is paid into court as the produce of real estate converted by compulsory powers it is treated as impressed with the quality of real estate (Vide White and Tudor's leading Cases on Equity, 9th Edn., page 325).

(13) In any event, we are of opinion that the petitioner cannot be deemed to have had any interest in the estate at the time of the notification. The material time for the purpose of determining the rights of parties would be the date of the notification by virtue of which the estate is statutorily transferred to the Government. The simple question is, at that point of time did the petitioner have any subsisting and real interest in the estate? The answer must be none except his right to get maintenance in accordance with the custom embodied in S. 9 of the Madras Impartible Estates Act. Of course, the petitioner will have his right of succession in certain contingencies. But one certainly cannot treat this right as a right to a share in the property during the lifetime of the holder for the time being. If at the time of the notification, the petitioner did not have any right to a share in the corpus of the estate, then he cannot contend that after the notification and after the estate had vested in the Government he will have such a right.

(14) In this view, it is unnecessary to deal with the constitutional issues raised by the petitioner concerning the validity of S. 45 and connected provisions of the law. The application is therefore dismissed.

B/M.K.S.

Application dismissed.



A.I.R. 1953 MADRAS 188 (Vol. 40, C. N. 63)

GOVINDA MENON

AND KRISHNASWAMI NAYUDU JJ.

Kanakammal, Appellant v. Muhammad Kathija Beevi, Respondent.

Letters Patent Appeal No. 107 of 1949, D/- 29-1-1952.

**Debt Laws — Madras Agriculturists' Relief Act (4 (IV) of 1938), S. 19 — Question of scaling down debts — Failure to raise in earlier execution application — Effect — Nature of application under S. 19 — (Civil P. C. (1908), Ss. 11, 47).**

An application under S. 19 of the Madras Agriculturists' Relief Act is not one which comes under S. 47, Civil P. C. and therefore the principle of *res judicata* in execution cannot apply, where a judgment-debtor fails to raise the question of scaling down the debts in an earlier application for execution so as to disentitle him from raising the question at the later stage.

Further, the mere fact that the judgment-debtor raised an objection to the executability of the whole decree on the ground that it has to be scaled down is no ground for scaling down the decree and the Court will not be justified in so scaling down without a separate application under S. 19 of the Madras Act. This is also another ground for holding that the judgment-debtor is not barred from filing the application to scale down the decree even though he had not raised the question at an earlier stage of the execution proceedings: ILR 1948 Mad 505, Expl.; (1949) 2 MLJ 493, Disting. (Para 6)

Anno: C. P. C., S. 11 N. 23; S. 47 N. 3.

R. Kesava Iyengar, for Appellant; T. R. Srinivasan and S. Gopalaratnam, for Respondent.

GOVINDA MENON J.: In execution of the compromise decree passed in the appellate Court in O. S. No. 49 of 1928 on 13th November 1931 certain properties were sold on 6th December 1939. The appellant who is the decree-holder filed another application for execution and in that the judgment-debtor raised the objection that the application was barred by *res judicata*. In — 'C. M. S. A. No. 177 of 1944' Bell J. held that the execution application was not barred by limitation. While this appeal was pending, the present respondent filed an application under S. 19 of the Madras Agriculturists Relief Act for scaling down the decree and both the lower courts held that the decree has to be scaled down. When the matter came up to this court in C. M. S. A. No. 243 of 1946 our learned brother Subba Rao J. held that the objection taken by the decree-holder that the judgment-debtor should have applied for scaling down the decree when the earlier application was pending cannot be maintained and therefore held that the judgment-debtor is entitled to scaling down and the learned Judge granted leave to appeal.

(2) The question raised is one of the *res judicata* in execution namely whether it was the bounden duty of the judgment-debtor when an execution application was pending to raise the question regarding the scaling down and if he failed to do that, whether it is open to him at a later stage to file an application for scaling down. Subba Rao J. held that the decision in — 'Adaikappa Chettiar v. Chandrasekhara Thevar', ILR 1948 Mad 505, did not go to the extent of holding that an application

under S. 19 of the Madras Agriculturists Relief Act is one relating to the execution of the decree in order that all the other provisions of the Code regarding executability of the decree should apply to that application. Subba Rao J. was of opinion that the decision of the Privy Council amounted to this, namely, that so far as appealability is concerned, an order under S. 19 should be deemed to be as if made under execution and no more.

(3) We have perused the judgment of the Privy Council in — 'Adaikappa Chettiar v. Chandrasekhara Thevar', ILR 1948 Mad 505, and it seems to us that their Lordships did not hold that an application under S. 19, Madras Agriculturists Relief Act, is one relating to execution of the decree. What their Lordships held was that the decision of this court in — 'Nagappa v. Annapoorni', ILR 1941 Mad 261, to the effect that no appeal lay from an order passed under S. 19 is incorrect, because in their Lordships' view a decision under S. 19 is one which finally determines the rights of the parties and is a formal expression of adjudication so far as the Court expressing it is concerned and it conclusively determines the rights of the parties with regard to one of the matters in controversy in the suit. Such being the case, an order under S. 19 is one which can come within the definition of the decree in S. 2(2), Civil P. C. Mr. Kesava Ayyangar relied upon the sentence at page 514 in — 'Adaikappa Chettiar v. Chandrasekhara Thevar', ILR 1948 Mad 505, where their Lordships state that one of the orders contemplated in that appeal, namely, the order of 25th July 1938 was one relating to the execution, discharge or satisfaction of the decree within the meaning of S. 47 of the Code and an appeal lay under S. 96. The order was one passed under S. 20, Madras Agriculturists Relief Act, by which the judgment-debtor requested the court to postpone the execution of the decree in order to enable him to file an application for scaling down the decree. Section 20 lays down that if no relevant application under S. 19 is made within 60 days, then the execution will have to proceed. It cannot be disputed that so far as an order under S. 20 is concerned, it is one relating to execution of the decree, because what is asked for is a postponement of the execution of the decree and it is therefore a matter relating to the execution of the decree. The decision of the Privy Council referred to does not say that because of the above observations regarding the nature of the application under S. 20, the order under S. 19 should be treated as one falling within the definition of execution, discharge or satisfaction of the decree under S. 47, C.P.C.

(4) Our attention was invited by Mr. Kesava Aiyangar to another decision in — 'Sha Sivaraj Gopalji v. Ayissa Bi', 1949-2 MLJ 493, where the facts were these: The decree-holder attempted to attach the share of a member of a Mappilla Marumakathayam tarwad and because of the law regarding impartibility then in existence it was not allowed, though by the time the order had been passed, the Madras Mappilla Marumakathayam Act which allowed partibility had been passed by the legislature. The result of this enactment was that the share of any member could be attached and sold in execution of the decree. It was sought to be raised in the appeal before this court but was not permitted and the appeal was dismissed. The decree-holder filed a fresh execution application asking for attachment of the share of the judgment-debtors and the Sub Court ordered



the attachment. In appeal again this Court held that the order in the previous execution application was *res judicata* as the decree-holder could have raised the plea in the earlier application but failed to do so it is therefore barred by the principle of *res judicata*. The view of the High Court was upheld by the Privy Council. We do not see how the decision of the Judicial Committee can be applied to the facts of the present case. Section 19 does not state the period during which an application for scaling down has to be made. It has been held by this Court that so long as the decree is in existence and could be executed, it is open to the judgment-debtor to apply for scaling down. We do not think that the decision in — ‘*Sha Sivaraj Gopalji v. Ayissa Bi*’ can be of any assistance to this appeal.

(5) The decision of the present case can be made to rest on much narrower ground, namely, that before Bell J. finally decided C. M. S. A. No. 177 of 1944 there was an application made to the executing Court E. A. No. 229 of 1944, to stay execution proceedings and that was allowed on 21st July 1944. It was in pursuance of that application that the present I. A. No. 430 of 1944 was filed to scale down the decree. Therefore, the genesis of I. A. No. 430 of 1944 was antecedent to the order of the High Court holding that the execution of the decree was not barred by limitation. A Full Bench of this Court in — ‘*Desikachariar v. Ramachandra Reddiar*’, 1951-1 MLJ 23, has laid down that if in an application under S. 20, the question whether the applicant is an agriculturist or not had been raised and decided that would operate as *res judicata* in any subsequent application to scale down the decree. Therefore then in E. A. No. 229 of 1944 it was held on 21st July 1944 that the applicant was an agriculturist entitled to the benefits of the Act and therefore entitled to scaling down the decree and that has not been set aside by any proceedings, we cannot say that the applicant did not raise the question of the scaling down before the High Court decided C. M. S. A. No. 177 of 1944. Such being the case, the objection raised namely, that the present application for scaling down is barred on account of the principle of *res judicata* in execution relying upon the decision in — ‘*Adaikappa Chettiar v. Chandrasekhara Thevar*’, ILR 1948 Mad 505, is not sustainable.

(6) Another point to be considered is that even if there is an execution petition pending and the judgment-debtor raises the question that the decree has to be scaled down, it is not open to the court to take notice of that objection unless either the decree-holder or the judgment-debtor files an application under S. 19 of the Act, since S. 19 positively lays down that a decree can be scaled down only on an application. The mere fact that the judgment-debtor raised an objection to the executability of the whole decree on the ground that it has to be scaled down is no ground for scaling down the decree and the court will not be justified in so scaling down without a separate application. This is also another ground for holding that the judgment-debtor is not barred from filing the application to scale down the decree even though he had not raised the question at an earlier stage of the execution proceedings. We are therefore definitely of opinion that an application under S. 19 of the Act is not one which comes under S. 47, Civil P. C. and therefore the principle of *res judicata* in execution cannot apply to the facts of the present case.

(7) This Letters Patent Appeal is, therefore, dismissed with costs.

B/D.R.R.

Appeal dismissed.

**A.I.R. 1953 MADRAS 189 (Vol. 40, C. N. 64)**  
RAJAMANNAR C. J.

Durbha Viswanadha Sastri, power of attorney holder for Ivaluri Nallikarjuna Rao and others, Appellants v. Dronamraju Venkatakrishna Rao and others, Respondents.

Second Appeal No. 45 of 1947, D/- 3-12-1951.

**Civil P. C. (1908), O. 21 Rr. 89, 90 — Judgment-debtor obtaining benefit of half rent for certain faslis under Madras Agriculturists' Relief Act, IV of 1938, S. 15, and depositing amount in Court — Amount withdrawn by decree-holder — Decree-holder taking out execution for entire amount and not for balance only in spite of order of Court — Decree-holder knowing what was due — Property sold in execution and purchased by decree-holder himself — Held that decree-holder who knew that what was due under the decree was an amount far less than the amount for which he brought the properties of the judgment debtor to sale, could not retain the properties purchased at such a sale by himself and that therefore the sale had to be set aside: AIR 1917 Mad 739(2), 14 Cal 18 Distinguished. (Paras 1, 3)**

Anno: Civil P. C., O. 21 R. 89 N. 17; R. 90 N. 31.

V. Parthasarthy, for Appellants; U. Sethumadhava Rao, K. Krishnamurthy and M. Dwarkanath, for Respondents.

**JUDGMENT:** Both the Courts have held that the sale held in execution of the decree in S. S. No. 312 of 1937 in E. P. No. 26 of 1938 was not valid. The District Munsif who tried the suit set aside the sale on four grounds, but in appeal the learned Subordinate Judge held that the decree had to be set aside on two grounds. These two grounds really amount to this, namely, that the decree was executed for an excess amount and to the knowledge of the decree-holder who himself was the purchaser. By virtue of Sec. 15 of Madras Act 4 of 1938 the judgment-debtor obtained benefit of half the rent for faslis 1344, 1345, and 1346. The amount deposited by the judgment-debtor was even withdrawn by the decree-holder. Nevertheless, execution was levied for the entire amount and not for the balance only, and this, in spite of an order of court. Obviously, therefore, the decree-holder who knew that what was due under the decree was an amount far less than the amount for which he brought the properties of the judgment-debtor to sale cannot retain the properties purchased at such a sale by himself, whatever might be the case of an innocent third party purchaser. It will really amount to allowing a person who is in the wrong to take advantage of that wrong.

(2) Observations in a decision of a Division Bench in — ‘*Kasthuri Aiyangar v. Arunachalam Chettiar*’, 34 IC 350 at 352 were relied upon by learned Counsel for the appellants. In that case the learned Judges held that the levy of execution for the full amount was justified, but went on to say by way of obiter that even if a certain payment had been taken into account, there would still be money due and it could not be said that the court had no jurisdiction to proceed with the execution of the decree. There was no necessity in that case to finally determine the question whether, in cir-



circumstances like those in the present case, namely, of a decree-holder himself purchasing the property in execution levied for a much larger amount than what was actually due and to his knowledge, the sale should be allowed to stand. In — *Rewa Mahton v. Ramkishan Singh*, ILR 14 Cal 18 the purchaser was a third party who could not be impressed with the knowledge of another decree against the decree-holder in the case in favour of the judgment-debtor.

(3) I agree with the learned Subordinate Judge in holding that the sale has to be set aside. The second appeal is, therefore, dismissed with costs. Leave refused.

B/R.G.D.

Appeal dismissed.

**A.I.R. 1953 MADRAS 190 (Vol. 40, C. N. 65)**

**SUEBA RAO AND PANCHAPAKESA  
Ayyar JJ.**

**V. Srinivasa Ayyangar, Petitioner v. The State of Madras and another, Respondents.**

Civil Misc. Petn. No. 8302 of 1950, D/- 4-4-1952.

**(a) Tenancy Laws — Madras Estates Land Act (1 of 1908), S. 3(2)(d) — Confirmation by British Government of part of inam village.**

An inam village would come under the definition of an "estate" if it was granted, confirmed or recognised by the British Government. A confirmation or recognition by the British Government of the inam village will only confer a right to the inam village, on the recipient. It follows that the confirmation or recognition by the British Government must necessarily be of the entire village. Where though the entire village was granted, a part of the village was resumed and included in the village and what was confirmed by the British Government was only that part of the village which continued to be an inam, it would not be an estate within the meaning of S. 3(2)(d). Hence the notification issued by the Government fixing the rate of rent in respect of 15/16th part of a village and other proceedings taken under Act 30 of 1947 in respect of that part are invalid: Case law discussed. (Paras 3, 5, 6)

**(b) Tenancy Laws — Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), S. 20 — Notification notifying minor inam as under tenure.**

Though a minor inam cannot be treated as a separate estate, it vests in the Government along with the parent estate subject to the other provisions of the Act. S. 20 saves such minor inams. S. 20 is not confined only to leases. The post-settlement minor inams or the minor inams included in the assets of the zamindari at the time of the permanent settlement would be protected under S. 20 and the rights, thereunder, can be enforced against the Government. The notification of Government under Madras Act 26 of 1948 notifying the one-sixteenth part of the village included in the assets of the zamindari as an under-tenure estate is clearly wrong. It follows that the notification under S. 3(2) of the Madras Estates Land Act is also bad: Case law discussed. (Paras 8, 9)

**(c) Tenancy Laws — Madras Estates Land Act (1 of 1908), S. 3(2)(d) — Quaere whether,**

if a grant was of an entire village and though the entire village was confirmed either in one proceeding or in different proceedings and separate title deeds were issued, the village covered by the separate deeds ceases to be an estate. (Para 11)

**(d) Tenancy Laws — Madras Estates Land (Reduction of Rent) Act (30 of 1947) — (Quaere) Whether, where Government did not purport to issue the notification under the Act fixing rates of rent on the basis of entire Zamindari, Government can fix rents in respect of the minor inam treating it as part of the Zamindari along with the other parts of the Zamindari.** (Para 12)

R. Kesava Aiyangar and K. Parasaran, for Petitioner; The Government Pleader, for Respondents.

**ORDER:** This is an application for issuing a writ of certiorari, and for quashing the proceedings taken by the respondents under the Madras Acts 30 of 1947 and 26 of 1948 with regard to the petitioner's village, Karuppur.

(2) The said village is situated in Rajasingamangalam Zamin taluk, Ramnad zamindari. It is an ancient pre-settlement Dharasanam granted in A. D. 1757 by the then ruler of the country, Muthuvijaya Raghunatha Sethupathi, to the original grantees. 1/16th part of the village was resumed by the Raja before the permanent settlement and added to the zamindari. At the time of the permanent settlement this 1/16th part was included in the assets of the zamindari. At the time of the Inam Commission enquiry, the Inam Commissioner confirmed only 15/16th portion of the village on 31st December 1863 subject to a payment of jodi of Rs. 142-14-4 and a quit rent of Rs. 24, and title deed No. 404 was issued for the said portion. The State of Madras issued a notification G. O. Ms. 2169 Revenue, dated 22nd August 1949 under Madras Act 26 of 1948 notifying part of the village included in the assets of the zamindari as an under-tenure estate. On 20th June 1950, they had also issued a notification in Fort St. George Gazette fixing rates of rent under Madras Act 30 of 1947 in regard to the two parts of the village.

The petitioner says that the notifications are ultra vires and void. In regard to the 15/16th portion of the village confirmed by the Government, it was argued that that part would not be an estate, as the Government did not confirm the entire village originally granted. Alternatively it was argued that though the original grant was of the entire village, the grantor himself resumed 1/16th part of the village, and therefore the effective grant was only of a part of the village.

(3) The governing provision is S. 3(2)(d) of the Madras Estates Land Act. It reads:

" "Estate" means—

(d) any inam village of which the grant has been made, confirmed, or recognised by the British Government, notwithstanding that subsequent to the grant, the village has been partitioned among the grantees or the successors in title of the grantee or grantees."

An inam village would come under the definition of an "estate" if it was granted, confirmed or recognised by the British Government. The previous rulers made grants of villages and parts of villages. After the British Government became the ruling power, they recognised or confirmed some of those inams. The definition of "estate" apparently was intended to



take in those villages, whether granted by the British Government, or though granted by some other ruling power were confirmed or recognised by the British Government. If so construed, the confirmation by the British Government must be in respect of the whole village. Explanation (2) provides for an exception where a portion of the inam village is resumed by the Government. It says:

"Where a portion of an inam village is resumed by the Government, such portion shall cease to be part of the estate, but the rest of the village shall be deemed to be an inam village for the purposes of this sub-clause. If the portion so resumed or any part thereof is subsequently re-granted by the Government as an inam, such portion or part shall, from the date of such re-grant, be regarded as forming part of the inam village for the purposes of this sub-clause."

This Explanation also shows that the Legislature was dealing with the grant or confirmation of whole inam villages. Otherwise there was no need to provide for the exception.

(4) Under sub-clause (d) minor inams or grants of parts of a village are excluded from the definition of an "estate". The whole inam villages granted by the British Government or subsequently confirmed by them are estates. Though a whole inam village was granted by some ruling power, after the British Government became the ruling power, that grant would not bind the British Government unless confirmed or recognised by them. The grantees would not have any legal title, till it was conferred on them by the British Government. The validity of the grant would necessarily depend upon the confirmation. If so, if the sub-clause is read as the Government Pleader asks us to read, it will mean that if the entire village was granted originally by a grantor other than the British Government, confirmation by the British Government of any part thereof would amount to validating grants of whole village, though the entire grant was not recognised by the Government; if the entire village is not confirmed or recognised by the British Government, there cannot legally be an entire inam village, the existence of which is a necessary condition for bringing the grant within the definition.

(5) The law relating to the effect of the cession of a territory to a new ruling power on the pre-existing grants is found in — 'Secretary of State for India v. Bai Rajbai', 39 Bom 625. At page 646, their Lordships of the Judicial Committee observed:

"The relation in which they stood to their native sovereigns before this cession, and the legal rights they enjoyed under them, are, save in one respect, entirely irrelevant matters. They could not carry in under the new regime the legal rights, if any, which they might have enjoyed under the old. The only legal enforceable rights they could have as against their new sovereign were those, and only those, which that new sovereign by agreement expressed or implied or by legislation, chose to confer upon them."

Similar observations were made by the Judicial Committee in — 'Vajesingji v. Secretary of State for India', 48 Bom 613. Their Lordships observed:

"After a sovereign state has acquired territory, either by conquest, or by cession under treaty, or by the occupation of such as has theretofore

been unoccupied by a recognised ruler, or otherwise, an inhabitant of the territory can enforce in the municipal courts only such proprietary rights as the Sovereign has conferred or recognised."

It is therefore clear from the aforesaid two decisions that a confirmation or recognition by the British Government of the inam village will only confer a right to the inam village on the recipient. It follows that the confirmation or recognition by the British Government must necessarily be of the entire village.

(6) The scope of the sub-clause was laid down by Kuppuswami Aiyar J. in — 'Viswanadham Bros. v. Subbaiya', 1945-1-M.L.J. 443. There an entire village was granted to a person by way of bhattavritti shrotriam inam. After the original grant, there was a grant by the grantee of some portion of it which was treated as a minor inam. At the time of the inam settlement the minor inam granted by the aghaharamdar was confirmed as inam and a title deed was issued. The question in that case was whether a lessee of a piece of land which formed part of the minor inam could claim that it was land in an estate within the meaning of S. 3 (2) (d) of the Madras Estates Land Act. The learned Judge held that merely because the land in question formed part of the original grant of an entire village it could not be said that at the time when it was recognised, it was part of the whole inam which was recognised or confirmed by the British Government, and that therefore the land in question could not be deemed to be part of an estate.

At page 444, the learned Judge made the following relevant remarks:

"The only provision of law under which the lessee could claim that this is part of an estate is S. 3 (2) (d) of the Estates Land Act. Under that section 'Estate' means any inam village of which the grant has been made, confirmed or recognised by the British Government, notwithstanding that subsequent to the grant, the village has been partitioned among the grantees or the successors-in-title of the grantee or grantees. The answer to the question as to whether the confirmation or recognition by the British Government was in respect of the entire inam village or of only a portion is the basis for the decision as to whether the land was an estate or not..... Admittedly the land in dispute forms part of the land to which title deed No. 1004 relates and that title deed does not relate to the entire village but only to a portion of it. So merely because it formed part of the original grant of an entire village or aghaharam it cannot be said that at the time when it was recognised this was part of the inam in favour of the aghaharam which was recognised or confirmed by the British Government."

We respectfully agree with these observations. Shahabuddin J. followed the principles laid down in the aforesaid judgment in the case in — 'Mangamma v. Appadu', 1948-1-M.L.J. 247: 64 L W 1. In that case, two parcels of land comprised in an inam village were treated even before the inam settlement as separate grants, and at the time of the settlement the lands were confirmed under two title deeds. The learned Judge held that the lands comprised under one of the title deeds did not form part of an estate, and that the tenant thereof could not claim occupancy rights. At page 250 the learned



Judge pointed out the principle underlying the sub-clause. He said:

"According to the definition of an estate mentioned above what has to be seen is whether the confirmation or recognition by the British Government was in respect of the entire inam village or of only a portion."

But the learned Government Pleader relied upon a judgment of the Judicial Committee in — '*Krishnaswami Aiyangar v. Perumal Goundan*', in support of his contention that the confirmation or recognition of the entire village by the British Government was not necessary to bring the village within the definition of estate, if at the time of the grant, though not made by the British Government, the entire village was granted.

The facts in that case were: An entire village was granted in pre-British times. In 1795, a small part of the village was resumed by the Government and granted in ryotwari tenure, but the rest of the village, by far the larger part continued to be treated as an inam village. The Government resumed the rest of the village also in 1894. In 1895, the Government granted on inam tenure the whole village, i.e., the whole village which for the past 100 years had been recognised an inam village. Their Lordships held that the grant was of the whole inam village. We are not able to appreciate the relevancy of the citation. In that case though the village at some remote time formed part of a larger village for over 100 years it was treated as a separate village. At the time of the grant by the Government it was treated as a whole village, and was granted as such. As the grant was of the whole inam village by the British Government it certainly came within the definition of estate under S. 3 (2) (d) of the Act. We therefore hold that as the Government did not confirm the entire village but only 15/16th part of the village, it would not be an estate within the meaning of S. 3 (2) (d) of the Madras Estates Land Act. It follows that the notification issued by the Government fixing the rate of rent in respect of the 15/16th part of the village and other proceedings taken under Act 30 of 1947 in respect of that part are invalid.

The notification and the said proceedings are hereby quashed. But we should not be understood to have expressed an opinion on the question whether if a grant was of an entire village and though the entire village was confirmed either in one proceeding or in different proceedings and separate title deeds were issued that the village covered by the separate deeds ceases to be an estate, for in this case though the entire village was granted, a part of the village was resumed and included in the village, and what was confirmed was only that part of the village which continued to be an inam.

(7) The next question is whether the notification of the Government of Madras under Madras Act 26 of 1948 notifying the one-sixteenth part of the village as an undertenure estate and also the notification dated 20-6-1950, fixing the rates of rent under Madras Act 30 of 1947, are valid. Learned counsel for the petitioner contended that both the notifications are invalid as undertenure minor inams are not governed by either of the two Acts. We shall deal with the argument in regard to the application of the aforesaid two Acts to the inam in question separately. The first question therefore is whether an undertenure minor inam is

abolished under Act 26 of 1948. Learned Govt. Pleader argued that the undertenure minor inams are parts of the zamindari estate and therefore along with the zamindari estate they are also abolished under the Act. Learned counsel for the petitioner on the other hand pressed on us to hold that the Legislature did not intend to abolish minor inams, whether they are pre-settlement inams excluded from the assets of the zamindari or included in the assets of the zamindari or whether they are post settlement inams. He emphasised upon the fact that there cannot be any logical distinction on principle between the different classes of minor inams which could have compelled the legislature to make a distinction in the application of the Act. He also strongly relied upon the circumstance that a minor inamdar is a owner of the minor inam and as the Act does not expressly abolish the minor inams we should hold that the minor inams were not touched by the Act.

To appreciate the contentions of the learned counsel it is necessary to notice some of the relevant provisions of Madras Act 26 of 1948, which we extract below:

"S. 1(3): It applies to all estates as defined in S. 3, clause 2 of the Madras Estates Land Act, 1908, except inam villages which became estates by virtue of the Madras Estates Land (Third Amendment) Act, 1936.

S. 2(3): "Estate" means a zamindari or an undertenure or an inam estate;

S. 2(7): "Inam estate" means an estate within the meaning of S. 3, clause (2) (d), of the Estates Land Act, but does not include an inam village which became an estate by virtue of the Madras Estates Land (Third Amendment) Act, 1936;

S. 2(15): "Under-tenure estate" means an estate within the meaning of S. 3, clause 2 (e) of the Estates Land Act.

S. 2(16): "Zamindari estate" means:

(i) an estate within the meaning of Sec. 3 clause 2 (a) of the Estates Land Act, after excluding therefrom every portion which is itself an estate under S. 3, clause (2) (b) or (2) (e) of that Act; or

(ii) an estate within the meaning of S. 3, clause (2) (b) or (2) (c) of the Estates Land Act, after excluding therefrom every portion which is itself an estate under S. 3, clause (2) (e) of that Act.

S. 3: With effect on and from the notified date and save as otherwise expressly provided in this Act:

(a) the Madras Permanent Settlement Regulation, 1802, the Estates Land Act, and all other enactments applicable to the estate as such except the Madras Estates Land (Reduction of Rent) Act, 1947 shall be deemed to have been repealed in their application to the estate;

(b) the entire estate (including all communal lands and porombokes; other non-ryoti lands; waste lands; pasture lands; lanka lands; forests; mines; and minerals; quarries; rivers, and streams; tanks and irrigation works; fisheries; and ferries), shall stand transferred to the Government and vest in them, free of all encumbrances; and the Madras Revenue Recovery Act, 1864, the Madras Irrigation Cess Act, 1865, and all other enactments



applicable to ryotwari areas shall apply to the estate;

(c) all rights and interests created in or over the estate before the notified date by the principal or any other landholder, shall as against the Government cease and determine;

(f) the relationship of landholder and ryot shall, as between them, be extinguished.

S. 20(1): In cases not governed by Ss. 18 and 19, where, before the notified date, a landholder has created any right in any land (whether by way of lease or otherwise) including rights in any forest, mines or minerals, quarries, fisheries or ferries, the transaction shall be deemed to be valid; and all rights and obligations arising thereunder, on or after the notified date, shall be enforceable by or against the Government.

Provided that the transaction was not void or illegal under any law in force at the time."

It is clear from the aforesaid provisions that all estates defined under Madras Estates Land Act, 1908 except inam villages which became estates by virtue of Madras Estates Land (Third Amendment) Act, 1936, vest in the Government. The estates under that definition comprise of five classes: (a) a permanently settled estate or temporarily settled zamindari; (b) any portion of such permanently settled estate or temporarily settled zamindari which is separately registered in the office of the collector; (c) any unsettled palayam or Jagir; (d) any village of which the land revenue alone has been granted in inam to a person not owning the kudiwaram thereof, provided that the grant has been made, confirmed or recognised by the British Government, or any separated part of such village; (e) any portion consisting of one or more villages of any of the estates specified above in clauses (a), (b) and (c) which is held on a permanent undertenure.

A minor inam therefore whether it is a post-settlement or pre-settlement grant is not separately designated as an estate under the said Act. Pre-settlement minor inams obviously do not come under any of the 5 aforesaid categories of estates. But it is said that a post-settlement minor inam or though a pre-settlement minor inam but included in the assets of the zamindari at the time of the permanent settlement, will come under the first category, namely, any permanently settled estate, or a temporarily settled zamindari. Strong reliance was placed on the definition of zamindari estate under S. 2 (16) of Act 26 of 1948. Zamindari estate is defined under that sub-section as:

"an estate within the meaning of S. 3, clause (2) (a) of the Estates Land Act, after excluding therefrom every portion which is itself an estate under S. 3, clause (2) (b) or (2) (e) of the Act."

The definition indicates that the estates under S. 3 (2) (b) or (2) (e) of the Act would be part of the zamindari estate but for the exclusion. As the section does not exclude the minor inams held under the zamindar, the argument was advanced that the minor inams are parts of the zamindari.

This contention based upon the definition was sought to be supported by the principles evolved by legal decisions in regard to minor inams prior to the enactment of Act 26 of 1948. We would at this stage proceed to consider the

citations made by the learned counsel which would afford a historic basis for the definition introduced in the new Act. — 'Virabhadrayya v. Sonti Venkanna', 24 M L J 659 affords an example for the converse proposition. Therein it was held that an inam though situate within the limits of a zamindari, if it had been excluded from the zamindari assets at the time of the permanent settlement as lekhiraj is no longer part of the zamindari and consequently not an estate within the meaning of S. 3 of the Estates Land Act. When it was contended that the pre-settlement aghaharam was a village in a portion of the Nuzvid zamindari separately registered in the office of the Collector, the learned Judges pointed out that as it was excluded from the assets of the zamindari any ownership on the part of the Nuzvid zamindar over the village ceased at the settlement, and his interest in it was confined only to the right to receive 1000 pagodas a year as that was alone included in the assets.

In — 'Brundavanachandra Horischandra Raja v. Ramayya', 26 M L J 600, it was held that portions of estates which are granted away but which do not come under S. 3 (2) (e) of the Act continue to be part of the estates notwithstanding such grants. In — 'Gadhadhara Das Bavaji v. Suryanarayana Patnaik', 44 Mad 677 the question was whether a holder of a post-settlement inam grant of a portion of a village with both the warams on a permanent Kattubadi was a landholder within the meaning of S. 3 (2) (e) of the Madras Estates Land Act and the tenants had permanent occupancy rights therein. Ayling and Coutts-Trotter JJ. held that such a minor inamdar was a landholder within the meaning of S. 3, cl. (5) whereas Kumaraswami Sastri J. recorded a dissenting note. In dealing with the question at page 685 Ayling J. observed:

"The suit lands admittedly, but for the grant in inam, would fall within clause (a) of S. 3 (2) of the Act. As regards the definition of 'landholder' it may be conceded at once that so long as the zamindar reserves to himself a quit rent the inamdar cannot be regarded as the owner of the lands in the ordinary legal meaning of the term. But the definition of "landholder" includes "every person entitled to collect the rents of the whole or any portion of the estate by virtue of any transfer from the owner", and I think the grant in inam must be regarded as such a transfer."

A detailed and exhaustive treatment of the scope of S. 3 (5) of the Madras Estates Land Act in its application to a minor inamdar is found in the Full Bench judgment in — 'Brahmayya v. Achiraju', 45 Mad 716. The court by a majority, the Chief Justice and Devadoss J. dissenting, held that when a zamindar makes a post-settlement inam grant of portion of a village with both warams and permanent kattubadi, the grantee is a landholder within the meaning of S. 3 (5) of the Madras Estates Land Act. At page 732 Oldfield J. observed:

"It is, however, unnecessary to pursue these considerations; because I have come to the conclusion that an inamdar with both warams of a part of a village is in any case a landholder under S. 3 (5), because he is a person entitled at least to 'collect the rent by virtue of a transfer from the owner or his predecessor in title.'"



Phillips J. poses the question at page 739 as follows:

"The question really, in my opinion, is whether the word 'owning' under clause 5, must necessarily mean owner of every conceivable right in the estate, or whether the present inamdar to whom a grant of the land was made subject to a payment of quit rent to the zamindar can be deemed to be owner."

At page 740 the basis for the learned Judge's conclusion is disclosed. He says:

"In construing the word 'owning', therefore, I do not think that we can say that it means the ultimate owner who has reserved even the smallest right for himself. What, I take it, must be reserved is not a mere payment but some actual interest in the land itself. In the present case, quit rent cannot be recovered by the zamindar under the summary provisions of Act 1 of 1908, and although it may be called a charge upon the land, it does not, in my opinion, amount to an interest in the land."

The learned Judge therefore held that a minor inamdar was owner of part of an estate within the meaning of S. 3 (5). Venkatasubba Rao J. stated that the minor inamdar would come under the two parts of the definition in S. 3(5). At page 761 the learned Judge observed as follows:

"It is said that the land of which the inam consists is not a part of the estate under S. 3 (5). The terms of the Reference assume that the land in question is within a zamindari. If physically the land is within a zamindari, I fail to see how the land is not part of an estate. Would it be argued that a purchaser of a part of the estate does not come within the definition on the ground that though the part he purchased is geographically within the limits of the estate it is still not a part thereof? I am unable to accept this contention."

The Full Bench therefore held that a minor inamdar is a landholder under S. 3 (5) of the Madras Estates Land Act. Under S. 3 (5) "landholder" means:

"a person owning an estate or part thereof and includes every person entitled to collect the rents of the whole or any portion of the estate by virtue of any transfer from the owner or his predecessor in title or of any order of a competent court or of any provision of law."

To come under the first part of the definition the minor inamdar must own an estate or part of an estate. The reasoning of some of the learned Judges in the Full Bench clearly shows that they treated him as owner of part of an estate. Relying upon this decision, it was argued that a minor inamdar is a owner of the minor inam and therefore it ceased to be part of the zamindari. But the Full Bench does not say that if it ceased to be part of an estate he could not be a owner of part of an estate. Under S. 3 (2), a part of an estate unless separately registered is not an estate within the definition; but though it is not an estate within the definition, it is still a part of an estate and as the minor inamdar owns that part, he is a landholder within the meaning of S. 3 (5). The Full Bench judgment therefore though it is an authority for the position that a minor inamdar is a owner, it also supports

the contention that the minor inam is still part of the zamindari.

The conflict between the various views of the learned Judges of this court in regard to the rights of the minor inamdars and the tenants holding under them has finally been settled by the Judicial Committee in — *Narayanaraju v. Suryanarayudu*, ILR 1940 Mad 1. There a zamindar made a post-settlement grant of a portion of a moknasa village as manyam. Their Lordships held that the grantee was a landholder within the meaning of S. 3 (5) of the Madras Estates Land Act. They noticed the conflicting views expressed by different Judges and also the difficulty in construing the section but in the end they accepted the majority view expressed in — *Brahmayya v. Achiraju*, 45 Mad 716.

(8) At page 15 they made the following observations:

"But they cannot agree that 'part of the estate' or 'portion of the estate' does not refer to the land itself by the word 'estate', nor do they feel any confidence in the doctrine that so long as the zamindar reserves any interest however insignificant a permanent grantee from him cannot be the owner. It may be that the words "or part thereof" were given a place in the definition of landholder without full appreciation of their effect in connection with the definition of 'estate'; but there is no presumption to that effect; the words cannot be ignored; and good reason must be found in the Act itself for restricting their prima facie meaning."

This judgment also shows that a minor inam is part of an estate and the holder thereof is a owner of that part.

In a case arising under the Madras Agriculturists' Relief Act, — *Navaneethakrishna v. Ramanujulu Chetti*, 1941-2 Mad L J 159 Wadsworth J. and Patanjali Sastri J., as he then was, held that the jodi payable by an agra-haramdar to the Kalahasti zamindar was rent within the meaning of S. 15 (4) of the Act. In the course of the judgment when it was contended that a zamindar cannot be a landholder as the inamdar was the landholder, the learned Judges stated thus:

"The position therefore is that the agra-haram here in question which is in Kalahasti zamindari continued as before the Permanent Settlement to be held on an undertenure under the zamindar whose right has now become vested in the petitioner. In such circumstances, we can see no reason why the petitioner should not still be regarded as the owner, and therefore, the 'landholder' of the village. The fact that by virtue of the amending Act 18 of 1936 the respondent has also to be regarded as a 'landholder' does not affect the position of the petitioner as a landholder in respect of that village. The definition of a landholder clearly contemplates a plurality of landholders by making express provision for settlement of disputes that may arise in such cases. The relation between the petitioner and the respondent is thus one of owner and an undertenure holder, just as it would be if the zamindar had made a post-settlement grant of the village as an agra-haram."

This judgment supports the view that for certain purposes the inamdar may be a owner, but the zamindar does not cease to be the owner. A brief statement of the pre-existing



state of law prior to the enactment of Act 26 of 1948 as disclosed in the aforesaid decisions may be stated thus: The Madras Estates Land Act recognises five categories of estates. Neither a pre-settlement minor inam nor a post-settlement minor inam is an estate under any one of these categories. A pre-settlement minor inam cannot even be part of an estate, whereas a post-settlement minor inam or though a pre-settlement inam but included in the assets at the time of the Permanent Settlement, could be a part of an estate. It may be a part of a permanently settled estate or a temporarily settled zamindari or any part of any portion of permanently settled estate or temporarily settled zamindari which is separately registered in the office of the Collector. Though the said inam cannot be an estate within the meaning of S. 3 (2), Madras Estates Land Act, the inamdar is a landholder within the meaning of S. 3 (5) of the Act. It is because he is either a person owning a part of the estate or a person entitled to collect the rents for the whole or any portion of the estate by virtue of the transfer from the owner.

For the purpose of the definition of landholder under S. 3 (5) he is the owner of the part of the estate though the proprietor of the estate did not completely part with his entire rights in the estate. The reversion still vests in him. He will be entitled to recover jodi from the inamdar. The proprietor therefore does not cease to be the owner. If that is the legal position, it follows that minor inam is part of the zamindari. The definition of "zamindari estate" in Act 26 of 1948 accepted and adopted the view by judicial decisions. The Act purports to abolish the estates defined under the Madras Estates Land Act except inam villages which became estates by virtue of Madras Estates Land (Third Amendment) Act, 1936. The definition of "zamindari estate" also shows that it takes in even the minor inams which did not come under any one or other of the other categories of the estates. It follows that though a minor inam cannot be treated as a separate estate, it vests in the Government along with the parent estate subject to the other provisions of the Act.

(9) The argument advanced by learned counsel for the petitioner on the basis that no logical principle can be discovered in the Legislature making a distinction between pre-settlement minor inams and post-settlement minor inams does not appeal to us. It may not be possible to predicate the legislative policy underlying the enactment. If the minor inams can be abolished only as part of a zamindari, it will lead to another anomaly, namely, that the inamdar of a whole inam village which is an undertenure estate within the meaning of the Act will get a higher rate of compensation than a minor inamdar whose land will be taken as part of the zamindari for the sliding scale provided in the Act for calculating compensation may affect him adversely. But the legislature in our view steered clear of these difficulties by enacting S. 20 in the Act. In our view S. 20 of Madras Act 26 of 1948 saves such minor inams. S. 20 says:

"In cases not governed by Ss. 18 and 19, where before the notified date a landholder has created any right in any land (whether by way of lease or otherwise) including rights in any forest, mines or minerals, quarries,

fisheries or ferries, the transaction shall be deemed to be valid; and all rights and obligations arising thereunder, on or after the notified date, shall be enforceable by or against the Government."

It was argued by the learned Government Pleader that S. 20 does not apply to minor inams for according to him the said section applies only to leases and that under S. 3(c) of the Act the estate would vest in the Government free from the interests created by the landholder. Under S. 3 (c),

"all rights and interests created in or over the estate before the notified date by the principal or any other landholder, shall as against the Government cease and determine".

But the said section itself starts by saying "with effect on and from the notified date and save as otherwise expressly provided in this Act", and S. 20 is the saving clause. We cannot also accept the argument that S. 20 should be confined only to leases. S. 20 expressly saves all interests created by the landholder in any land whether by way of lease or otherwise before the notified date. If S. 20 takes in a permanent lease on a fixed rent, we do not see why minor inams subject to jodi which are similar to permanent leases on fixed rent should be treated differently.

The argument that S. 20 should be confined to leases only is obviously untenable as the section itself says that the creation of interests by the landholder may be "by way of lease or otherwise". The section also confers upon the Government the power to terminate the rights so conferred in public interests after paying full compensation. But it is not suggested that the Govt. invoked that power in public interests. We therefore hold that the post-settlement minor inams or the minor inams included in the assets of the zamindari at the time of the permanent settlement would be protected under S. 20 of the Act and the rights thereunder, can be enforced against the Government. The notification of Government under Madras Act 26 of 1948 notifying the 1/16th part of the village included in the assets of the zamindari as an undertenure estate is clearly wrong.

Even so it was argued by learned Government Pleader that the notification under Act 30 of 1947 fixing the rates of rent would be valid, as in the view expressed the 1/16th part of the village is part of the zamindari and therefore is part of an estate under S. 3 (2) (a) of the Madras Estates Land Act. As the Government did not purport to issue the notification on the basis of the entire zamindari it is not necessary to express our opinion on the question whether the Government can fix rents in respect of the minor inam treating it as part of the zamindari along with the other parts of the zamindari. That question will have to be decided in appropriate proceedings when it is specifically raised. It follows that the notification under S. 3 (2) is also bad. In the result the two notifications are quashed. The petitioner will have his costs.

(10) (This petition having been posted for being spoken to this day the Court made the following order) ORDER (Delivered by Subba Rao J.) This appeal is posted for being spoken to as some observations made by us ap-



peared to be wider than we intended. We thought it would be in the interests of all the parties concerned to clarify that part of the judgment at this stage than to leave it for future elucidation and argument. The learned counsel appearing for the parties also agree in regard to the advisability of the course adopted by us.

(11) In the course of the judgment we said though the grant was of an entire village, if a part of the same was confirmed it would not be an estate within the meaning of the Act. We should not be understood to have expressed our opinion on the question whether if a grant was of an entire village and though the entire village was confirmed either in one proceeding or in different proceedings and separate title deeds were issued that the village covered by the separate deeds ceases to be an estate; for, in the case we decided though the entire village was granted, a part of the village was resumed and included in the assets of the zamindari; and what was confirmed was only that part of the village which continued to be an inam.

(12) We held that the estate in question is not an undertenure and therefore the provisions of Act 30 of 1947 do not apply. But it was contended by the Government Pleader that though it is not an undertenure it is part of the zamindari and therefore the Act would apply. As the Government did not purport to issue the notification on the basis of the entire zamindari, it is not necessary to express our opinion on the question whether the Government can fix rents in respect of the minor inam treating it as part of the zamindari along with the other parts of the zamindari. That question will have to be decided in appropriate proceedings when it is specifically raised.

B/D.H.

Order accordingly.

**A.I.R. 1953 MADRAS 196 (Vol. 40, C. N. 66)**

**SOMASUNDARAM J.**

The Public Prosecutor, Appellant v. Ustepalle Swami Chetty and others, Respondents.

Criminal Appeals Nos. 910 to 913 of 1951, D/-10-4-1952.

**Companies Act (1913), S. 248 (2) — Regulations under — Regulation 14 (a) and (b) — Offence under Act — Complaint — Who can make.**

With regard to the offences under the Companies Act there is no provision that any offence should not be taken cognizance of unless the complaint is filed by any of the persons mentioned in the Act. In the absence of such a provision the normal rule namely that any person may set the criminal law in motion will apply. Clauses (a) and (b) of Reg. 14 do not take away the right of any citizen to file a complaint under the Companies Act. Hence, a complaint either by any citizen or a member of the company or by the Assistant Registrar will be a valid complaint. (Para 4)

Anno: Companies Act, S. 248 N. 1.

The Asst. Public Prosecutor, for Appellant; P. C. Parthasarathi Aiyangar, for Respondents.

**JUDGMENT:** This is an appeal by the State against the acquittal of the respondents herein on the ground that no proper sanction has been accorded for the prosecution of the accused for offences under Ss. 76 and 131, Companies Act.

(2) A complaint was laid against the respondents by the Assistant Registrar at the instance of the Registrar of Joint Stock Companies for the said offences. Under S. 248 (2), Companies Act

"The Central Government may appoint such registrars and assistant registrars as it thinks necessary for the registration of companies under this Act, and may make regulations with respect to their duties."

In pursuance of this power, the Central Government has made certain regulations and we are concerned here only with Regulation 14(a) and (b). Regulation 14(a) says:

"The Registrar may in his discretion institute such enquiries or make such investigation in respect of any matter as may in his opinion be necessary for the proper performance of his duties and the due administration of the Act and may institute or cause to be instituted prosecutions under the Act for defaults on the part of companies or persons in furnishing such returns, documents or notices as the law requires them to furnish or for any other non-compliance of the provisions of the Act for which penalties are provided therein."

Clause (b) says:

"Whenever it is found necessary to enforce the penal provisions of the Act against any company or person, the Registrar or Assistant Registrar, as the case may be, shall request the State Counsel in case the registered office of the company concerned is situated in the city of Madras, and in other cases, the District Magistrate of the district in which such registered office is situated, to take the necessary steps."

(3) In this case there is no doubt that the Assistant Registrar has written to the District Magistrate setting out the facts of the case and asking him to take necessary action but the District Magistrate seems to have given the paper back to the Assistant Registrar who merely filed it in court. It is now contended that according to the Regulation 14(b), the complaint must be laid either by the District Registrar or District Magistrate, or at the instance of the District Magistrate. The lower court has taken the view that such a complaint is necessary and therefore acquitted the accused as there was no such complaint of the District Magistrate or at his instance.

(4) With regard to the offence under the Companies Act there is no provision that any offence should not be taken cognizance of unless the complaint is filed by any of the persons mentioned in the Act. In the absence of such a provision the normal rule namely that any person may set the criminal law in motion will apply. But in cases under the Companies Act, it has been considered desirable that either the Registrar or Joint Registrar or officer concerned in dealing with the Act should prefer the complaint. The Regulations framed assigned the duty of making investigations into these matters to the above officers and directing them to file the complaint in such matters. But these Regulations do not take away the right of any citizen to file a complaint under the Companies Act. In the absence, therefore, of any special provision requiring that the complaint should be filed by a particular person, a complaint either by any citizen or a member of the company or by the Assistant Registrar will be a valid complaint. The complaint, therefore, filed in this case is a valid one and the acquittal on that ground is wrong and is therefore set aside. The case is remanded to the lower court for disposal according to law.

(5) The respondents have filed a petition before the Sub-Divisional Magistrate in which they have



set out in detail the reasons for not calling the meeting in time. The lower court will give due weight to what is stated in the petition and dispose of the case according to law.

B/V.R.B.

Case remanded.

**A.I.R. 1953 MADRAS 197 (Vol. 40, C. N. 67)**

**P. V. RAJAMANNAR C. J.  
AND VENKATARAMA AIYAR J.**

The Associated Industrial Engineers by their Managing Partner, P. V. Padmanabha Naidu, Appellant v. P. A. Jabbar Sahib and others, Respondents.

O. S. Appeals Nos. 32 of 1951 and 20 of 1952, D/- 21-3-1952.

**(a) Companies Act (1913), S. 87 C — Office allowance and remuneration — Provision in contract for both — Office allowance expressly stated payable is distinct from remuneration.**

A provision in a contract of managing agency providing for the payment to managing agent both an office allowance and remuneration is quite in accordance with the provisions of S. 87 C. The minimum payment of remuneration to the managing agent in the absence of or inadequacy of profits, the making of a provision for which is contemplated in sub-s. (1) is not the same thing as office allowance and what is expressly stated to be payable as office allowance is not in the nature of remuneration. That sum when it is specified in the contract is "defined" as contemplated by the section and it is not necessary that the contract should specify the number of clerks, peons etc. The word "defined" cannot be construed to mean "described in detail". (Para 7)

Anno: Comp. Act, S. 87 C N. 1.

**(b) Companies Act (1913), Ss. 87 C and 87 B (f) — Contract for specified period — Provisions for payment of office allowance and remuneration — Agent to be indemnified against loss or damage arising out of breach of condition etc., by company — Winding up before expiry of contract period — Claim for office allowance and damages.**

The terms of a contract of managing agency were that the appointment was for a period of 20 years, that the managing agent was to get an office allowance at a specified rate per month in addition to remuneration of ten per cent. out of net profits as defined under S. 87 C (3), that salaries of staff and other expenses of the business of the company were to be separately borne by the company, that the appointment was not terminable unless the managing agent was found guilty of fraud or gross negligence or as provided for by law and that the company should indemnify the managing agent for loss or damages caused to him by the failure, default or breach of the conditions by the company. Subsequently disputes arising between the company and the managing agent, the former prevented the latter from being in charge of the company and terminated the contract by resolution of the directors for which however the approval of the general meeting was not obtained. The managing agent continued to have the records of the company and maintain his separate office. Very little business was done by the company but not due to the fault of the manag-

ing agent. Finally the company went into liquidation before the expiry of the period of contract.

Held (i) that the person appointed continued to be the managing agent until the company ceased to exist and the termination of his office by the resolution of the directors was not a valid termination in view of S. 87 B (f): AIR 1950 PC 81, Rel. on.

(ii) that when he had been wrongfully prevented from being in charge of the company that could not be made a ground for refusing to pay him the stipulated office allowance upto the date of winding up and that under the circumstances he was entitled to that payment. (Para 8)

(iii) that it was not an implied term of the agreement that the company shall continue to carry on business during the period specified in the contract and hence office allowance after date of liquidation could not be claimed.

(iv) that the claim for damages against remuneration receivable during the period after winding up was not sustainable as there was no implied condition for continuation of business for the full 20 years, and as there was also no wrongful termination of the agency: Case law referred to. (Para 9)

Anno: Comp. Act, S. 87 C N. 1; S. 87 B N. 1.

G. Vasantha Pai, for Appellant in O. S. A. 32/51; M. G. Kamath, for 3rd Respondent in O. S. A. 32/51, S. G. Rangaramanujam, for Appellant in O. S. A. 20/52 and for Respondent No. 2 in O. S. A. 32/51.

**RAJAMANNAR C. J.:** These two appeals are against an order of Krishnaswami Nayudu J. passed on an application in the course of liquidation of a limited company called the South Indian Industrial Engineering Syndicate Ltd., Gudiyatham. The company was registered on 12th March 1946, with a nominal capital of 30 lakhs divided into three lakhs of ordinary shares of Rs. 10 each out of which there was an issue of fifty thousand shares. In and by an agreement dated 10th April 1946 a firm known by the name of Messrs. Associate Industrial Engineers was appointed as Managing agents of the company for a period of twenty years on terms and conditions set out therein. The company obtained a certificate for the commencement of the business on 30th July. Very soon thereafter misunderstandings arose between P. V. Padmanabha Naidu, the Managing partner of the Associate Industrial Engineers, and some of the directors of the company of whom the most prominent was one P. A. Jabbar Sahib. He filed two criminal complaints against Padmanabha Naidu. On 1st October 1946, Mr. Oates, one of the partners of the managing agency firm wrote to the Directors of the Company stating that he had severed his connection with the firm and that the firm had been dissolved. Thereupon the Board of Directors resolved on 6th October 1946 that in view of the criminal cases pending against Padmanabha Naidu and the non-receipt of the audit report and the dissolution of the managing agency firm, the business and all monies and other transactions of the company by the managing agents be suspended till the final decision of the disputes. Subsequently, on 11th November 1946, two of the directors were constituted as a committee to carry on



the business of the company. On 29th November 1946, this committee filed a complaint against Padmanabha Naidu for wrongfully withholding the delivery of account books and records of the company. On 6th January 1947, two share-holders filed a petition in this court for winding up of the company but it was dismissed.

On 12th April 1947, the Committee of Directors instituted a suit in the court of the District Munsif, Vellore (O. S. No. 151 of 1947) against the partners of the managing agency firm for a declaration that the Managing agents were lawfully suspended as per resolution dated 6th October 1946 and for an injunction restraining them from interfering or causing obstruction in the management of the company. This suit was decreed by the District Munsif on 29th June 1948. But on appeal the learned Subordinate Judge of Vellore held that the resolution of the 6th October 1946 was ultra vires and invalid but granted a permanent injunction restraining the managing agents from interfering in the affairs of the company. By order of this court dated 6th December 1949, the company was directed to be wound up.

The two main grounds in the petition for winding up were: (1) That the company defaulted in filing the statutory report and in holding the statutory meeting under S. 162(2), Companies Act; and (2) That it did not commence business within a year of its incorporation.

(2) In May 1950, Padmanabha Naidu on behalf of the Associate Industrial Engineers, the managing agency firm, filed a claim before the Official Liquidator who had been appointed in the winding-up proceedings. The claim was made up of three items as follows:

1. A sum of Rs. 1705-9-6 alleged to be the amount advanced by the managing agency firm to the Board of Directors of the company;
2. A sum of Rs. 49400-5-0 being the amount of office allowance payable to the managing agency firm from 1st March 1947 to 6th December 1949, as per the terms of the agreement, and,
3. A sum of Rs. 25000 as damages for premature termination of the managing agency agreement.

In accordance with the directions of the learned Judge sitting in Chambers, Krishnaswami Nayudu J., the Official Liquidator, after notice to the concerned parties, made an enquiry and allowed the claim in its entirety. The members of the Committee of Directors then made an application to the learned Judge in Chambers for setting aside the order of the Official Liquidator allowing the claim preferred on behalf of the Managing agents. Before the learned Judge there was no dispute as regards the first item of Rs. 1705-9-6. The learned Judge disallowed the second item and allowed only a sum of Rs. 10,000 in respect of the third item. In the result he held that the Managing agents would be entitled to a sum of Rs. 11705-9-6. Against this order of the learned Judge, the Managing Agents have filed O. S. A. No. 32 of 1951. O. S. A. No. 20 of 1952 is by the Committee of Directors. In this judgment, the managing agency firm will be referred to as the appellant and the Committee of Directors as the respondents.

(3) To understand the basis of the claim of the appellant it is necessary to set out the

material terms and conditions of the managing agency agreement Ex. P. 2. They are as follows:

Clause (1): The said appointment of the Managing Agents shall be initially for a period of 20 years from the date of these presents notwithstanding any change in the constitution or in the name and style of the said firm, its successors and assigns;

Clause (3): The managing agents shall be entitled to the following remunerations:

(a) An office allowance for the first six months from the date of these presents a sum of Rs. 800 (Rs. eight hundred) per month; for the next six months thereafter at the rate of Rs. 1200 (one thousand two hundred) per month; and thereafter at the rate of Rs. 1500 (one thousand five hundred), p.m.; with a provision to increase this allowance, from time to time as the business increases, at the discretion of the Directors to a maximum of Rs. five thousand (Rs. 5000) per month, provided however that the salaries of the staff and other expenses for the business of the company shall be borne by the company and shall not be included in the said office allowance.

(b) The managing agents shall also be entitled to a remuneration of 10 per cent (ten per cent) of the annual nett profits of the company as defined by S. 87 (c) (3), Companies Act, provided however that the managing agents agree to waive such portion or the full amount of their remuneration of 10 percent on the said annual nett profits, as may be necessary in any year, in which the said annual nett profits of the company are not sufficient for declaration of at least six percent dividend on the paid-up share capital of the company.

(c) The abovesaid remuneration shall be paid by the company to the managing agents during the period of their appointment, namely 20 years.

Clause 8: Except in the case of the Managing agents being found guilty of fraud or gross negligence or in cases where the law provides, the managing agents shall not be liable to be discharged from their office or be liable to indemnify the company or any one else, for any acts or omissions done by them in the discharge of their duties as managing agents of the company. In all such cases, the company shall indemnify the Managing agents for any loss or damage suffered by them.

Clause 9: The managing agents shall also be entitled to be indemnified for loss or damage that they may suffer by reason of failure or default or breach of any of the conditions herein on the part of the said company.

(4) The second item of claim is made up of two amounts:

(1) Rs. 1560 as office allowance due from 1st March 1947 to 9th April 1947 at the rate of Rs. 1200 per month, and

(2) an amount of Rs. 47840 being such allowance for the period from 10th April 1947 to 6th December 1949 at the rate of Rs. 1500 per month.

This item is expressly founded on clause 3 (a) of the agreement. Prima facie the appellant appears to be entitled to the amount of this item. The company was wound up only on 6th December 1949 and the amount is claimed in respect of a period anterior to this date. The claim was resisted by the respondents mainly on the following grounds:



(a) that the suspension of the managing agency by a resolution of the company dated 6th October 1946 was proper and therefore the appellant was not entitled to any remuneration or office allowance thereafter.

(b) that the Managing Agency firm had ceased to exist when it must be deemed to have been dissolved by one of the partners severing his connection with the firm;

(c) that the winding up of the company was due to the negligence, default and mismanagement of the managing agents.

(5) Before the Official Liquidator, apart from these grounds which were contained in the affidavit filed by the respondents in answer to the claim, certain other legal objections were also raised. These objections are founded on the provisions of the Companies Act. The learned Judge held that the resolution of the 6th October 1946 purporting to suspend the managing agency was ultra vires and invalid. He further held that notwithstanding the retirement of one of the partners, Mr. Oates, the managing agency firm must be deemed to have continued and therefore there had been no lawful termination by the company of the services of the managing agents. The learned Judge also found that the winding up was brought about by the negligence and default of the managing agents in carrying out their duties and that therefore the managing agents had not disentitled themselves to any compensation for the termination of the contract. These findings were not challenged by the learned counsel for the respondents before us. But the learned Judge disallowed this item of claim because in his opinion the amount specified as office allowance was not in the nature of a minimum remuneration, that the managing agents would be entitled to be paid office allowance only so long as the company functioned and that the managing agents were prevented from being in charge of the company.

(6) Learned counsel for the appellant contended that the amount referred to in clause (3) of the agreement as office allowance is really in the nature of minimum remuneration. In the alternative he contended that he would be entitled to the amount claimed as office allowance. Both sides relied on certain provisions of the Indian Companies Act which we shall now set out. Section 87-C of the Act in so far as it is material runs as follows:

“(1) Where any company appoints a Managing Agent after the commencement of the Indian Companies (Amendment) Act, 1936 the remuneration of the managing agent shall be a sum based on a fixed percentage of the nett annual profits of the company, with provision for a minimum payment in the case of absence of or inadequacy of profits, together with an office allowance to be defined in the agreement of management;

(2) Any stipulation for remuneration additional to or in any other form than the remuneration specified in sub-sec. (1) shall not be binding on the company unless sanctioned by a special resolution of the company.”

(7) Now it is clear that on the face of it the Managing agency agreement provides both for an office allowance and a remuneration. This is quite in accordance with the statutory provision. We are unable to agree with the contention of the appellant that the amount expressly stated to be payable as official allowance

is in the nature of a minimum remuneration. Sec. 270(1) (S. 87 C (1)?) no doubt does contemplate a provision being made for a minimum payment as remuneration in the case of absence of or inadequacy of profits. But on the language of that sub-section, it is equally clear that this minimum payment is something different from the office allowance. Besides, if it is argued that this provision is in the nature of a stipulation for additional remuneration in a different form, then it would offend the provision of S. 87(c) (2) of the Act. It only remains to be considered whether the appellant is entitled to the amount of the second item as office allowance defined in the agreement for management. We cannot agree with the learned Counsel for the respondent that the agreement does not define the office allowance. When a specific sum is mentioned as the office allowance payable, we fail to see why this allowance cannot be held to be defined. The respondent's counsel, if we understood him aright wanted us to construe the word “defined” to mean “described in detail”. This is to say, the agreement should specify the number of clerks, peons, attenders, stationery etc. Counsel was unable to cite any authority in support of this construction and we have no hesitation in refusing to adopt what appears to us to be an unreasonable interpretation.

(8) The learned Judge, as already mentioned, disallowed the appellant's claim to the second item on the ground that the appellant firm was prevented from being in charge of the company. With respect to the learned Judge, we fail to see how this circumstance would deprive the appellant of his rights under the agreement. On 6th October 1946, there was no doubt a resolution of the Board of Directors suspending the functioning of the Managing Agency firm as such. But it is important to notice that this resolution did not purport to terminate the managing agency. Under S. 87-B(f) the removal of a managing agent shall not be valid unless approved by the company by resolution at a general meeting of the company. (See — *Ram Kissendas v. Satya Charan*, AIR 1950 P. C. 81). Our attention has not been drawn to any such resolution of the company. It is mainly on this ground that the learned Additional Subordinate Judge of Vellore held that the resolution of 6th October 1946 was ultra vires. It is true that the respondents made several attempts to prevent the appellant from acting as managing agents. There were criminal cases and an application for injunction. The criminal cases, however, ended in an acquittal of the managing partner of the appellant firm. From these proceedings, it is apparent that the appellant continued to have the records of the company with it. It may be that there was not much business done by the company, but it cannot be said that this was entirely due to the fault of the appellant. Even assuming the appellant firm was prevented from being in charge of the company it was so prevented by the wrongful action of the respondents. They cannot either in law or in equity rely on their own wrongful conduct as a circumstance disentitling the appellant to the office allowance during the period when the appellant was so prevented. Before us, the argument proceeded on the basis that the managing agency was lawfully terminated only on the date of the winding up of the company, i.e., 6th December 1949. If this be so, the ap-



pellant would prima facie be entitled to be paid the office allowance as provided in the agreement. It was not suggested by Counsel for the respondents that the managing agency firm did not have its own office. That office was obviously different from the office of the company as is clear from Cl. 3(a) of the managing agency agreement which refers to the salaries of the staff and other expenses for the business of the company which had to be borne by the company and were not included in the office allowance payable to the managing agents. In our opinion the appellant was entitled to the office allowance for the period upto the date of winding up, viz., 6th December 1949 at the rates mentioned in clause (3) of the agreement. The second item of the claim must be allowed in its favour.

(9) The third item of claim is by way of special damages payable to the appellant for the premature termination of the managing agency. The appellant's counsel expressly abandoned the appellant's claim to damages on the basis of the remuneration of ten per cent of the annual nett profits of the company and confined the basis of his claim to the provision for the payment of the office allowance at a fixed rate. Though according to this basis he would be entitled to claim at the rate of Rs. 1500 a month for the balance of the term of 20 years, he restricted his claim to Rs. 25000. Clause 8 of the managing agency agreement provides that except in the case of managing agents being found guilty of fraud or gross negligence or in cases where the law provides, the managing agents shall not be liable to be discharged from their office, and under Cl. 9 the managing agents shall be entitled to be indemnified for loss or damage suffered by reason of failure or default or breach of any of the conditions on the part of the company. Learned counsel for the appellant relied on several English decisions in support of his contention that when an agreement provides for the payment of a salary and other allowances to an employee or agent, the employee or agent is entitled on termination of his employment or agency to such salary and allowances for the unexpired portion of his contract of employment or agency. In — '*In re English Joint Stock Bank Yelland's case*', 4 Eq. 350, one Mr. Y. was engaged as the sole manager of a branch of a bank for a term of five years from 1st July 1865 at a stipend of not less than £. 500 a year. It was also provided that whilst he should continue to act as manager of the branch he should have the right of occupying the bank premises as a dwelling house free of all rent, taxes and other outgoings. Y acted as manager of the branch of the bank until 11th May 1866 when the bank stopped payment. An order for winding it up was made on 25th May 1866. On 1st August Y received a notice from the Official Liquidator that his engagement was at an end and that his services would no longer be required. Y sent in a claim for £. 1958 for three years and 11 months' salary at the rate of £. 500 a year and a further sum of £. 360 being equivalent to £. 120 a year for three years' residence and offices on the bank premises free of rent, rates and taxes calculated from 24th June 1867 when he would have to vacate the premises. It was held by Sir Page Wood V. C. that the proper course would be to ascertain the present value of an annuity of £. 500 terminating on 1st July

1870 and a proper rent for the bank premises for the rest of the term, regard being had to the risk to health and life and from that amount deduction should be made for Y being at liberty to obtain a fresh appointment and regard must also be had to the liberty reserved to him by the agreement of acting as agent for other companies. The matter was sent back to Chambers for calculation upon this principle.

(10) In — '*In re: London and Colonial Co., Ex parte Clark*', L. R. 7 Eq. 550 by an agreement between a limited trading company and their agent in a British Colony it was provided that the salary of the agent was to be £. 750 a year for a period of five years from the day of his arrival in the colony and in addition he was to be allowed certain commissions on remittances made by him to England. The company also agreed to defray all expenses for offices, ware-houses and staff of clerks. The agent arrived in the colony in December 1865 and commenced business. In March 1867 the voluntary winding up of the company was ordered to be continued under supervision and in January 1868 the agent's services were put an end to. The agent claimed salary at £. 750 per annum from 18th January 1868 to 18th December 1870 and commission on certain remittances made by him and also estimated commission which would have been payable to him during the remainder of his engagement, expenses of his voyage and legal proceedings. The Vice Chancellor made the following declaration as regards his claims:

"Following what was done in '*Yalland's case*', L. R. 4 Eq. 350 allow to Mr. Clark his full salary to the end of the five years.

Also allow to him a proper sum for rent and office expenses for the same period, having regard to the amount expended whilst the company was a going concern, also his commission upon all goods handed over by him under the power of attorney at invoice prices; also allow him a proper sum for the expenses of his return voyage and those of his wife; and in taking such accounts let there be a separate account of all commissions and salaries due to him after the winding up."

(11) In — '*In re English & Scottish Marine Insurance Co., Ex parte Maclure*', 5 Ch. Ap. 737 the agreement between an Insurance company and its agent provided not only for a fixed salary but also for a commission of ten percent, on all business transacted. The agreement was for a period of five years, but before the five years had expired the company was wound up voluntarily. The agent claimed against the company,

(1) The balance due to him at the time of the commencement of the liquidation for salary, office expenses and commission. This was agreed to by the liquidators;

(2) The prospective value of £. 500 a year till the expiry of the period of five years;

(3) The office expenses to the same date; and

(4) The prospective value of the commission to the same date.

The claim was heard by the Master of the Rolls who held that the agent was entitled to the salary for the balance of the period of the agreement, but disallowed his claim in respect of the value of the commission. As regards office expenses there was a subsequent



agreement between the Official Liquidator and the Agent under which the agent agreed to accept a specified sum. There was an appeal which was disposed of by Sir W. M. James L. J. He held that the agent was not entitled to prove against the company for the loss of his commission during the remainder of the term of five years.

(12) In — 'In re the Patent Floor Cloth Co., Dean and Gilbert's claim', 41 L. J. Ch. 476 there was no fixed salary. A company engaged two persons to act as their commercial travellers for three years in a certain district at a commission upon goods ordered. The company was wound up before the termination of the three years. It was held that the commercial travellers were entitled to compensation in respect of the commission for the unexpired portion of the term, and the amount was directed to be ascertained by the Chief Clerk in Chambers. The case in — 'In re, English and Scottish Marine Insurance Co., Ex parte Maclure', 5 Ch. Ap. 737 in which the claim for commission had been disallowed was distinguished on the ground that in that case the remuneration was salary and commission whereas the remuneration was only commission in this case.

(13) The ruling in — 'Reigate v. Union Manufacturing Co., (Ramsbottom)', 1918-1-K. B. 592 is more or less on similar lines. Here a manufacturing company employed the plaintiff as agent for a period of seven years for the sale of their goods. The agent was to obtain orders at agreed prices and he was to get a commission upon the invoice prices of all goods delivered by the company and duly paid for by the purchasers. Before the expiry of the period of seven years, the company passed resolutions for voluntary winding up and eventually sold their business. In an action to recover damages for breach of the agreement it was held that the company was liable to damages. The enquiry as to damages was directed to be made by the Official Referee and the company was allowed to show circumstances which might lead to the conclusion that during the remainder of the period there was very little prospect of any large quantity of business being done.

(14) Before applying the principles laid down in the above decisions to the facts of the present case we think we should also refer to a decision not cited before us, namely, — 'Rhodes v. Forwood', 1 A. C. 256. A and B agreed that for seven years A should be the sole agent for the sale of B's coals and that B should not employ any other agent for that purpose. A was to be paid a fixed commission of three per cent. At the end of four years, B sold the colliery itself. In an action by A for damages for breach of the agreement it was held by the House of Lords that the action was not maintainable. The 'ratio decidendi' was that where two parties agree for a fixed period the one to employ the other as his sole agent for certain business, there is no implied condition that the business itself shall continue to be carried on during the period named. Lord Hatherley observed:

"The parties seem to me to have entered into a simple contract of agency, which necessarily determines when the subject-matter of the agency is gone. The subject-matter of the agency has disappeared without mala fides on either side. Therefore the contract is

brought to an end by the course of events— by that happening which might necessarily have been expected to happen and which would have the effect of putting an end to the contract.....

My Lords, it appears to me that all that has happened is this: The parties meet together, and they assume as between themselves the probability of a certain state of things existing, but they do not enter into a guarantee that that state of things shall continue to exist."

Lord Penzance pointed that the natural reading of such a contract as that before the House was that as long as the principal chooses to carry on his business he shall be bound to employ the person with whom he has agreed as his agent, but that he shall be at liberty when he likes to put an end to that business to do so. The rule of law enunciated by the House of Lords in this case has been referred to in several of the decisions cited by the appellant's counsel.

In — 'In re, the Patent Floor Cloth Co., Dean and Gilbert's claim', 41 L. J. Ch. 476 though the ruling itself is not referred to as the case was decided earlier the same principle is stated. Distinguishing — 'In re, English and Scottish Marine Insurance Co., ex parte Maclure', 5 Ch. Ap. 737 Bacon V. C. said:

"But that was a case in which the man had stipulated for two things, salary and commission, and if the man who had agreed to pay him the salary chose to leave off business the servant could not prescribe to his master that he must carry on business whether he liked it or not."

(Vide also — 'Reigate v. Union Manufacturing Co., (Ramsbottom)', 1918-1-K. B. 592 at 600, 601). Buckley in his Commentary on the Companies Act, 12th Edn. sums up the legal position on a review of all the authorities thus:

"Where two parties mutually agree for a fixed period the one to employ the other as his sole agent in a certain business at a certain place, the other that he will act in that business for no other principal at that place, a condition that the business itself shall continue to be carried on during the period named is not to be implied in the absence of special circumstance, e.g., if under the terms of the agreement the principal is bound to accept orders obtained by the agent" (pp. 619-620).

In our opinion this principle must be applied with greater force to the case of a managing agency such as that with which we are concerned in the present case. We have excluded altogether out of consideration cases in which though the company may continue to carry on business the managing agents' services have been wrongfully dispensed with. Such cases would stand on quite a different footing.

Here we have a case where the company has been compelled to close down its business and it is only by this event that the managing agency has come to an end. Can we infer as an implied term of the agreement that the company is bound to carry on business for a period of 20 years? We think not. If that be so and if the company has been forced to come to an end the managing agent cannot be heard to say that he must be paid what he might have earned if the company had continued to carry on business for the full term of 20 years. This



of course would obviously apply to any claim which may be put forward by the appellant for an estimated amount of profits which might have been earned by the company if it had continued. We think that the same consideration must also apply to the claim for office allowance. The appellant cannot compel the company to continue to carry on business for 20 years or pay him office allowance for the full period of 20 years though the company itself may cease to carry on business long before the expiry of the period. We further think that the position of a managing agent materially differs from that of an ordinary employee of the company, employed at a fixed salary. In this view the third item of claim must be entirely disallowed.

(15) O. S. A. No. 32 of 1951 is allowed in part. The appellant will get proportionate costs but the respondents 1 and 2 will bear their own costs. Respondent 3, the Official Liquidator will take the costs from the company's funds. O. S. A. No. 20 of 1952 is allowed with costs. B/M.K.S. Order accordingly.

**A.I.R. 1953 MADRAS 202 (Vol. 40, C. N. 68)**

**GOVINDA MENON AND KRISHNA-SWAMI NAYUDU JJ.**

Muthalammal, Appellant v. Veeraraghavalu Nayudu and others, Respondents.

Second Appeal No. 1803 of 1948, D/- 8-4-1952.

Civil P. C. (1908), O. 22, Rr. 1 and 10 — Right to sue in personal actions — 'Widow's claim to maintenance against husband's estate — Death of widow pending suit — Survival of claim to legal representative — (T. P. Act (1882) S. 6(dd) ) — (Hindu law — Widow — Maintenance).

The right of a Hindu widow to claim maintenance out of her husband's estate when it has not crystallised into a definite sum is an inchoate right which cannot be transferred or assigned. Her claim to maintenance is personal and, therefore, if she dies pending her suit for maintenance against the estate of her husband in the hands of a coparcener the claim does not survive to her legal representative: Case law referred to and discussed. (Para 10)

Anno: Civil P. C., O. 22 R. 1 N. 5; O. 22 R. 10 N. 9; T. P. Act, S. 6 N. 13.

T. R. Srinivasan and S. Gopalaratnam, for Appellant; K. V. Ramachandra Iyer, for Respondents.

GOVINDA MENON J.: The appellant, whose mother had filed a suit in 'forma pauperis' against her husband's brother for past and future maintenance at the rate of Rs. 100 per year to be made a charge on the family properties, was on her death brought on record as the legal representative of her mother in the trial court. Both the lower courts have dismissed the suit on the ground that the appellant's mother's claim for maintenance against her husband's estate in the hands of the coparcener was a personal claim which does not survive to her legal representative on her death. The learned District Munsif relied upon a decision of Happell J. in C. R. P. No. 675 of 1945 in which the facts were as follows:

(2) A certain lady filed a suit against her husband for maintenance and while the suit was pending she died. But before her death she purported to assign her rights to past

maintenance to her father, and on her death, the father filed an application to be brought on record as the legal representative of the daughter. The learned Judge held that the question of the original plaintiff's right to maintenance was a personal right and since it was not a suit to recover an ascertained sum, a transfer of such a personal right could not be recognised in law. The claim of an unliquidated and unascertained amount due to a Hindu lady by way of maintenance could not be the subject of an assignment.

(3) This judgment of Happell J. has not been referred to by the learned District Judge. In his judgment the two cases cited before him viz., — 'Rangappa Aithala v. Shiva Aithala', 65 MLJ 410 and — 'Rajalakshmi Deviammal v. Naganna Naidu', 21 LW 461, were distinguished by the learned District Judge on the ground that they were cases where the claim was for a specific sum of money, already ascertained as the quantum of arrears.

(4) Under the Mitakshara law, it is clear that the wife of a member of a joint family, though a member of the family as such, is not a coparcener in any sense of the term. Her right to maintenance has therefore to be ascertained by a consideration of the rights which she has to it and the obligation which her husband, or husband's coparceners, have to discharge. It is also well settled that the widow of an undivided coparcener is not entitled to claim from the survivor as maintenance more than the proceeds of the share which would have been allotted to her husband had there been a partition during his lifetime. What, therefore, is the nature of her right to maintenance in the share of her husband in the joint family property? The contention urged on behalf of the appellant is that according to Hindu law-givers, originally the wife and the husband had common ownership of property and her right to maintenance had to be traced to such ownership. It is by subsequent evolution that the ownership in the property has ceased to exist and in its place a maintenance right has been substituted.

The nature of the claim is thus described in Apastamba's Dharma-sutras, quoted at page 234 of Golapchandra Sarkar Sastri's Hindu Law, 8th edition:

"There is no partition (or separation) between husband and wife because from the 'taking of hand' (i.e., marriage) companionship (or jointness, of husband and wife) in (religious) acts (is ordained); likewise in the fruits of (acts of) spiritual merit; and also in the ownership of wealth; since (Manu and other sages) do not declare (the commission of the offence of) theft, in the case of necessary gift (made by a wife, of her husband's property."

The exact expression is द्रव्य परिग्रहेषुच "Dravyaparigrahashucha".

From the fact that as a result of marriage it is stated that there is jointness in the ownership of wealth, the earlier Hindu law-givers contemplated the wife to have some kind of right in the property of her husband. The origin and nature of such a right can also be inferred from other passages in the same book, such as at p. 271:

"The wife is declared to become co-owner of the husband from the time of their marriage." and at p. 278 where in dealing with woman's rights the learned author says as follows:

"'Wife's right to husband's property': The 'patni' or lawfully wedded wife acquires from



the moment of her marriage a right to everything belonging to the husband, so as to become his co-owner. But her right is not co-equal to that of the husband but is subordinate to the same, and resembles the son's right to the father's self-acquired property. The husband alone is competent to alienate the same, and the wife cannot interdict his disposal, but being dependent on him must acquiesce in it, provided it does not unjustly affect her right to maintenance out of it. Nor can the wife enforce a partition of the property. But it is by virtue of this right that the wife enjoys the husband's property, and is entitled to get maintenance out of it; and it is also by virtue of this right that she gets a share equal to that of a son, when partition takes place at the instance of the male members. Thus the wife also of a male member becomes a coparcener of the family property.

The widow under S. 3, sub-s. (2) of the Hindu Women's Rights to Property Act gets in the joint family property the same interest as her husband had. Consequently, if the husband was joint with his brothers and sons, then on the death of the husband, the widow becomes a member of the coparcenary with the rights of survivorship and of securing the joint status."

(5) The argument put forward is that what was once a right of the wife in the property of her husband has now become converted into a right for maintenance and for this argument other passages in the same book are also cited and they are Chapter XI, Section 3, sub-s. (iii) at page 528 dealing with the rights of the wife and the widow: and chapter XI, S. 4, sub-s. (i). Again, at page 540 the following passage occurs:

"Where the right to maintenance is the legal incident of a right to property, such as that of the widow of the deceased proprietor, the lowest limit is to be determined by having regard to the extent of the property, and to similar right, if any, of any other person."

At page 541 we find the following passage:

"But all this is open to the objection that the right to maintenance being a right to property, which the law confers on one person against another, and annexes it to some estate, why should any such extraneous consideration affect it in the manner set forth above, when the law does not say so? It is, therefore, held that improvement of her financial condition is no ground for reducing the maintenance."

(6) These passages may refer to Dayabhaga System of law.

(7) A right to maintenance is also described as arising from the theory of an undivided family where the head of the family is bound to maintain its members, their wives and children. See page 813 of Mayne on Hindu law and Usage, 11th Edition.

(8) If the basic principle of the right of a male member's wife for maintenance to be paid out of the property of the joint family, or that of a widow from her husband's estate in the hands of the surviving coparceners, is based upon the theory that in remote past, when the Hindu law had not developed as a result of judicial decisions as it is today, the female member had some kind of rights in property without being a coparcener and without being entitled to claim a share, then it is said that such a right is one which relates to rights in property and can be made the subject

of inheritance or transfer. In — *Hoymoluttu Debia Chowdrain v. Korrana Moyee Debia Chowdrain*, 8 WR 41, a Bench of the Calcutta High Court held that such a right is heritable and transferable. But the report is so meagre that it is not possible to ascertain as to whether the subject of that decision was an ascertained sum or a mere right to claim maintenance out of the estate. Our attention was also invited to — *Subbarayulu Chetti v. Kamalavalli Thayaramma*, 21 MLJ 493 at p. 499 and — *Rajalakshmi Deviammal v. Naganna Naidu*, 21 LW 461 at p. 468. But as the learned District Judge has himself remarked, these were cases where a specific, ascertained and liquidated sum of money was claimed from the estate. If that is so, such an amount is capable of being transferred. We do not think that the passages at pages 88 and 92 of Travelyan's Hindu Law, 2nd Edn., carry the case any further than what has been stated in the quotations extracted above from Golapchandra Sarkar Sastri's Hindu Law, 8th edition.

(9) The real difficulty which the appellant has to encounter is that even if the widow's right is one which arises in property or out of property, still, since that amount is not ascertained, liquidated and specified, it cannot be the subject of a transfer. For one thing it might be, as is contended by the respondent in this case, the widow is entitled to nothing as she has remarried or she might have become disentitled to maintenance on account of her subsequent unchastity. Therefore, it is not, in all cases, that a Hindu widow can have a defined and ascertained sum claimable from her husband's estate unless by agreement between the parties a sum of money has been specifically fixed, which has to be paid out of the estate.

(10) For the respondent it is contended that right to maintenance is not property and that a woman is not a coparcener though she is a member of the family. Since the right to maintenance is not property it cannot be assigned. At pages 333 and 334 of Mayne on Hindu Law and Usage, 11th Edn. the learned author states that the female members of the family have no vested right by birth and come in only as heirs to obstructed heritage and cannot be coparceners with the male members, though, along with the males, or in exceptional cases by themselves, they are members of the undivided family as a corporate body.

That this is so is clear from observations in various authorities such as — *Radha Ammal v. Commissioner of Income-tax, Madras*, ILR 1951 Mad 56 and — *Seethamma v. Veeranna*, ILR 1950 Mad 1076. Both these cases arose after the Hindu Women's Right to Property Act (XVIII of 1937) was passed, but even then it has been held that she is not a coparcener though entitled to a share on the death of her husband. At page 1082 of the report in — *Seethamma v. Veeranna*, ILR 1950 Mad 1076, the learned Chief Justice says as follows:

"In our opinion, the status of a Hindu widow of a deceased member of a joint family governed by the Mitakshara under the provisions of the Act is not that of a coparcener, but that of a member of the joint family with certain special statutory rights."

If that is so such inchoate rights which have not crystallised into a definite sum cannot be made the subject of transfer. In this connection an earlier decision of the Calcutta High Court reported in — *Bhyrub Chunder v. Nubo Chunder*, 5 WR 111, which was followed in —



'Naradabai v. Mahadeo Narayan Kashinath Narayan and Shama Bai', 5 Bom 99, 103, 104, is worthy of note. At pages 103 and 104 of the latter decision West J. observes as follows:

"The husband's duty of maintaining his wife is one which he cannot owe to another. Her right as against him is one that she cannot transfer to another. Even a widow's right to maintenance against the heirs taking her husband's property cannot be assigned. Ordinarily, therefore, a Hindu wife has no property in her husband's estate that she can part with as a consideration for a contract to her, and a right in her maintenance by way of contract cannot rest on such a consideration."

[With respect we are inclined to follow the expression of opinion by West J. and hold that a widow's right to maintenance against her husband's property is one which cannot be transferred or assigned. It seems to us therefore that the decision of the lower appellate Court is right and the second appeal is dismissed with costs.

B/M.K.S.

Appeal dismissed.

#### A. I. R. 1953 MADRAS 204 (Vol. 40, C.N. 69)

##### GOVINDA MENON AND MACK JJ.

The Public Prosecutor, Appellant v. Veerabhadrapa Lakshminarayana Setty, Respondent.

Criminal Appeal No. 939 of 1951, D/- 23-7-52.

**Factories Act (1948), Ss. 14, 92 and 106 — Failure to construct dust-proof husk chamber — Complaint — Limitation.**

The Inspector of Factories inspected a factory on 5-10-1950 and found that the accused had failed to construct a pucca dust-proof husk chamber as required by S. 14. The Inspector visited the factory again on 24-1-1951 when also he found the above defect and laid a complaint on 15-3-1951 for an offence under S. 92. The question was whether the complaint was barred by limitation as being beyond three months of the first visit of the Inspector on 5-10-50.

Held that the offence committed was a continuing one, and when the Inspector visited the factory on the second occasion on 24-1-1951 the offence committed on that date came to his knowledge on that day, and the prosecution having been launched within three months of that date was in time. (Para 5)

The Appellant in person; N. V. Ganapathi, for Respondent.

##### ORDER OF REFERENCE

SOMASUNDARAM J.: In this case, the Inspector of Factories inspected the factory in question on 5-10-1950 and found that the accused had failed to construct a pucca dust-proof husk Chamber as required by S. 14, Factories Act. The failure to do this is an offence punishable under S. 92 of the Act. Under S. 106 of the Act no court shall take cognizance of any offence punishable under this Act unless complaint thereof is made within 3 months of the date on which the alleged commission of the offence came to the knowledge of the Inspector. A complaint for this offence must be laid within 3 months from the above date, i.e., 5-10-1950. But the complaint was laid on 15-3-1951 and it is clearly beyond 3 months.

But it is argued that the Inspector visited the factory again on 24-1-1951 when also he

found the above defect and the complaint being within 3 months from the later date, the complaint is within time. In support of this contention a decision of Subba Rao J. in — 'Cr. P. C. No. 417 of 1950' is cited. In my view, the period of 3 months is to be calculated from the time the Inspector had first knowledge of the offence. Otherwise, it would only mean an extension of period. The knowledge in the section means the knowledge which the Inspector had first obtained and not subsequently. In view of the different opinion which Subba Rao J. has held it is necessary that this should be decided by a Bench. I therefore direct this to be posted before a Bench.

##### JUDGMENT

(2) GOVINDA MENON J.: This appeal has been referred to a Bench by Somasundaram J. on account of a difference of view between himself and Subba Rao J. with regard to the proper construction to be put upon S. 106, Factories Act, 63 of 1948. The facts are stated in the judgment of our learned brother, Somasundaram J. and need not be restated here. What happened was that the respondent here failed to comply with the provisions of S. 14, Factories Act, by not putting up a dust-proof husk chamber in the factory, and this was noticed by the Inspector of Factories when he visited the place on 5-10-1950. As a result of that, the Inspector issued a notice to the manager and the occupier to rectify this defect within a period of time mentioned by him. Nothing was done with the result that when the Inspector again visited the factory on 24-1-1951 it was found that the 'status quo ante' continued, whereupon a charge-sheet under S. 92, Factories Act, for having committed an offence under S. 14, Factories Act, was laid before the Magistrate on 15-3-1951.

Among other points, the learned Magistrate found that the prosecution was barred by the provisions of S. 106, Factories Act, because the alleged offence came to the knowledge of the Inspector on 5-10-1950 when he first visited the factory, and the prosecution having been launched more than three months thereafter, was barred by the provisions of that section. Subba Rao J. in — 'Cr. R. C. No. 417 of 1950' took the view that such offences were continuing ones and, according to the learned Judge, if the argument of limitation were to prevail, it would lead to an anomalous situation that once the authorities concerned overlooked a contravention of a certain specific provision by the manager or the owner of the factory, they would be precluded for ever from complaining against subsequent delinquencies on his part. Such being the case, the learned Judge was of opinion that, being a continuing wrong, every succeeding act gave rise to a cause of action.

(3) It cannot be disputed that the offence committed is a continuing one, for the non-erection of a dust proof husk chamber, for every day of such failure, amounts to an offence. If it is an offence on a particular date, it does not cease to be an offence on the next day and so on, until the deficiency is rectified. We feel that the offence is certainly a continuing one. But the question is what exactly is the import of the expression "the offence came to the knowledge of the inspector". Does it mean the date when the offence first came to the knowledge of the inspector, or a continuing offence coming to the knowledge of the Inspector on any subsequent day? Section 106 is



modelled somewhat on S. 146 of the Factory and Workshop Act, 1901 (1 Edward 7, Ch. 22), which is as follows:

"The information shall be laid within three months after the date at which the 'offence comes to the knowledge of the inspector' for the district within which the offence is charged to have been committed....."

Here also, the words are 'within three months after the date at which the offence comes to the knowledge of the inspector'. Therefore, it seems to us that in interpreting the present section the meaning put upon the words in a similar English statute by English Courts will be very helpful. In — *Verney v. Mark Fletcher and Sons Ltd.*, 1909-1-KB 444, a Divisional Court of the King's Bench division consisting of Lord Alverstone C. J., Higham J. and Walton J. had to construe that section. What happened there was that in May 1905 and again on March 12, 1908 an Inspector of Factories for the district in which a factory of the respondents was situated, visited the factory and found that the fly-wheel of an engine was not fenced as required by the Factory and Workshop Act, 1901. Nothing seems to have been done except that he told the respondents that the fly-wheel was not securely fenced and required them to fence it in accordance with the provisions of the Act.

Again, he visited the factory on 1st July 1908 and found that the same fly-wheel was still unfenced. On 22nd July 1908, the Inspector laid information against the respondents for an offence under S. 135 of the Act in that the factory was, on 1st July 1908, not kept in conformity with the Act in that the fly-wheel was not securely fenced as required by S. 10 of the Act. It was argued before the Divisional Court by eminent Counsel like Avory K. G. and Patrick-Hastings that since the Inspector had knowledge of this deficiency in May 1905 and in March 1908 it should be said that the alleged offence came to the knowledge of the Inspector more than three months prior to the date of the initiation of the prosecution. The learned Lord Chief Justice who delivered the judgment, in answer to this contention expressed the following opinion:

"The information in the present case charges the respondents that their factory was on July 1, 1908, not kept in conformity with the Act by reason of the omission to fence their fly-wheel. If that be proved, I have not the slightest doubt that there was on July 1 a direct and continuing breach of the provisions of S. 10. It is said that because in May 1905 and again in March 1908, the fly-wheel was unfenced, to the knowledge of the inspector, and the information was not laid until July 22, 1908, the requirements of S. 146 have not been complied with. In my opinion, an offence was committed on July 1, 1908, just as much as in March 1908, or May 1905, and the offence committed on July 1 came to the knowledge of the inspector on that day, when he visited the respondents' factory. I therefore, come to the conclusion that the information was laid in time."

(4) We respectfully are in agreement with these dicta.

(5) In the present case, as we have already held, the offence committed is a continuing one, and when the Inspector visited the factory on the second occasion on 24th January 1951 the offence committed on that date came to his knowledge on that day, and the prosecution having been launched within three months of

that date is in time. We are therefore of opinion that the learned Magistrate was wrong in the construction he put upon S. 106 of the Factories Act. In view of the fact that the appeal has been filed mainly with the object of having a pronouncement on this question of law, we think it is unnecessary to proceed with the matter any further except by stating what the correct law, in our opinion is. We therefore set aside the order of acquittal, but in the circumstances we do not wish to impose any sentence on the respondents. The other two points are only subsidiary matter on which we agree with the lower court.

B/V.R.B.

Order set aside.

**A.I.R. 1953 MADRAS 205 (Vol. 40, C. N. 70)**

**RAJAMANNAR C. J. AND VENKATA-  
RAMA AYYAR J.**

Velu Pillai alias Veluswami Pillai, Appellant v. G. V. Sundararajulu Naidu and others, Respondents.

Letters Patent Appeal No. 79 of 1949, D/- 11-7-1952.

**Civil P. C. (1908), S. 48 — Execution application — Application for execution of mortgage decree filed in time returned for amendment of decree — Application for amendment of decree made also in time — Amendment of decree made after 12 years — Decree-holder trying to continue execution is not barred by S. 48.**

(Para 1)

Anno: C. P. C., S. 48 N. 7.

T. S. Venkatarama Iyer, for Appellant; T. K. Subramania Pillai, for Respondents.

RAJAMANNAR C. J.: We agree with the learned Judge Panchapakesa Aiyar J. against whose judgment this Letters Patent Appeal has been filed that the execution petition filed by the respondent is not barred by limitation. The decree in question was passed on 2-11-1933. It is a mortgage decree but by inadvertence, interest subsequent to the date of the decree was not awarded by it. On 29-3-1945 the respondent filed an execution petition including subsequent interest also which was not awarded by the decree. The petition was therefore returned to be represented after the decree had been amended. Thereupon the respondent filed an application for amendment within 12 years from the date of the original decree. The amendment, however, was ordered only on 26th March 1946. Thereafter when the respondent wanted to continue the execution proceedings, he was met with the plea that the decree had become barred under S. 48, C. P. C. as 12 years had elapsed from the date of the original decree. We fail to see how the bar of limitation can be successfully sustained in this case. Admittedly the execution petition which is now sought to be proceeded with was filed within 12 years from the date of the original decree. The application for amendment of the decree was also made within that period. The fact that the amendment was eventually ordered on a date after the expiry of the period of 12 years would not make a difference because the amendment would obviously date back to the date of the application at least, if not to the date of the original decree. It was contended for the appellant judgment-debtor that the original execution petition must be deemed to be one not in accordance with law; but we are unable to accept this contention. He also relied upon the ruling in — *Faquir Chand v.*



Kundan Singh', 54 All 622. That decision, however, has no bearing whatever on the facts of this case because in that case the execution petition itself was filed after the lapse of 12 years from the date of the original decree. In the present case, the execution petition was filed well within time but was being returned to be represented after the amendment of the decree had been carried out. In these circumstances, there was no bar of limitation under S. 48, C. P. C. The appeal is dismissed with costs.

B/V.S.B.

Appeal dismissed.

**A.I.R. 1953 MADRAS 206 (Vol. 40, C. N. 71)**

CHANDRA REDDI J.

Proprietor, St. Joseph's Automobile and Mechanical Works, Tuticorin, Appellant v. Maria Soosai Pillai, Respondent.

A. A. O. No. 321 of 1950, D/- 23-4-1952.

**(a) Workmen's Compensation Act (1923), S. 30 — Questions of fact — Interference.**

Under S. 30, the appellate Court's jurisdiction to interfere with an order of the Commissioner for Workmen's Compensation in appeal is confined to substantial questions of law. Hence, it is not open to the appellant to question the correctness of the conclusion of the Commissioner on the question of facts. (Para 4)

Anno: W. C. Act, S. 30 N. 3.

**(b) Workmen's Compensation Act (1923), S. 2 (1) (d) (ii) — Father of deceased.**

When the earnings of the deceased workman were hardly sufficient for his maintenance and no balance left which would contribute to the family fund the parent cannot be said to be a dependent within the meaning of S. 2, clause 1 (d). But if the deceased workman was rendering either valuable services to the family that might be taken into consideration in determining the degree of dependency, the dependency is with reference to the date of the death of the workman and the fact that at a future date the father might have to depend upon the son is not a relevant consideration. Where the earnings of the deceased workman far from being an asset to the family were not sufficient to maintain him and the father had to spend considerable portion of his earnings on the maintenance of his deceased son, the father not being a dependent wholly or partially on the earnings of the deceased workman was not a dependent within the meaning of the definition in S. 2 (1) (d). Case law discussed.

(Paras 11, 12)

Anno: W. C. Act, S. 2 N. 3, 5.

K. S. Rajagopalachari, for Appellant; G. Chandrasekhara Sastri (*Amicus Curiae*), for Respondent.

**JUDGMENT:** This appeal arises out of an application filed by the respondent herein for compensation under the Workmen's Compensation Act. The respondent's son who was of tender years was employed as a workman in the appellant's workshop as a cleaner on a daily wage of Rs. 0-4-0. The workman met with an accident on 8-5-1949 while working in the factory during night time which resulted in his death. The respondent claimed a lump sum payment of Rs. 500 under S. 3 of the Act.

(2) This application was opposed by the employer on the ground that respondent's son was not a workman within the meaning of the Act as he was only an apprentice, that the accident did not arise during the course of his employment and lastly that the application was incompetent as the applicant was not a dependent within the meaning of S. 2(1) (d) of the Act. The Commissioner for workmen's compensation overruled these objections and granted a sum of Rs. 500 by way of compensation to the applicant. He found that the deceased was a workman within the meaning of S. 2(1) (n) and that the accident occurred in the course of his employment under the applicant. As regards the competency of the applicant to maintain the application, the opinion of the Commissioner was that the applicant was partly dependent on the deceased and as such was entitled to claim compensation.

(3) The employer has filed this appeal against that order.

(4) In this appeal, the findings of the Commissioner on the first two issues were not seriously challenged as they were essentially questions of fact. Under S. 30 of the Act, this court's jurisdiction to interfere with an order of the Commissioner for Workmen's Compensation in appeal is confined to substantial questions of law. That being so, it is not open to the appellant to question the correctness of the conclusion of the Commissioner on those two questions.

(5) The only point that was debated was that the respondent was not a dependent within the meaning of S. 2(1) (d) of the Act. Under that section a dependent "includes a parent other than a widowed mother if wholly or in part dependent on the earnings of the workman at the time of his death". In order to come within the ambit of the definition of "a dependent" a father has to prove that he was dependent upon the earnings of his deceased son either wholly or in part.

(6) The appellant contends that in this case the parent is not a dependent because on his own admission he was not in any way depending on the earnings of his son. The statement of the applicant in the evidence that has given rise to this conclusion is this:

"At the time of his death he was eking Rs. 0-4-0 per day. The expenses for the food of the deceased would be about Rs. 20 to Rs. 25 per month. He was paid Rs. 6 per month. For other expenses, I used to pay him for dress etc."

(7) The counsel for the appellant urges that on this admission the father cannot be said to be a dependent within the meaning of S. 2(1) (d) of the Act. In order to claim the benefit under S. 2, the parent must show, the learned counsel argues, that out of the earnings of the son there was a balance which was useful to him. In support of this contention, he cited a decision of a Bench of this court in — '*Venkatarama Aiyar v. Babasahib*', 1942-1 M.L.J. 406. There their Lordships had to consider whether a father without even alleging that he was dependent on the earnings of his deceased workman could maintain an application for compensation.

The learned Judges expressed the opinion that under S. 2(1) (d) as amended by Act XI of 1933 a parent had no locus standi to claim compensation under the Act without proof of



his dependence on the earnings of his workman either wholly or in part. It may be pointed out that prior to 1933, sub-cl. (d) stood as follows:

"'Dependent' means any of the following relatives of a deceased workman, namely, a wife, husband, parent, minor son, unmarried daughter, married daughter who is a minor etc."

But the amendment took away the parent other than the widowed mother from that category and under the amended definition a father could be regarded as a dependent only when he could establish that he was really depending on the earnings of the workman either wholly or partly. This case did not decide the point that arises for consideration in this case.

(8) The question that I have to decide is whether a mere contribution by the workman towards the expenses of the family is sufficient to enable the father to claim as a dependent within the meaning of the Act irrespective of the fact whether the parent derived any advantage out of the earnings of the deceased workman. This point has come up for discussion in other courts, though there is no case of our court bearing on this point.

(9) In — *Damjee v. Maung Hla Sein*, AIR 1939 Rang. 369 the question was whether a husband was a dependent on the earnings of his wife within the meaning of S. 2(1) (d) of the Act. All that was alleged in the application for compensation was that he and his wife used to pool their earnings which went into a common pot. The learned Judges took the view that that was not sufficient to constitute the husband a dependent who could claim compensation under the Act. The test, according to the learned Judges was whether as a result of the death of the workman any loss had occurred to the applicant and whether without the earnings of the deceased workman he could live as well as he lived before. The learned Judges remarked that the purpose of the statute was not to give solatium to a relative of the deceased workman but to replace the loss sustained as a result of the fatal accident to the workman.

(9a) There is a very elucidating exposition of the law on the subject in the speech of Scrutton LJ in — *'Pear v. Blockow Vaughan and Co.'*, 94 L.J.K.B. 497 at 510;

"It seems to me that one person is not dependent upon another unless he is receiving a net advantage from that person, that is to say, a balance after paying the expenses of the maintenance if he bears them."

Again, it is observed in the speech of the same Law-Lord on page 510:

"I wish, however, to guard myself on one question, that is, if at the time of the death there is no dependency, because at the time of the death there is no balance coming, or which has come in the past, from the deceased to the alleged dependant. I personally am not at present satisfied that in such a case it can be said 'Oh, but he is dependent, because there would have been a contribution, or might have been a contribution in the future'."

In the same case Warrington L. J. remarked that if the son made no contribution for the provision of the ordinary necessities, the father could not be treated as a partial dependent on the son. In that case, a son who was

a boy of 11 years and employed in a coal mine was earning 11 Sh. 10 d. a week which was contributed to the family fund. There being no evidence as to what was the amount of burden thrown upon the father and as to the net balance in respect of which there is dependency on the part of the father, it was held that the father was not a co-dependent on the deceased workman wholly or in part.

(10) In — *'Tamworth Colliery Co. Ltd. v. Hall'*, 1911 A. C. 655, the principle was stated to be that if the father did not gain anything from the earnings of his son, he was not a dependent who could claim compensation under the Workmen's Compensation Act. Lord Loreburn L. C. observed that "the proper course is to look at all the circumstances and to say to what extent, if at all, was the father dependent upon his son's earnings." Support may be found for this view in — *'Nugent v. Londonderry Collieries Ltd.'*, 1930-1-K. B. 159.

(11) Mr. Chandrasekhara Sastri who assisted the court as Amicus Curiae has cited a decision of the House of Lords in the — *'Main Colliery Co. Ltd. v. Davies'*, 1900 A. C. 358. It was decided there that as the wages of the workman contributed to the family fund with which the father could keep his family the father must be said to be dependent partially on the earnings of his deceased son who was a workman and comes within the definition of "dependent". According to that decision, the test in deciding whether a parent was dependent wholly or partially upon the deceased workman was:

"What the family was in fact earning, what the family was in fact spending, for the purpose of its maintenance as a family seems to me to be the only thing which the country court Judge could properly regard."

This decision lays down that in deciding whether a person was dependent on the deceased workman within the meaning of the definition "dependent" it has to be ascertained whether there was any kind of dependency at all giving a right to claim compensation. The principle deducible from the various decisions is that when the earnings of the deceased workman were hardly sufficient for his maintenance and no balance left which would contribute to the family fund the parent cannot be said to be a dependent within the meaning of S. 2, Cl. 1(d). But if the deceased workman was rendering either valuable services to the family, that might be taken into consideration in determining the degree of dependency. It may also be stated that the dependency is with reference to the date of the death of the workman and the fact that at a future date the father might have to depend upon the son is not a relevant consideration.

(12) In this context, I may also refer to a passage in Halsbury's Laws of England (2nd Edition, volume 34), at page 894:

"Where several members of a family contribute to a family fund, a diminution of this fund by withdrawal of the contribution of one of its members owing to death by accident, will only give a right to the head of the family to compensation if the contribution so withdrawn was expended wholly or in part upon the necessities of life for the family."

As I have already pointed out the admission of the applicant makes it abundantly clear that the earnings of the deceased workman far from



being an asset to the family were not sufficient to maintain him and the applicant had to spend considerable portion of his earnings on the maintenance of his deceased son. In these circumstances, the only conclusion that could be reached is that the father not being a dependent wholly or partially on the earnings of the deceased workman was not a dependent within the meaning of the definition in S. 2(1) (d) and therefore has no 'locus standi' to maintain this application. It follows that the order of the Commissioner for the Workmen's Compensation is erroneous and ought to be set aside.

(13) In the result, the appeal is allowed. The appellant is willing to make 'ex gratia' a payment of Rs. 100 to the respondent in addition to the amount already given by him to the applicant for the funerals of his son. He will therefore be entitled to get back the amount deposited less the sum of Rs. 100 which will be paid out to the respondent.

(14) Before leaving this I must thank Mr. Chandrasekhara Sastri who assisted me as 'amicus curiae' in this case.

B/D.H.

Appeal allowed.

### A.I.R. 1953 MADRAS 208 (Vol. 40, C. N. 72)

SUBBA RAO J.

Gudivada Jagannadham, Petitioner v. M/s. A. S. Krishna and Co., Ltd. and another, Respondents.

Civil Miscellaneous Petition No. 9258 of 1950, D/- 10-9-1951.

**Houses and Rents — Madras Buildings (Lease and Rent Control) Act (25 (XXV) of 1949), S. 10 — Grounds taken but not pressed — Application dismissed — It is final adjudication on those grounds — (Civil P. C. (1908), S. 11).**

When an application with specific grounds is filed and if some of the grounds are not pressed, the order of the Court dismissing the application on that basis is a final adjudication on the question raised but not pressed: 1949-2 MLJ 594, Distinguished.

(Para 1)

Anno: C.P.C., S. 11 N. 106.

V. Sulvamaniam and V. Ramakrishna, for the Petitioner and K. Rajah Ayyar and A. V. Krishna Rao, for the Respondents.

**ORDER:** This is an application for issuing a writ of certiorari to quash the order of the Additional Subordinate Judge of Guntur made in an appeal filed against the order of the Rent Controller of Guntur.

The first respondent is the owner of a three-fifths share in the house and premises bearing door No. 7411 in Guntur Municipality. The petitioner is a tenant in respect of that share. It is not necessary to notice the previous litigation between the first respondent and others whereunder the first respondent's right to three-fifths share in the suit premises was recognised and declared, as the title of the first respondent to that share is not now disputed before me. The first respondent filed H.R.C. No. 13 of 1949 under S. 7 (2) (1) of the Madras Act 25 of 1949 for evicting the petitioner. It was alleged in that petition that the house required urgent repairs and also that the petitioner made a default in payment of the rent. That application was filed on 2nd February 1949. On 12th April 1949, the petitioner filed another appli-

cation for amendment of the petition by adding the following clause to paragraph 7. It reads:

"as the petitioner's lease to occupy the premises which he has been occupying has expired by 1st February 1949 and the petitioner has vacated the same and as the petitioner does not own any other non-residential building in Guntur town for the purpose of carrying his business and as there is no other non-residential building in Guntur to the possession of which it is entitled for carrying on its business."

There is some argument before me on the question whether this amendment was actually ordered by the Rent Controller of Guntur. A counter affidavit was filed to the application for amendment on 18th April 1949. The Rent Controller noticed the argument based upon the amendment. He practically, though not definitely, accepted all the grounds alleged in the petition and those added by the amendment and ordered eviction. The respondent preferred an appeal (C. M. A. No. 54 of 1949) to the Subordinate Judge of Guntur. In that appeal, the points formulated for decision were as follows:

"1. Whether the rent fixed by the Rent Controller is fair and reasonable; if not, what is the fair rent due for the building in question?

2. Whether the appellant was in arrears of rent and was liable to be evicted?"

The appellate judgment also disclosed that the advocate who appeared for the respondent at that stage gave up his other two contentions, namely, that the appellant caused damage to the building, and that, subsequent to the filing of the petition for eviction, the respondent wanted the building for carrying on his own business. The learned Subordinate Judge held against the petitioner on the points formulated and allowed the appeal. From the aforesaid facts, it is manifest that the amendment must have been allowed. Otherwise, the Rent Controller would not have decided the point raised by the amendment. Nor would the appellate Judge have recorded the fact that the point raised by the amendment was not pressed before him. Indeed, the learned Subordinate Judge who disposed of the present appeal observed in his judgment that the amendment must presumably have been allowed. In the counter affidavit filed by the respondent before him it is not stated either expressly or by necessary implication that the amendment was not made. Indeed, throughout the proceedings the case was argued on the basis that the amendment was allowed. It may therefore be accepted for the purpose of this application that the amendment was allowed. The result of the previous litigation would then be that the petitioner applied for eviction on four grounds and that he gave up two grounds, and, in respect of the other two grounds, the learned Subordinate Judge found against him. The respondent filed the present application for eviction against the petitioner, the main ground being that the petitioner required the premises for his own occupation. The Rent Controller ordered eviction. The appeal filed against that order was also dismissed. The petitioner questions that order on the ground that the learned Subordinate Judge erred in holding that the order in the previous application did not preclude the respondent from filing the present application under S. 10 of the Madras Act 25 of 1949. Section 10 reads as follows:

"The Controller shall summarily reject any application under sub-s. (2) or under sub-s.



(3) of S. 7, which raises between the same parties or between the parties under whom they or any of them claim, substantially the same issues as have been finally decided, or as purport to have been finally decided in former proceedings."

The only question therefore is whether the learned Judge in C. M. A. No. 54 of 1949 finally decided or purports to have finally decided the question, namely, whether the respondent required the premises for his own occupation. From the narration of the aforesaid facts it will be seen that the learned Subordinate Judge dismissed the application of the respondent as he did not press the present contention before him and as he found against him on other contention raised. Ordinarily, a decision arrived at by a court of law in those circumstances would operate as a bar of res judicata under S. 11, Civil P. C. But Mr. Rajah Aiyar contended that the wording of S. 10 of Madras Act 25 of 1949 is different and that unless the question was finally decided in the previous application, S. 10 would not operate as a bar for the maintainability of a fresh application. In support of his argument, he relied on the decision of Rajamannar C. J. and Raghava Rao J. in — 'Miss Revathi v. Venkataraman', 1949-2 MLJ 594. There, the previous application was dismissed for default. When a second application was filed, the learned Judges held that a dismissal for default would not be a final decision within the meaning of S. 10. I respectfully agree with the view expressed therein. But that decision has no bearing on the question to be decided in the present case, where an application is dismissed not for default, but on merits. It is also not necessary to consider the question whether the principle of constructive res judicata applies to this case, for the question was specifically raised and not pressed. I hold that when an application with specific grounds is filed and if some of the grounds are not pressed, the order of the court dismissing the application on that basis is a final adjudication on the question raised but not pressed. In that view, the order made in C. M. A. No. 54 of 1949 is a bar to the maintainability of the present application. In the result, the order of the learned Subordinate Judge is hereby quashed and the petitioner will have his costs.

B/R.G.D.

Order quashed.

**A.I.R. 1953 MADRAS 209 (Vol. 40, C. N. 73)**

**SATYANARAYANA RAO, AND  
RAJAGOPALAN, JJ.**

R. Hanumanthappa and Son, Applicant v. The Commissioner of Income Tax, Madras, Respondent.

Referred Case No. 52 of 1950, D/- 9-4-1952.

**Income-tax Act (1922), S. 16 — Hindu undivided family — Father and son entering into Managing Agency agreement with a stranger company — Subsequent partnership between father and son with effect from date of Managing Agency agreement — Their income from Managing Agency cannot be included in total income of joint family assessee — (Companies Act, S. 2, Cl. 9(a)).**

A father and a son, members of a Hindu undivided family had entered into Managing Agency agreement with a stranger company on 15-3-1937 i.e. before Mysore Companies Act (18 of 1938) came into force — On 20-3-1940 they (the father and the

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son) entered into partnership. The partnership deed provided that partnership constituted partnership even on 15-3-1937 the date of Managing Agency agreement. It was also provided that the parties (father & son) would have liberty to draw separately their respective shares in the income of the company & to credit them to the joint family firm. On the question whether the income of the Managing Agency could be included in the total income of the joint family firm for the purpose of income tax.

Held (i) That though at the moment the Managing Agency agreement was entered into, there was no partition under Mysore Companies Act which came into force in 1938, it was clear from the language of the agreement that the other party of the agreement was the firm and not individual members of the joint family. The disability under S. 2, Cl. 9 (a) Indian Companies Act that a joint family as such could not enter into Managing Agency agreement did not exist at the time of the agreement, would not therefore help the revenue authorities to include this income into the total income of the joint family assessee.

(ii) Even if they had entered into the agreement in their individual capacity, they were not purporting to act on behalf of or for the benefit of the joint family.

(iii) That it was partnership between father and son that had entered into the Managing Agency and the income of the father and son derived from that Agency was not the income of the joint family but was the individual income of the partners. Its inclusion in the total income of the joint family assessee was therefore not legal: AIR 1952 Mad 828, Followed. (Para 3)

S. Swaminathan for Applicant; C. S. Rama Rao Saheb for Respondent.

REFERENCE .....

/Para

('52) 1952-21 ITR 311: (AIR 1952 Mad 828) 3

**JUDGMENT:** The question that was referred to us for our decision is:

"Whether on the facts and in the circumstances of the case, the inclusion of a sum of Rs. 2,46,407 for the assessment year 1944-45, and Rs. 1,03,985 for the assessment year 1945-46 representing remuneration derived by the Managing Agency of the Devangere Cotton Mills Ltd., Devangere, in the total income of the assessee family is lawful."

(2) The assessee is a Hindu undivided family. The only question that arises for consideration in this reference is, whether the income derived by Hanumanthappa and his son under the Managing Agency agreement with the Devangere Cotton Mills Co., entered into on 15-3-1937 should be included in the total income of the assessee under S. 16 of the Act. Being an income which accrued in the native state, it is exempt under S. 14 of the Act from tax, but it could be taken into consideration under S. 16 of the Act in computing the total income of the assessee for the purpose of determining the rate. It is from that point of view that the question becomes relevant.

(3) The joint family was carrying on business in British India under the name and style of R. Hanumanthappa and Son. At the time of the Managing Agency agreement, the two members, Hanumanthappa and Rama Setty constituted themselves into a firm and entered into the Managing Agency agreement. Rama



Setty has a minor son and we do not know the exact date of his birth and therefore we are unable to state whether this boy was in existence on the date on which the Managing Agency agreement was entered into.

Under the Indian Companies Act, as interpreted by this court in — 'Murugappa Chetti and Sons v. Commr. of Income-tax, Madras', 1952-21 ITR 311 (Mad) a joint family as such cannot enter into a Managing Agency agreement in view of the definition of "managing agent" in S. 2, cl. 9(a), Companies Act. In the Mysore State, the Mysore Companies Act (XVIII of 1938), contains also similar provisions as the Indian Companies Act with reference to Managing agency and the definition is also identical. Though at the moment this agreement was entered into by the firm of Hanumanthappa and Son with the limited company, Devangere Cotton Mills, there was no prohibition as the Mysore Act came into force only in 1938, still, on the language of the document, it is clear that the other party of the document was the firm and not the individuals Hanumanthappa and Rama Setty. Even if they have entered into in their individual capacity, the joint family as such would not acquire any interest in the commission earned by the individuals, because they were not purporting to act on behalf of and for the benefit of the joint family. The fact therefore that the disability which, under the law, as it now exists, viz., that a joint family as such could not enter into a managing agency agreement did not exist when this agreement was entered into in Mysore State would not help the revenue authorities to enable them to include this income in the total income of the assessee.

On 20-3-1940, the deed of partnership was executed between the two, Hanumanthappa and Rama Setty, whereunder it was stated that even on 15-3-1937 when the Managing agency agreement was entered into with the company, it was decided that the two individuals should constitute themselves into a partnership under the name and style of R. Hanumanthappa and Son with effect from 20-11-1936. This undoubtedly establishes that there was a partnership which was in existence even in 1937, partnership between Hanumanthappa and his son, and it was that partnership that in fact entered into an agreement with the company. The deed of partnership is also important as it contains a provision that the two partners should have the liberty to draw separately and utilise their respective shares in the income of the company, that is, the managing agency commission, and it will be open to them to credit to the joint Hindu family firm doing business in cotton and running several factories under the name and style of R. Hanumanthappa and Son.

It is made clear by this court that unless and until the partners divide the profits as between themselves and exercise the option of bringing that income into the income of the joint family, it would not become the income of the joint family. (*Murugappa Chetti and Sons v. Commissioner of I.-T.*, 1952-21 ITR 311 (Mad)). This partnership deed was registered as early as 20-3-1940 under S. 58(1), Mysore Partnership Act, before the Registrar of Mysore and therefore no question of its genuineness arises. Apparently, this document was executed after the Mysore Companies Act came into force which contains similar provisions regarding Managing Agency agreement as the Indian Companies Act in which the amendments were introduced in 1936. As the assessment which is now under

consideration is long after the date of this partnership deed, whatever the position might have been before 1940, this deed of partnership makes it clear that the income earned by these two persons as partners was not the income of the joint family but is the individual income of the partners.

The circumstances under which the commission earned by the members of the Hindu undivided family could be made an income of the Hindu undivided family was considered in this court in — 'Murugappa Chetti and Sons v. Commr. of Income-tax, Madras', 1952-21 ITR 311 (Mad). As pointed out in that judgment, merely because in the previous years, the assessee did not object to treat the income as income of the joint family would not convert the subsequent income which accrued into a joint family income unless the parties who have earned the income agreed to throw it into the common stock and blend it with the income of the joint family. For these reasons, we think that the question referred to us by the Tribunal must be answered in the negative and in favour of the assessee. As the assessee has succeeded, he will be entitled to his costs, which we fix at Rs. 250/-.

B/H.G.P.

Reference answered.

#### A.I.R. 1953 MADRAS 210 (Vol. 40, C. N. 74)

CHANDRA REDDY J.

Medikenduri and others, Appellants v. Kata Venkatayya and another, Respondents.

Second Appeal No. 2411 of 1948, D/- 22-7-52.

##### (a) Hindu Law — Debts — Antecedent debt.

In order to support a sale on the doctrine of antecedent debt there should not only be antecedency in time but there should be real dissociation in fact. (Para 5)

##### (b) Hindu Law — Alienation — Alienation by manager and by shebait — Distinction.

There is a real distinction between an alienation by a manager of a joint Hindu family and an alienation by a shebait of a temple. Powers of a manager of a joint Hindu family are larger than those of a shebait of a temple in this respect. (Para 8)

##### † (c) Hindu Law — Alienation — Benefit to estate — Sale of ancestral land in order to purchase lands elsewhere.

In order to validate a sale of ancestral land by the father, the benefit need not be purely of a defensive or protective character. To hold so should be to miss the significance of the expression "benefit to the estate". If the transaction is not a speculative or risky one but is beneficial or advantageous from the financial point of view and is calculated to confer a benefit on the estate the sale must be held to be a valid one binding on the members of the estate. Whether a particular transaction is beneficial to the estate or not varies according to the circumstances of that case: Case law discussed. (Paras 9 and 19)

The sale of ancestral land by a manager of joint family in order to purchase lands elsewhere therefore constitutes a benefit to the estate so as to be binding on the joint Hindu family. (Para 7)

M. Ramchandra Rao and L. Krishna Rao, for Appellants; K. Kottayya, for Respondents.

JUDGMENT: This second appeal is filed by the plaintiffs against the judgment of the Sub-



ordinate Judge of Guntur reversing the decree of the District Munsif, Guntur, in their favour. The reliefs claimed in the plaint are a permanent injunction restraining the defendants from disturbing their possession or in the alternative for possession and alternatively for division of the suit properties and allotment of 4/5 share to them. There was prayer for mesne profits also.

(2) The material facts are these: The plaintiffs who were minors at the time of the filing of this suit are the sons of the first defendant. The first defendant and the plaintiffs constitute a Hindu joint family of which the first defendant is the manager. The family owned considerable properties including the suit properties. The properties in suit were given to the adoptive mother of the first defendant in lieu of her maintenance. On the 2nd of February 1944, the first defendant entered into an agreement for the purchase of lands in a village called Kakumanu and paid an advance of Rs. 450. He had to get a sum of Rs. 700 from the vendors. In order to find the balance of the purchase money, he sold the lands in question under Ex. D. 2 to the second defendant on 5-2-1944 for a sum of Rs. 2000.

The lands purchased by the first defendant were of the extent of 5 acres, and 3 cents while the lands sold by the first defendant were of the extent of 3 acres. Subsequently the first defendant sold three acres 53 cents and retained for the family 1 acre and 50 cents. Shortly after this the plaintiffs instituted the present suit represented by their mother as their guardian alleging that the sale by the father under Ex. D. 2 in favour of the second defendant was a sham and collusive transaction not supported by consideration and that, in any event, the sale did not bind their four fifths share in the family property as it was not for purposes binding upon the family.

(3) The first defendant remained *ex parte*. The suit was contested by the second and third defendants, the latter being a lessee from the second defendant. The chief defences to the suit are: that the sale was fully supported by consideration and was a bona fide transaction and it was binding on all the members of the family as it was in the interests of the joint family to enter into the transaction impugned.

(4) The trial court upheld the plea of the second defendant so far as the genuineness of the transaction was concerned but it agreed with the defendants that the sale in question was not one that conferred any benefit on the family and, therefore, not binding on the plaintiff and decreed the suit for partition and allotment of 4/5 share in the suit properties to the plaintiffs. The second defendant filed an appeal against the judgment of the District Munsif. The plaintiffs acquiesced in the finding of the trial court as regards the payment of consideration and that finding has become final. The Subordinate Judge reversing the decree of the trial court held that the sale in question could be supported both on the ground of antecedent debt and benefit to the estate. The plaintiffs who are aggrieved by this decision have preferred this second appeal.

(5) In support of this appeal Mr. Ramachandra Rao contended that the findings of the lower appellate court both as regards the nature of the debt for the discharge of which the suit transaction was entered into and as to the benefit conferred on the family cannot be sup-

ported. It was urged by him that the debt incurred by the first defendant for purchasing the lands in Kakumanu cannot be an antecedent debt for the reason that there is no antecedency in fact. There seems to be great force in this argument of Mr. Ramachandra Rao. Remembering the shortness of the interval between the date of the agreement for the purchase of the lands at Kakumanu and the sale of the suit lands, it seems to be difficult to predicate that the debt was antecedently incurred and there was real dissociation between the two transactions. In order to support a sale on the doctrine of antecedent debt there should not only be antecedency in time but there should be real dissociation in fact. It is unnecessary to refer to various decisions that have laid this proposition.

It should also be noted in this connection that at the time when the first defendant entered into an agreement for the purchase of Kakumanu lands he was at the end of his personal resources and he must have contemplated a sale of this land for the purpose of discharging the liability. There can therefore be no basis for holding that the sale of the suit lands in favour of the second defendant can be validated on the doctrine of antecedent debt. It follows that the finding of the trial court that the sale in question was effected with a view to discharge an antecedent liability cannot be sustained.

(6) This does not however dispose of the second appeal. The question remains whether the sale can be sustained on the plea of benefit to the family. It should be borne in mind in this connection that the suit lands were given to one Rangamma, the adoptive mother of the first defendant, in lieu of maintenance and so far as the plaintiffs' family is concerned it was not fetching any income whereas by the purchase of the Kakumanu lands, the plaintiffs' family was deriving an annual income of about Rs. 170. The land purchased was wet land while the land which is now the subject-matter of this appeal is dry land.

(7) The main contention of Mr. Ramachandra Rao was that the sale of ancestral land by a manager of a joint family in order to purchase lands elsewhere cannot constitute a benefit to the estate so as to be binding on the joint Hindu family and the sale can be justified only for the preservation or protection of the other properties of the family. In support of this contention, he relied on some decisions of this court in — '*In re Krishnaswami Doss Reddi*', 1912 M. W. N. 167. Sundara Aiyar J. expressed the opinion that the sale by a Hindu father of ancestral property for the purpose of purchasing lands elsewhere could not be binding on the family, although it was convenient for better management and was in no way prejudicial to the interests of the joint family. This view is shared by a Bench of this Court in — '*Subramania Nadan v. Ramasami Nadan*', 25 M. L. J. 563. It was decided by Wallis C. J. and Kumaraswami Sastri J. in — '*Ganesa Aiyar v. Amirthasami Odayar*', 1918 M. W. N. 892 that the sale of family lands by a Hindu father, some miles away from his place of residence, for the purchase of lands nearer home cannot be justified and would not bind the other members of the joint family.

(8) Reliance was also placed on behalf of the appellants on the decision of the Privy Council in — '*Palaniappa Chetty v. Sreemath*



Devasikhamony Pandara Sannadhi', 40 Mad. 709. In that case, it was held by the Privy Council that the 'shebait' of a Hindu temple is not entitled to sell a 'debattar' property for the purpose of fetching an interest larger than the income to be derived from the property. I do not think that this last case is of much assistance to the appellant. The observations relied upon by the learned counsel in support of his contention that the benefit to the estate must be only of a defensive character and should be calculated to preserve or to protect the estate occur in the following passage:

"The preservation, however, of the estate, from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, these and such like things would obviously be benefits."

But it should not be forgotten that their Lordships have definitely stated that it is impossible to give a precise definition of benefit applicable to all cases and they did not attempt to do so. Further, in that case their Lordships were dealing with an alienation by a 'shebait' and it cannot be overlooked that there is a real distinction between an alienation by a manager of a joint Hindu family and an alienation by a 'shebait' of a temple. In my opinion the powers of a manager of a joint Hindu family are larger than those of a 'shebait' of a temple in this respect.

(9) In this connection, the dictum laid down by the Privy Council in — 'Hanooman Persad Panday v. Mussamat Babooee Munraj Koonwaree', 6 M. I. A. 392 at 423 in dealing with the question as to the circumstances under which alienation of joint family properties by a Hindu father would bind the estate may usefully be extracted:

"The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance is a thing to be regarded."

This passage in the judgment of their Lordships in my opinion does not lend countenance to the contention that in order to validate a sale of ancestral land by the father the benefit should be purely of a defensive or protective character. To hold so would be to miss the significance of the expression "benefit to the estate". If it was purely of a defensive character, there was absolutely no necessity for the expression "benefit to be conferred on the estate" because the actual pressure on the estate and the danger to be averted will cover the case of necessity.

(10) In this connection it may not be out of place to refer to the text on Mitakshara dealing with alienation of joint family properties by a Hindu father. The three circumstances under which the sale can be effected are stated to be 'Apathkala', translated as time of distress; 'Kutumbārtha', i.e., for the benefit of the family and 'Dharmārtha', i.e., for pious purposes. The author of the Mitakshara illustrates the reference to 'Kutumbārtha' by referring to 'Kutumba Poshana'. The reference to 'Kutumba Poshana' cannot be taken as exhaustive but only as illustrative. If it was only a need of defensive character that could validate the sale of ancestral land, there was no necessity to lay down the second circumstance, namely, 'kutumbārtha'. That the benefit to be conferred on the estate is not synonymous with necessity is illustrated in a recent case in which there is a

marked departure from the view taken in the earlier cases that the benefit to the estate should be of a defensive or preservative character.

(11) In — 'Sellappa v. Suppan', I. L. R. 1937 Mad. 906 Venkatasubba Rao J. who was one of the members of the Bench observed after referring to — 'Palaniappa Chetty v. Sreemath Devasikamony Pandara Sannadhi', 40 Mad 709 as follows:

"To infer from the three instances given in this passage that the transaction should be of a defensive nature does not seem warranted by the language used. These three instances are given as cases of obvious benefit, which seems necessarily to imply, far from suggesting the contrary, that cases of less obvious benefit are not to be excluded. Indeed it could be easily conceived what strange anomalies would arise were the restricted view to prevail. To take a familiar example, where unproductive immovable property is sold with a view to the investment of the proceeds in the purchase of more suitable property, we fail to see why the sale should be condemned as not being for a justifiable purpose. Other similar cases may be supposed in which it would be in the interests of the coparcenary to sell ancestral property with a view to make a fresh purchase."

(12) The learned Judge refers to the Full Bench decision of the Allahabad High Court in — 'Jagat Narain v. Mathuradas', 50 All. 969 with approval. In the Allahabad case, a Hindu father sold joint family properties and put it in a bank. A year thereafter the bank failed and the question arose whether the sale would be supported on the ground of benefit to the estate. The learned Judges held that it was binding on the family as the transaction was calculated to confer benefit on the estate and was such as would be entered into by prudent owner of properties. The test propounded by the learned Judges there was whether the transaction was such as a prudent owner would enter into.

(13) The trend of the recent cases has been to lean strongly towards sustaining such alienations if they were beneficial to the family from a financial point of view or advantageous otherwise, as can be seen not only from the cases cited above but also the unreported decisions of this court.

(14) In — 'App. Nos. 60 and 61 of 1934', Varadachariar and King JJ. upheld the alienation of ancestral property by a Hindu father in the following circumstances: In 1927 certain items of the joint family properties were sold by the father of a Hindu joint family and a portion of the sale proceeds was invested in the purchase of lands for the family and the other portion was utilised for investing in family businesses. In dealing with this question, their Lordships observe that so long as the father was actuated by a desire to benefit the family, the alienation could not be said to be an invalid one. The test laid down there by the learned Judge was one of prudence and benefit to the estate. The learned Judge remarked that in the absence of proof that the father was not prompted by improper motives in alienating the property the transaction should be held to be one binding on the members of the family.

(15) In — 'App. No. 206 of 1942' another Bench of this court expressed the same opinion as in — 'App. Nos. 60 and 61 of 1934'.



There, ancestral lands were sold for Rs. 73,000 out of which Rs. 37,000 was applied for buying lands nearer home. With regard to the balance, it was not proved that it was used for purposes binding on the estate. The learned Judge held that the sale by the father was valid for the reason that a good portion was used for buying land. The fact that other portion of the sale price was not proved to have been used for binding purposes did not in the opinion of the learned Judge render the sale an ineffective one, since the purchasers had made bona fide enquiries as to the need for the sale.

To the same effect is the decision of the learned Chief Justice and Satyanarayana Rao J. in — ‘App. Nos. 261 and 418 of 1946’. There a Hindu widow mortgaged properties belonging to her husband's estate to discharge a debt which she incurred for converting an old house into a terraced house. The question was whether the original borrowing was for the benefit of the family. The learned Judges following the ruling in — ‘Sellappa v. Suppan’, I. L. R. 1937 Mad. 906 and the decision in — ‘App. Nos. 60 and 61 of 1944’ upheld the transaction as in their opinion it was calculated to confer benefit on the estate.

(16) Mr. Ramachandra Rao cited the decision in — ‘Hemraju Dattubuva v. Nathu’, 59 Bom. 525, as substantiating his contention. But I do not think it really lends much support to it. What was laid down there was that the manager of a minor's estate is not entitled to alienate the minor's property for the purpose of enhancing the value of the estate or for the purpose of increasing the income but it would not be safe to hold that a transaction which is not of a preservative or productive character would not be said to be for the benefit of the minor. From this it is clear that the contention that the benefit should be of a defensive character was repelled. After referring to the several authorities touching the subject, the learned Chief Justice stated thus:

“On the other hand I am not prepared to go quite so far as Mr. Justice Patker went in — ‘Ragho v. Zaga Ekoba’, 53 Bom. 419 and to say that no transaction can be for the benefit of the minor which is not of a character to protect or preserve property of the minor. It would, generally, I think, be difficult to justify a sale not of that character, but I can conceive of cases not of that character in which the facts might nevertheless be of such a compelling character that any court would hold the transactions to be for the benefit of the estate, e.g., the sale of the land which could not conveniently be cultivated with other property of the minor, and the investment of the purchase money in lands which could be so conveniently cultivated, assuming, of course that the price obtained, and the price paid, were proper, or the sale of lands in order to raise money to secure irrigation or permanent improvement of the other lands of the minor; or a beneficial exchange; or a case like the one in — ‘Nagindas Maneklal v. Mahomed Yusuf’, 46 Bom. 312 where it was necessary to sell in order to prevent the destruction of the property.”

(17) I do not think that these observations give any support to the proposition that in no case can a sale of ancestral lands would be justified except it be for the preservation or protection of that estate. If the sale is really beneficial and advantageous to the estate I do

not find any reason why it should not be upheld.

(18) The Patna High Court seems to have taken the same view that is expressed by this court in — ‘Sellappa v. Suppan’, ILR 1937 Mad 906; in — ‘Baijuath Thakur v. Survan Chowdhury’, AIR 1940 Pat. 423, where a mortgage by the manager of a joint Hindu family in order to purchase lands for the benefit of the family was held to be binding on the family.

(19) On a consideration of the decided cases and the textual authority bearing on the subject, I have reached the conclusion that if the transaction is not a speculative or risky one but is beneficial or advantageous from the financial point of view and is calculated to confer a benefit on the estate the sale must be held to be a valid one binding on the members of the estate. Whether a particular transaction is beneficial to the estate or not varies according to the circumstances of that case.

(20) In these circumstances I hold that the view of the learned Subordinate Judge that the sale conferred a benefit on the family and is consequently a valid one binding on the plaintiffs is a sound one and cannot be set aside.

(21) The result is that the decision of the lower appellate court is confirmed and the second appeal is dismissed. The respondent will get two-thirds of his costs throughout. No leave.

B/V.R.B.

Appeal dismissed.

**A.I.R. 1953 MADRAS 213 (Vol. 40, C. N. 75)**

**P. V. RAJAMANNAR C. J. AND VENKATA-RAMA AIYAR J.**

Gada Venkata Subbayya, Appellant v. Koyal-lamudi Venkanna, Respondent.

Letters Patent Appeal No. 27 of 1949, D/- 8-7-1952.

**Limitation Act (1908), Arts. 182 and 181 — Decree scaled down — Execution application — Limitation — (Madras Agriculturists' Relief Act (4 of 1938), Ss. 19 and 20).**

While the execution was pending the judgment-debtor filed application under S. 20, Madras Agriculturists' Relief Act. On that application there was an order for stay and on the same day the execution petition was “struck off”. Subsequently the decree was scaled down. More than 3 years after scaling down of the decree the decree-holder filed application to bring previous execution on pending list and to continue further execution.

Held, that a scaled-down decree was not a fresh decree to give fresh starting point to the decree-holder; and even after scaling down, what could be executed was only the original decree though the amount for which execution could be levied might be less than the amount of the original decree.

(Para 2)

Held further, that since the execution was not dismissed, nor could it have been lawfully dismissed, the court did not intend by the words ‘struck off’ to finally dispose of the execution petition. The original decree must therefore be deemed to have been alive all the time and it was not necessary for the decree-holder to file an application to revive the original execution petition under Art. 181, Lim. Act. 28 Mad 50 (FB), Dist. (Para 3)

Anno: Lim. Act, Art. 182 N. 143 Pt. 12.

V. Parthasarathy, for Appellant; P. Satyanarayana Raju, for Respondent.



REFERENCE .....

/Para  
3

('05) 28 Mad 50 (FB)

RAJAMANNAR C. J.: This is an appeal under the Letters Patent against the judgment of Panchapakesa Aiyar J. in a Civ. Misc. second appeal arising on the following facts. The respondent obtained a decree in O. S. No. 243 of 1933 on the file of the District Munsif, Kovvur, for Rs. 1053-4-3 and costs. The decree-holder filed applications for execution of the decree the last of which was E. P. No. 338 of 1939. When this was pending, the judgment-debtor filed an application E. A. No. 565 of 1940 on 28th June 1940 under S. 20 of Madras Act, 4 of 1938 and on that application there was an order for stay passed on 2-7-1940. On the same day, E. P. No. 338 of 1939 was "struck off." On 28th August 1940, the judgment-debtor filed a regular application under S. 19 of Madras Act, 4 of 1938 and the decree was eventually scaled down to about Rs. 300 by an order of court dated 31st January 1941. On 22-11-1944 more than three years after the order scaling down the decree, the decree-holder filed E. A. No. 1341 of 1944 to bring E. P. No. 338 of 1939 into the pending list and to continue further execution. The contention of the judgment-debtor was that the decree-holder's right to execute was barred by time. This plea was upheld by the lower appellate court but the learned Judge Panchapakesa Aiyar J. held that the decree-holder's right to execute had not become barred by time. The judgment debtor is the appellant before us.

(2) The argument of the learned counsel for the appellant was shortly as follows. It is true that when E. P. No. 338 of 1939 was "struck off" it could not be treated as a dismissal on the merits and that the order should be treated as a purely ministerial or administrative direction to keep the petition off the file of current cases. But the decree was actually amended on 31-1-1941 and if this was the decree which had to be executed, the application for execution should have been filed within three years from the date of the order scaling down the decree and as E. A. No. 1341 of 1944 was filed more than three years after that date, the decree-holder's rights had become barred. So the argument ran. The fallacy in this argument is to treat the scaled down decree as a fresh decree and to assume that the decree-holder gets a fresh starting point from the date of the order scaling down the decree. Not only is there no authority in support of the appellant's contention but there is authority for the position that a scaled-down decree is not a fresh decree and even after scaling down, what can be executed is only the original decree though the amount for which execution can be levied might be less than the amount of the original decree. This argument therefore must fail.

(3) It was next contended that it was necessary for the decree-holder to file an application to revive the original execution petition which had been struck off and that application for revival must be filed within three years from the date on which the impediment to the continuance of the original execution petition had been removed viz., 31-1-1941, the date on which the decree was scaled down. The basis of this argument is the application of Art. 181 of the Limitation Act. The answer to this contention is that here there is no question of reviving an execution petition which legally must be deemed to be dead. It may be that when, as in the case in — *'Suppa Reddiar v. Avudi Ammal'*, 28 Mad 50 (FB) an execution petition is dismiss-

ed on some ground or other but subsequently that dismissal turns out to be wrong and the decree-holder becomes entitled to have the dismissed execution petition revived, then an application must be made for revival and such an application might well fall within Art. 181 of the present Limitation Act, (Art. 178 of the Act in — *'Suppa Reddiar v. Avudi Ammal'*, 28 Mad 50 (FB).) In this case, however, EP No. 338 of 1939 was not dismissed nor could it have been lawfully dismissed. There was no default on the part of the decree-holder and the court did not intend by the words "struck off" to finally dispose of the execution petition. It must be deemed to have been alive all the time and all that the decree-holder presumably did in E. A. No. 1341 of 1944 was to request the court to take up the petition and to proceed with further execution. Art. 181 will not have any application to such a request. We agree with the learned Judge on both the points which were pressed by the judgment debtor before the learned Judge and before us.

(4) The appeal fails and is dismissed with costs.

B/H.G.P.

Appeal dismissed.

A.I.R. 1953 MADRAS 214 (Vol. 40, C. N. 76)

BASHEER AHMED SAYEED J.

C. P. Kunhambu Nair, Petitioner v. Kunnuntara Vadakka Veetil Ambu and others, Respondents.

Civil Revn. Petn. No. 2167 of 1951, D/- 17-7-1952.

(a) Madras Hindu Religious Endowments Act (19 of 1951), S. 103(j) — Does not deal with forum.

All that seems to have been intended and aimed at by the provision of S. 103(j) is only the substitution of the authority which is to continue the proceedings. It does not have any reference to the "forum" before which these proceedings have to be continued. (Para 2)

(b) Interpretation of statutes — Court will not fill in lacuna when language is clear.

When there is a specific language available, the language alone has to be construed and understood and in interpreting and construing the language it is not for the Court to make up the lacuna that might have occurred in the process of enacting any legislation. Court is not concerned with any possible intention behind it which is not expressed. Filling up of any omission or making up any lacuna is the business of legislation. (Para 3)

(c) Madras Hindu Religious Endowments Act (19 of 1951), S. 103(j), Explanation and S. 6(6)(i) — Proceedings under old Act, 2 of 1927 pending in mofussil in District Court — Coming into force of the new Act of 1951 — Proceedings are automatically transferred to sub Court — All that the District Court has to do is the physical act of transferring the papers with the petition to the Sub-Court. (Para 6)

(d) Madras Hindu Religious Endowments Act (19 of 1951), S. 106 — Scope.

S. 106 appears to be intended only to remove difficulties in the administration of the Act in matters other than the strict interpretation of the provisions of the Act and their applicability. It does not help a person to seek help from Govt. in inter-



preting Act according to intended intention of the legislature. (Para 6)

(e) **Madras Hindu Religious Endowments Act (19 of 1951), S. 106 — Whether offends against rule of delegated legislature. (Quaere). (Para 6)**

(f) **Madras Religious Endowments Act (19 of 1951), S. 103(k) — Does not refer to forum. (Para 6)**

M. K. Nambiar, for Petitioner; A. Achuthan Nambiar, for Respondents.

**ORDER:** Mr. M. K. Nambiar appearing for the petitioner is seeking to revise the order of the learned District Judge of South Kanara whereby he declared that the pending proceedings in O. P. No. 26 of 1951 stood automatically transferred to the appropriate court or authority and that they should be deemed to be pending before that court or authority by virtue of S. 103(j) and (k) of Act 19 of 1951, the New Hindu Religious Endowments Act.

(2) O. P. No. 26 of 1951 was originally filed under S. 84(2), Hindu Religious Endowments Act, 2 of 1927 praying that the District Court might set aside the order of the Hindu Religious Endowments Board that the Vishnu-moorthi temple of Cheemani village, Kasargod taluk was a private temple within the meaning of the Hindu Religious Endowments Act. When this petition was pending before the learned District Judge of South Kanara, the old Act was re-enacted as Act No. 19 of 1951. In the old Act, S. 9(3) defined court as meaning the District court. Under the new Act, which came into operation on the 29th September 1951, by a notification, S. 6(1) and (2) defined the court as the City Civil Court instead of the High Court and as sub-court instead of the District Court. The effect of this enactment is that instead of the District court, as in the previous Act, the Sub-Court became substituted for purpose of filing applications to set aside orders passed by the Hindu Religious Endowments Board. Similarly, instead of the High Court for purposes of proceedings within the City of Madras, the City Civil Court was substituted. Similarly under S. 103(j) instead of the Board the authority by or against whom any proceedings could be instituted in the court became the Commissioner of Religious Endowments instead of the Hindu Religious Endowments Board, as was the case under the old Act. The Explanation to S. 103(j) of the new Act provides for the continuation of the proceedings so far as the High Court was concerned. Instead of the pending proceedings being continued in the High Court this provision states that they should be continued in the City Civil Court. Therefore, while there is a specific provision that proceedings now pending before the High Court should be continued in the City Civil Court, there is no corresponding provision in the new Act governing pending proceedings in the mofussil courts, apart from the substitution of the Sub-court for the District Court, provided for by S. 6(6) (i).

(3) Mr. Nambiar contends that in the absence of a specific provision on similar lines as the one contained in the Explanation to S. 103(j), pending proceedings in the District Court cannot be transferred or cannot be deemed to have been automatically transferred to the Sub Court. There is no provision, according to him, in the whole of the new Act which authorises

the District Judge to transfer these proceedings to the Sub-court. Simply because the District court had been specifically mentioned in the old Act, and in its place the Sub court has been specifically mentioned the general law, namely, the Civil Procedure Code also would not entitle the District court to transfer such proceedings to the Sub-court. The provision in the new Act 19 of 1951 which has been relied upon by the learned District Judge, namely, S. 103(j), only refers to the "continuation" of the pending proceedings by the "concerned authority". It states that instead of the Board, as was the case previously, under this Act, it should be the Commissioner. The learned counsel for the respondents seeking to support the interpretation put upon this provision by the learned District Judge would seek to import into the meaning of this provision that the continuation by the Commissioner in place of the Board also would mean continuation in the new court that has been substituted for the old court.

A reading of the language of this sub-clause (j) of S. 103, in my opinion, does not warrant this extension of the meaning sought to be given to it by the learned District Judge or the learned counsel for the respondent in this court. That section has reference only to suits, applications or proceedings taken by or on behalf of or against the Board under the provisions of the said Act and pending at the commencement of that Act and provides that they may be continued by or on behalf of or against the Commissioner subject to the provisions and in so far as they are not inconsistent with this Act. All that seems to have been intended and aimed at by this provision is only the substitution of the authority which is to continue the proceedings and that has been made the commissioner instead of the Board. It does not have any reference to the "forum" before which those proceedings have to be continued. It might be that it might have been the intention of the framers of this Act that the forum also would become substituted by this provision whereby it is provided that the pending proceedings shall be continued by the Commissioner instead of by the Board. But actual language used does not warrant any such interpretation so far as I could see. That intention does not appear to have been carried into effect by the language used.

The learned counsel for the respondent would seek to emphasise upon the words "subject to the provisions of and in so far as they are not inconsistent with this Act", to mean that the forum in which the continuation should take place also gets automatically substituted according to the new definition provided in this court. I do not think that I can agree to this interpretation as I think it will be straining far too much the language of this sub-clause (j) of S. 103 of the Act. As a matter of fact, while the explanation to S. 103 (j) provides that "all suits, and applications under the said Act in the High Court in respect of religious institutions within the presidency town and pending on the date of the commencement of this Act, which would have been instituted in the Madras City Civil Court if this Act had been in force at the time when such suit or applications were instituted shall be continued in, and disposed of by the High Court, no such provision has been made in regard to the pending proceedings in the courts



in the mofussil outside the presidency town the effect being that pending proceedings will have to be dealt with by the District court only. This seems to be an obvious omission on the part of the legislature and it is not for this court to go into the reasons or causes for such omission. When there is a specific language available, the language alone has to be construed and understood and in interpreting and construing the language it is not for the court to make up the lacuna that might have occurred in the process of enacting any legislation. This court is concerned only with express language found in any provision and not with any possible intention behind it which is not expressed. Filling up of any omission or making up any lacuna is the business of legislation and it is not open to the court to go outside the strict language that is found in the provision that it is called upon to interpretate and apply.

(4) Mr. Nambiar has invited my attention to certain provisions in certain other Acts which have been made for the purpose of meeting situations of a similar kind. For instance in the Act passed by the Dominion Legislature to provide for the enlargement of the appellate jurisdiction of the Federal court in civil cases, namely, Act 1 of 1948, in order to meet a similar situation in respect of pending proceedings before the Judicial Committee of the Privy Council the Legislature thought it fit to enact S. 5 specifically so as to provide for the transference of pending proceedings from the Privy Council to the Federal court. There the section is to the following effect:

"Every application to His Majesty in Council for special leave to appeal from a judgment to which this Act applies remaining undisposed of immediately before the appointed day shall on that day stand transferred to the Federal court by virtue of this Act, and shall be disposed of by that court as if it had been an application duly made to that court for special leave to appeal from the said judgment."

(5) This illustrates the necessity for a specific provision in situations like the one under consideration to meet the need for continuing pending proceedings in one court by their transference to another court. Even so, in an Act passed by the Parliament of India, viz., Act 33 of 1950, to provide for the extension of certain opium and revenue laws to certain parts of India, there is found a specific section, viz., S. 3(a) setting forth modifications of state laws, relating to Income-tax investigation, in order to bring within the scope of the Investigation Commission appointed by the Central Government investigation proceedings pending in Part B State and it is in the following terms:

"If immediately before the commencement of this Act there is no force in any Part B State other than Jammu and Kashmir any law (hereinafter in this section referred to as 'the State law') corresponding to the Taxation on Income (Investigation Commission) Act, 1947 (Act XXX of 1947) that law shall continue to remain in force with the following modifications, namely, (a) all cases referred to or pending before the State Commission (by whatever name called) in respect of matter relating to taxation on income other than agricultural income shall stand

transferred to the Central Commission for disposal."

This again illustrates the necessity felt by the legislature to introduce specific provision for the transfer of pending proceedings from one court to another when the forum gets altered by means of a new enactment. That no such thing has been done in the new Act 19 of 1951 only goes to show that it is an omission which has gone unnoticed by the legislative body which was responsible for the enactment.

(6) Mr. Achuthan Nambiar appearing for the respondent contends that the remedy for the aggrieved party in cases like this is provided by the provision in S. 106 of the new Act, which is to the effect that

"if any difficulty arises in giving effect to the provisions of this Act, the Government may, as occasion may require by order, do anything, which appears to them necessary for the purpose of removing the difficulty."

He would suggest that the aggrieved party, namely, Mr. Nambiar's client, should approach the Government and get his grievances redressed. I do not think there is any force in this argument. That section is not intended for the purpose for which Mr. Achuthan Nambiar thinks it may be available. That section, in my view, appears to be intended only to remove difficulties in the administration of the Act in matters other than the strict interpretation of the provisions of the Act and their applicability. It is first of all very doubtful whether a provision of this kind does not offend against the doctrine of delegated legislation. But it is not necessary for me to go into that question as it does not arise and it is not relevant to the issue before me. However I do not think I can agree with the contention of the learned counsel for the respondent that this section gives the remedy to the aggrieved party in the present case. Even S. 103 (k) which only refers to any remedy by way of application, suit, or appeal which is provided by this Act which was available in respect of proceedings under old Act pending at the commencement of the new Act, and provides that such remedies should still be available as if the proceedings in respect of which the remedy is sought had been instituted under this Act. This again has no reference to the forum in which the remedy could be sought. It only applies to the remedy which was available under the old Act and which is being preserved under the new Act.

Therefore in the view I have taken of the meaning and import of S. 103 (j) and explanation thereof, I do not think I can agree with the construction put upon this by the learned District Judge. In my view it cannot be said by reason of sub-clause (j) and the Explanation to it, that S. 103 lays down that the pending proceedings stand automatically transferred to the new forum contemplated by the new Act, namely, the Sub Court, and that all that the District Judge is called upon to do is to resort to the physical act of transferring the papers concerned with the petition now pending. If that was really the intention of the legislature, then it should have been made clear even as the provisions in the Indian Independence Act of 1947, namely, S. 15 has made it clear that all actions pending against the Secretary of State at the time when the Indian Independence Act was passed were to be dealt with by the High Commissioner for India in Britain.



In such circumstances it is difficult to make good the omission by an interpretation of S. 103 (j) or the Explanation thereof and consequently this revision petition has to be allowed. I make no order as to costs.

B/R.G.D.

Order accordingly.

**A.I.R. 1953 MADRAS 217 (Vol. 40, C. N. 77)**

**GOVINDA MENON AND MACK JJ.**

The Dominion of India formerly the Governor General in Council, New Delhi, represented by the General Manager of the South Indian Railway, having its head office at Tiruchirapalli, Appellant v. Adam Haji Pir Muhamed Essac represented by his duly authorised agent Sulaiman Abdulla, Respondent.

Appeal No. 6 of 1948, D/- 31-7-1952.

(a) Railways Act (1890), S. 80 — Form of suit — Goods consigned at Cawnpore station on G. I. P. Rly. for Cuddalore station on South Indian Railway — Deterioration and damage of goods at Cuddalore Station as a result of negligence amounting to misconduct committed on South Indian Railway — Suit for compensation under S. 80 against South Indian Railway — South Indian Railway and not G. I. P. Railway held was *prima facie* liable for compensation and suit was therefore properly instituted: 29 All 228 (FB), 71 MLJ 325, Disting. (Para 4)

Anno: Railways Act, S. 80 N. 1.

(b) Railways Act (1890), S. 56 (2) — Auction Sale of unclaimed goods — Obligation of consignor — (Contract Act, S. 160).

There is nothing in the bailment sections of the Contract Act, which lay down any obligation on the bailor to take delivery from the bailee when he offers it, nor is there any decision, which lays down any such hard and fast rule. Normally as property in the goods entrusted to a carrier remains with the owner, he is bound to take delivery even if they are damaged, his remedy being to claim compensation, nor can he cast upon the bailee responsibility for further custody as bailee without payment of storage or demurrage dues. Each case has to be considered on its own facts and no hard and fast rule can be laid down.

Held on facts, that despite the refusal of the railway company to give delivery when the plaintiff's representative demanded it and all the bags in the Cuddalore godshed, there was nevertheless a duty cast on the plaintiff to have taken delivery of the goods, though damaged when delivery was offered in accordance with the very fair and reasonable term offered by the railway company. (Para 7)

There was therefore no justification for disallowing the freight and demurrage charges to the Railway Company from the claim for compensation against it: AIR 1926 Lah 512; AIR 1926 Lah 575, Explained. (Para 8)

Anno: Railways Act, S. 56 N. 1; Contract Act, S. 160 N. 1.

S. S. Ramachandra Iyer, for Appellant; G. Ramakrishna Iyer, for Respondent.

MACK J.: Appellant is the South Indian Railway impleaded in the suit filed in 1945 as the Governor General in Council, New Delhi, represented by the General Manager. There has been much evolutionary change since, with all the Railways in the Union nationalised and today the appellant is the Do-

minion of India. The original plaintiff was Adam Haji Pir Muhammad Esack and he too is now represented by the Custodian of Evacuee Property. He will however, be referred to in this judgment for convenience as the plaintiff. He sued to recover Rs. 5600 from the South Indian Railway in respect of a consignment of 200 bags of Bengal gram, which were booked at Cawnpore on the G. I. P. Railway on 1-11-1944 to Cuddalore on the South Indian Railway. The learned Subordinate Judge decreed his suit in full.

(2) The relevant facts are these: Plaintiff, a wholesale dealer in grains, groceries and so on had business ramifications throughout what was then British India. He had a branch at Cawnpore and another at Cuddalore. The 200 bags of Bengal gram were, according to invoice No. 6 of 1944 Ex. P. 1, dated 1-11-1944, consigned in the name of someone by name R. F. C. to one M. Bagavandas. Subsequent to the consignment, Bagavandas endorsed Ex. P. 1 to the plaintiff, who appears to have purchased it after it was consigned for transit. It is common ground that the bags arrived at Arkonam in a full sealed wagon on the broad gauge railway and were there transhipped into two meter gauge wagons M. C. 413 and M. C. 60 each containing 100 bags. These two wagons with seal cards with No. "8" on them instead of the correct invoice No. 6 reached Cuddalore on 16-11-1944. It is common ground that the invoices were prepared in triplicate and that one copy had to be carried by the guard. The copy, which should have been in the guard's possession, was not forthcoming and had got mislaid somewhere. The result was that when plaintiff's agent at Cuddalore (P. W. 1) went to the goods station and asked for delivery on 17-11-1944 on the strength of Ex. P. 1, the Goods Station Master, D. W. 3 declined to deliver without instructions, for which he wired. His main difficulty appears to have been that the seal cards on the wagons showed invoice No. 8 and as the guard was unable to produce the copy of the invoice, which should have been in his possession, he was not sure whether these bags related to Ex. P. 1. On 23-11-1944, an Inspector (D. W. 1) was sent to Cuddalore and he opened the wagons to see if the bags had marks. He found no identifying marks and further more that the seal card did not show the date of the invoice. The bags were unloaded on 13-12-1944 from the wagons and stacked in a covered shed. Despite the South Indian Railway writing to the G. I. P. Railway that there was only one person claiming under invoice No. 6, it was not till 24-1-1945 that the G. I. P. Railway authorised delivery. The station master, Cuddalore, then sent word to the plaintiff's branch there to take delivery. They declined. Registered notices, (see Ex. D. 31 dated 30-1-1945) were sent both to the plaintiff and to Bagavandas calling upon them to take delivery in the following terms:

"Legally you cannot refuse delivery of a consignment or part thereof in whatever condition it may be available for delivery. The railway is prepared to allow delivery on remarks for actual condition and weight. The consignment is lying undelivered solely at your risk according wharfage. The delay in delivery is due to you and the railway is not responsible."

Plaintiff replied by letter Ex. D. 33 dated 4-2-1945 declining to take delivery on various



grounds, that the goods had become deteriorated and damaged while lying in a state of exposure in the goods shed, and that after the arrival of the goods at Cuddalore, there had been a fall in price of Rs. 8 a bag. At the same time, this letter appreciated the fairness of the railway offer of delivery with remarks on actual condition and weight, meaning that the plaintiff would be compensated for loss sustained by them. It was not till 29-5-45 that the railway company sold the 200 bags in public auction for Rs. 3625 under S. 56(2) of the Railways Act. The delay is satisfactorily explained as grain being a controlled commodity, the collector's permission had to be obtained for sale. Deducting freight of Rs. 432 and demurrage of Rs. 1052, there was a balance of Rs. 2140-9-8 available to the plaintiff, who however sued to recover the full value of the grain according to the invoice.

(3) The first point taken by Mr. Ramachandra Aiyar for the appellant is that the suit against the South Indian Railway is not maintainable and that the plaintiff should have sued the contracting railway, i.e., the G. I. P. Railway. He relied on — 'Chunnilal v. Nizam's Guaranteed State Railway Co.', 29 All. 228 a Full Bench decision of the Allahabad High Court followed by King J. in — 'South Indian Railway v. Krishnaswami Naidu', 71 M. L. J. 325. The facts of those cases were quite different and they were held to be not covered by S. 80, Railways Act, which enables a suit for compensation for injury to through booked traffic being brought either against the contracting railway administration or against the railway on which loss, injury, destruction or deterioration occurred. In the present case, there is clear and ample evidence to show that the deterioration occurred at Cuddalore, where the goods arrived in good time on 16-11-44. In two letters Ex. D. 21 dated 17-1-45 and Ex. D. 25 dated 25-1-45 written by railway officials 'inter se', there is a clear reference to the deterioration of these bags, and a request for instructions by wire if delivery can be made to invoice No. 6. Quite apart from this positive evidence of deterioration, the main grievance of the plaintiff is that although these bags arrived in Cuddalore on 16-11-1944, his representative was refused delivery and delivery was only offered more than 2 months later not only after the bags had deteriorated, but also after there had been a substantial fall in price. There can be no doubt that there was a muddle and a mistake arising out of negligence, amounting to misconduct on the part of the railway servants, which resulted in the delivery of these bags being refused to the plaintiff immediately after their arrival.

(4) We have looked into the original invoice Ex. P. 1 and find there invoice No. 6 and also the digit 8 in the column for the descriptive marks on the consignment. This doubtless accounted for the mistake in the seal cards on which No. 8 appeared. Mr. Ramachandra Aiyar, while conceding the mistakes committed on the railway, has pleaded that the South Indian Railway did everything possible to put matters right, and has gone to the length of suggesting that plaintiff's representative at Cuddalore could easily have written to the plaintiff at Cawnpore to put matters right with the consigning railway there. We have no hesitation in finding in the first place that there was deterioration and damage at Cuddalore, as a

result of negligence amounting to misconduct committed on the South Indian Railway and that this being the case, the suit has been properly instituted under S. 80, Railways Act, against the South Indian Railway.

(5) The South Indian Railway will, therefore, be *prima facie* liable for compensation as a result of such misconduct. It is next urged by Ramachandra Aiyar that the consignor was also guilty of negligence in not putting identifying marks on these bags. It is urged that, had this been done, it would have enabled the Inspector who opened the wagons on 23-11-1944 to give delivery. As regards this, negligence was shared between the consignor and the railway company, who should have seen that the bags were marked with the identifying marks noted in the invoice before final acceptance. We do not think that the absence of identifying marks on the bags had really anything to do with the refusal to deliver these bags to the plaintiff, one which was the direct cause of other negligent mistakes of both the railway companies.

(6) It is finally urged that the plaintiff was at fault in not taking delivery of the bags towards the end of January when after considerable delay, the G. I. P. Railway authorised the South Indian Railway to deliver. There appears to us some substance in this contention. Reliance has been placed on — 'East Indian Railway Co. v. Behari Lal', AIR 1926 Lah. 512 and — 'Secretary of State for India v. Firm Harikrishna Das', AIR 1926 Lah. 575 two Bench decisions of the Lahore High Court. In both these cases, it was held that a consignee is bound to take delivery of goods even if they are damaged, his remedy being to claim compensation. In the first case, a consignment of 200 bags of atta despatched from Delhi reached its destination after about four and a half months in 1920. There was no evidence as regards the condition of the atta on arrival and no damage being established, the plaintiff was held entitled only to the auction-realisation less auctioneer's commission and certain freight charges, restoring the trial court decree and reversing the decision of the District Judge in appeal that the consignee in the circumstances were not bound to take delivery. In the second case, — 'Secretary of State for India v. Krishnadas', AIR 1926 Lah. 575, 172 bags of atta arrived at its destination on the railway on 3rd July 1920 but the plaintiff consignee did not claim them till 10th July and refused delivery on the ground that the atta had been damaged by rain, which had fallen that very day. Here too the trial court gave the plaintiff a decree for the price realised by the auction held on the 1st of December 1920 under S. 56(2), Railways Act, less the demurrage. The District Judge allowed the plaintiff's claim for the value of the goods minus freight and demurrage only after 10th July. Here too, the trial court decree was restored.

(7) We are unable to regard these decisions as authority for the position that in all cases in which a consignor refuses to take delivery, he can only recover what the goods fetch in auction less freight and demurrage. There is nothing in the bailment sections of the Contract Act, which lay down any obligation on the bailor to take delivery from the bailee when he offers it, nor is there any decision, which lays down any such hard and fast rule. Normally as property in the goods entrusted to a



carrier remains with the owner, he is bound to take delivery even if they are damaged, his remedy being to claim compensation, nor can he cast upon the bailee responsibility for further custody as bailee without payment of storage or demurrage dues. Each case has to be considered on its own facts and no hard and fast rule can be laid down. On the facts of the present case, we are satisfied that despite the refusal of the railway company to give delivery on 17-11-1944 when the plaintiff's representative demanded it and all these bags were in the Cuddalore goods shed, there was nevertheless a duty cast on the plaintiff to have taken delivery of the goods, though damaged when delivery was offered on 24-1-1945 in accordance with the very fair and reasonable terms offered by the railway company in their letter, Ex. D. 31. The legal position in the extract from this letter supra is, in our opinion, correct though it does not necessarily follow in all cases that a consignor refusing to take delivery is precluded from filing his suit for compensation and can only receive what the goods fetch in auction when sold under S. 56(2) of the Railways Act. In the present case, there can be no doubt that by 24-1-1945 the price of Bengal gram had fallen by Rs. 8 a bag and further more that there was deterioration due to exposure while the bags were unnecessarily detained in the Cuddalore goods shed in consequence of the negligence of the railway companies for a period of more than two months.

(8) We are unable to uphold the lower court's decree in full for Rs. 5600 with full costs. There is no justification for disallowing the freight, and in view of the plaintiff's wrongful refusal to take delivery when ultimately offered on 24-1-1945, he must also pay demurrage charges of Rs. 1052. Plaintiff will accordingly have a modified decree for Rs. 4116 against the railway company with half costs throughout, and interest at six per cent from date of lower court's decree.

B/H.G.P.

Decree modified.

**A.I.R. 1953 MADRAS 219 (Vol. 40, C. N. 78)**  
**RAMASWAMI J.**

In re Nallamothe Chimpireyya and others, Petitioners.

Criminal Revn. Case No. 553 of 1952 and Criminal Revn. Petn. No. 450 of 1952, D/- 11-7-1952.

**Madras Hindu Religious and Charitable Endowments Act (19 of 1951), Ss. 62 and 87 — Civil suit under S. 62 — Power of Civil Court to restrain by injunction proceedings under S. 87 — Jurisdiction of magistrate to pass order under S. 87 during pendency of suit — Interference in revision — (Criminal P. C. (1898), S. 439).**

When the Assistant Commissioner appoints a new trustee and orders delivery of possession of the trust property to that trustee a party aggrieved by the order is entitled under S. 62 to file a civil suit. But the Civil Court which has jurisdiction to modify or cancel the order has no power to stay the order pending the disposal of the suit. (Para 5)

The pendency of the Civil suit will not affect the jurisdiction of the magistrate under S. 87 to enquire into the matter of putting the new trustee in possession of the property of the trust. The magistrate,

apart from S. 62, is not a subordinate of the Civil Court and the proceedings before him cannot be stayed by the Civil Court.

(Para 5)

Where there is valid appointment of a trustee by the Assistant Commissioner and a certificate in the prescribed form has been issued by him and the magistrate pronounces an order in conformity with the provisions of the Criminal P. C. stating the point for decision, the decisions and reasons therefor, after holding an enquiry within the four corners of S. 87, Madras Religious and Charitable Endowments Act, the High Court will refuse to interfere in revision. (Para 5)

Anno: Cr. P. C., S. 439 N. 1.

M. Ramakrishna Rao, for Neti Subramaniam and J. V. Krishna Sarma, for Petitioners.

**ORDER:** This is a criminal revision case which is sought to be filed against the order made by the learned Joint Magistrate of Ongole under S. 87, Madras Hindu Religious and Charitable Endowments Act, 19 of 1951.

(2) The short facts are: Koneri Veerayya was appointed as Trustee of the Chennakeswaraswami temple in Kothakote village in Ongole taluk by the Assistant Commissioner for Hindu Religious Endowments, Guntur district, on 9-6-1948. The respondents before the Joint Magistrate, Ongole, who are petitioners before me are the ex-trustees of the temple. In this case, a certificate has been issued as contemplated under S. 87 of the new Act in the prescribed form setting forth certain properties belonging to the religious institution and directing delivery of possession to the person appointed as aforesaid of such properties etc. The ex-trustees have been obstructing and preventing the trustee lawfully appointed by the Assistant Commissioner from taking possession of the properties mentioned in the certificate. Therefore, the petition had been filed under S. 87 of the new Act for necessary action. The learned Joint Magistrate of Ongole directed the respondents before him, viz., the petitioners before me to deliver possession of the properties to the respondent-trustee before me. Thereupon this revision case has been filed.

(3) I may point out here that the petitioners' case is that a suit has been filed in the Sub-Court, Ongole, under S. 62 of the present Act and that he has obtained an order on 11-3-1952 restraining the respondents from taking possession of the lands pending disposal of that suit. This contention was overruled by the learned Joint Magistrate and this is reiterated here as the only point of substance before me for admitting this revision case.

(4) The contentions of the petitioners before me are as follows: That the learned Joint Magistrate should have held that he had no jurisdiction to direct delivery of possession of the properties when a civil suit was pending in respect of the same subject matter; that the learned Joint Magistrate should have seen that the power under S. 87 exercised by the Subordinate Judge (sic) — probably Joint Magistrate — is subject to the filing of the suit by the aggrieved party and that when the suit is pending in respect of the same matter there is no jurisdiction for him; that the Joint Magistrate should have held that in view of the order of temporary injunction issued by the Subordinate Judge he had no power to direct delivery of possession of the properties; that the Joint Magistrate should have held that in matters pending before the civil court long



prior to Act 19 of 1951 came into force he cannot affect matters which have been started long before the Act came into operation; and that the Joint Magistrate, Ongole, erred in finding that the Assistant Commissioner's order corresponds to the order of the Commissioner under the new Act in respect of the appointment of the first respondent as trustee.

(5) These objections singly or cumulatively are devoid of any substance and here are my reasons. The first contention about jurisdiction is meaningless because the First Class Magistrate is vested with jurisdiction to enquire into the matter of putting the trustee or executive officer in possession and the pendency of a civil suit will not in any way affect his jurisdiction. In fact S. 62 of the new Act clearly lays down that an aggrieved party can file a suit; but the civil court while vested with the jurisdiction to modify or cancel such order shall have no power to stay the Commissioner's order pending the disposal of the suit. This is precisely what is sought to be done here. S. 62 is an answer to the second and third points raised by the petitioners. In fact it is overlooked that apart from S. 62, the Joint Magistrate, Ongole, is not the subordinate of the learned Subordinate Judge of Ongole and an injunction cannot be granted to stay proceedings in a court not subordinate to that from which an injunction is sought and to stay proceedings in any criminal matter. Incidentally the penultimate point taken is not correct because as a matter of fact the suit filed by the petitioners before us was under the new Act, though it might have been started under the old Act. The last point is equally devoid of substance because of the transitory provisions provided for in the new Act. This revision petition is nothing more than a device to protract proceedings and to defeat the very object of the new Act.

In this connection we may briefly allude to the statement of objects and reasons when S. 78 of the old Act was substituted for the previous S. 78 by Act 4 of 1930. It was stated:

"It is notorious that trustees dismissed by Committees under Act 20 of 1863 have in several instances refused to hand over possession to the persons newly appointed and have defied the committees by remaining in possession pending the end of protracted litigation started by them. This clause is intended to end the scandal."

But unfortunately for the framers of this new section, for reasons with which we are not concerned here, the praiseworthy object was defeated. Therefore, when the new Act 19 of 1951 was framed a more summary and expeditious method of putting trustees appointed under the Act in possession was adopted, viz., clothing the Magistrate of the area with jurisdiction and interdict civil courts from interfering by means of injunctions and bringing to a standstill the orders of the Commissioner.

These provisions are now sought to be undermined by the type-design contentions as advanced above and they merit no encouragement at our hands. On the other hand, so far as our criminal revisional jurisdiction is concerned, all that we have to consider is the legality and propriety of the order made by the lower courts and once it is found that a trustee has been lawfully appointed by the Assistant Commissioner and that a certificate in the prescribed form has been issued and that a fair and proper enquiry has been held by the Magistrate within the four corners of S. 87 and that an order in conformity with the provi-

sions of the Criminal Procedure Code is pronounced, viz., stating the point for decision, the decision and the reasons for the decision, the High Court will not interfere in revision leaving it to the party to canvass his grievance in the suit prescribed by the new Act and obey the order of the Magistrate and in the event of his succeeding in the suit take back delivery of possession because in this case it can never be said that a restitution will be impossible.

(6) There are no grounds whatsoever to interfere with the order of the lower court and this criminal revision case is dismissed. (Leave refused).

B/M.K.S.

Petition dismissed.

**A.I.R. 1953 MADRAS 220 (Vol. 40, C. N. 79)**  
**CHANDRA REDDI J.**

Kamarusu Kasi Viswanadhan and another, Appellants v. Rudra Viranna, Respondent.

Second Appeal No. 2175 of 1948, D/- 8-7-1952.

**Civil P. C. (1908), S. 92 — Village fund — Suit for accounts — S. 92 held applied.**

The fund was to be utilised only for purposes connected with the village, but the purposes had to be determined by a majority of the members of the village community. Whatever might be the purpose for which it might be utilised, as a result of the decision of the majority of the villagers it must be for the benefit of the village community as a whole. The fund was meant for being utilised for the amenities of the villagers and not for the benefit of any individual or a particular group of persons. The plaint in a suit by some of the residents in the village for accounts against the defendants entrusted with the fund made out a case of a trust created for the public purpose of a charitable nature:

Held that the allegations came within the mischief of S. 92 and the provisions of the section should be complied with: 1946-2 MLJ 17 Relied on. (Paras 8, 9)

Anno: Civil P. C., S. 92 N. 2, 5.

V. Parthasarathy, for Appellants; D. Narasimharaju and K. B. Krishnamurthy, for Respondent.

**JUDGMENT:** The plaintiffs are the appellants. They filed the suit out of which this second appeal arises on behalf of all persons interested in a fund said to be a common fund of the village for directing the defendant to render an account of the amounts entrusted to him. The allegations, material for the purpose of this enquiry, are as follows:

(2) The plaintiffs and defendant are residents of the village named Duvva. It has been the practice in the village to have a common fund of the village for the use and convenience of the villagers and to keep the same in the custody of somebody in the village selected by a majority of the villagers assembled and to use the fund for such purpose as might be determined by the majority. All the villagers have equal rights to the said common village fund. All the villagers have got a right to demand in what manner and to what extent the said amount is being utilised. The person in charge of the fund is bound to render an account for the use made of it.

(3) Again in paragraph 5, it is alleged that this fund was kept with the defendant for the common purpose of the community.



(4) One of the defences to the suit was that S. 92, Civil P. C. was a bar. The courts below dismissed the suit upholding this defence as the procedure prescribed in S. 92, Civil P. C. has not been followed. The plaintiffs who are aggrieved by this decision have preferred this second appeal.

(5) In support of this appeal Mr. Parthasarathi contended that inasmuch as the purposes for which the common fund should be utilised had to be determined by the villagers and that was not so done, it could not be said that the fund was impressed with the trust of a public charitable nature and would not therefore fall under S. 92, C. P. C. I do not think I can give effect to this contention. In Halsbury's Laws of England, 2nd Edn., Hailsham Edn., Vol. 4, at page 109 "Charity" is described as follows:

"Charity in its legal sense comprises four principal divisions: trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion, and trusts for other purposes beneficial to the community not falling under any of the preceding heads. Within one of these divisions all charity to be administered by the court must fall, though every object which might be brought within one of them is not necessarily a charity, for, it must, further, be of a public nature and capable of administration by the court."

(6) At page 126 the learned author says in paragraph 167:

"The benefit of a charitable trust of this class need not extend to the whole community, provided that the class to be benefited is substantial enough to give the trust a public character."

It is pointed out by the author in paragraph 168 that in deciding whether a particular gift is charitable as being beneficial to the community, the main point to be considered is the purpose to which it would be put.

(7) In Mayne on Hindu Law and Usage, after extracting the passage in paragraph 145 of Halsbury's Laws of England, Vol. 4, the learned author says:

"The Courts in India have, in relation to Hindu Wills and gifts adopted the technical meaning of charitable trusts and charitable purposes which the courts in England have placed upon the term 'charity' in the statute of Elizabeth. All purposes which are charitable according to English law will be charitable under Hindu law. But, in addition, under the head of advancement of religion, there are other charitable objects in Hindu law which will not be charitable according to English law."

(8) This passage is quoted with approval by the Federal Court in — 'Manikasundara Bhattar v. R. S. Nayudu', 1946-2 MLJ 17. It was observed by the learned Judges:

"In our judgment therefore the word 'charities' is an appropriate generic term of wide scope and meaning apt to include all public, secular, charitable and religious trusts and institutions recognised as such by British Indian law."

It is clear from what has been cited above that any purpose connected with a village community is a public purpose of a charitable nature falling under S. 92, C. P. C. whatever might be the nature of that purpose. On the allegations in the plaint it is clear that the fund is to be utilised only for purposes connected with the

village, but that the purposes have to be determined by a majority of the members of the village community. According to the plaint whatever might be the purpose for which it might be utilised, as a result of the decision of the majority of the villagers it must be for the benefit of the village community as a whole. It is specifically stated that the fund is meant for being utilised for the amenities of the villagers. It is not the case of the plaintiffs that the fund is to be distributed amongst all the villagers or that it is for the benefit of any individual or a particular group of persons. The allegations in the plaint make out a case of a trust created for the public purpose of a charitable nature. There can therefore be no doubt that these allegations come within the mischief of S. 92, C. P. C. (See decision of the learned Chief Justice and Somasundaram J. reported in — 'Abdul Razack Sahib v. Abdul Hamid Sait', 1950-2 MLJ 282).

(9) What emerges from this discussion is that if the fund is for the use of the villagers, that is for purposes connected with the village community, as a whole or with a substantial part of the village community, whatever may be the nature of the purpose to which it might be utilised, the trust must be said to be one of a public charitable nature. In my opinion the allegations in the plaint and the prayers asked for will certainly bring the case within the ambit of S. 92, C. P. C. Therefore in agreement with the courts below I hold that this case falls under S. 92, C. P. C. and the provisions of that section should have been complied with. In these circumstances, I must uphold the decision of the courts below and dismiss this second appeal with costs. (Leave to appeal is refused).

B/R.G.D.

Appeal dismissed.

**A.I.R. 1953 MADRAS 221 (Vol. 40, C. N. 80)**

**SATYANARAYANA RAO AND RAJA-GOPALAN JJ.**

C. S. Hajee Mohamed Ibrahim and Co., Applicant v. Commissioner of Excess Profits Tax, Respondent.

Refd. Case No. 38 of 1950, D/- 7-4-1952.

**(a) Excess Profits Tax Act (1940), S. 10A — Burden of proving that transaction came within S. 10A — (Evidence Act (1872), Ss. 101 to 103).**

The burden of establishing that the transaction in question is within the mischief of S. 10A is undoubtedly on the department and it is for them to establish by cogent and convincing evidence that there were circumstances which point to the conclusion that the main purpose of the transaction was to avoid or reduce the liability to excess profits tax. It is not enough for the department in order to discharge the onus on them to establish merely that the transaction was one which came into existence after the Act came into force. There should be additional circumstance or circumstances which would point to the conclusion that the object with which the parties entered into the transaction and the main object was to avoid the tax or to get it reduced. R. C. No. 64 of 1946 Foll. 18 ITR 988, 29 TC 289 Rel. on. (Para 4)

Anno: E. P. T. Act, S. 10A N. 1; Evidence Act, Ss. 101 to 103 N. 1, 6, 8.



**(b) Excess Profits Tax Act (1940), S. 10A — Purpose of transaction being avoidance of reduction of liability to excess profits.**

It is the right of every individual to enter into a partnership, to get it dissolved and to constitute new partnership and merely because the partnership happened to be dissolved and the new partnerships were brought into existence at a time when the Excess Profits Tax Act was in force, from that circumstance itself it cannot be inferred that the motive and object of the person so acting was to avoid the liability for excess profits tax. (Para 5)

Anno: E. P. T. Act, S. 10A N. 1.

T. M. Krishnaswami Aiyar, for M. Subbaraya Aiyar, for Applicant; C. S. Rama Rao Sahib, for Respondent.

SATYANARAYANA RAO J.: Under S. 66(2) of the Indian Income-tax Act the following question was referred to this court for decision by the Appellate Tribunal, viz.,

"Whether on the facts and circumstances of this case the dissolution of the firm of Hajee Mohammed Ibrahim and Co. in 1941 and the formation of two partnerships each consisting of two of the partners of the old firm at Erode and Salem were entered into with the main purpose of avoiding or reducing liability to excess profits tax."

The question referred to us has to be decided with reference to the language of S. 10-A of the Excess Profits Tax Act. It provides that if the Excess Profits Tax officer is of opinion that the main purpose for which any transaction or transactions was or were effected was the avoidance or reduction of liability to excess profits tax, he may with the previous approval of the Inspecting Assistant Commissioner make such adjustments as respects liability to excess profits tax as he considers appropriate so as to counteract the avoidance or reduction of liability to excess profits tax which would otherwise be effected by the transaction or transactions.

(2) There was originally a firm which carried on business at Erode and Salem under the name and style of C. S. Hajee Ibrahim & Co. Its business consisted of purchase and sale of clothes and fancy goods. It consisted of six partners, (1) C. S. Hajee Muhammad Ibrahim Rowther, (2) C. S. Hajee Abdul Majeed Rowther, (3) P. K. Mohamad Yusuf Rowther, (4) C. K. E. Mohamed Hanifa Rowther, (5) A. C. K. Shaik Abdul Kadir Rowther, and (6) P. K. Mohamed Habib Rowther. Of the six, Mohamed Habib Rowther (No. 6) retired from the partnership on 22-1-1941. By reason of the dissensions between the partners in December 1951 the firm which then consisted of five partners was dissolved under a deed of dissolution of partnership dated 15-12-1941. Out of the five partners, Mohamed Yusuf Rowther was paid his share of the capital and profits in the business after debiting his drawings. It amounted to a sum of Rs. 7415-3-0. The remaining four partners formed themselves into two partnerships of two persons each. Hajee Abdul Hajeed Rowther and Muhamad Hanifa Rowther agreed under a deed of partnership D/- 13-12-1941 to carry on business under the name & style of C. S. Hajee Abdul Majeed & Co. at Salem. On the same day there was another partnership between Hajee Mohamed Ibrahim Rowther & A. C. K. Sheik Abdul Kadir Rowther who under another deed of partnership agreed to carry on

business at Erode under the name & style of Hajee Hohamed Ibrahim and Co.

In the deed of dissolution it was provided that the partners who entered into the new partnership to carry on business at Erode should take the assets and liabilities as stated in schedule A attached to the deed of dissolution. This schedule A shows the value of the stock on hand at Erode as well as other assets of the partnership, including the outstandings. Similarly, schedule B shows the assets and liabilities allotted to the new partnership which agreed to carry on business at Salem. Under the new deeds of partnership it was agreed that the capital which has been entered in the personal account of each partner should be treated as the capital of the business and if any further capital is required the partners should contribute individually. The shares of the partners in the Salem partnership were 18 shares of which Hajee Abdul Majeed Rowther had ten shares & Mohamed Hanif Rowther had 8 shares. In the Erode partnership firm the shares were: Hajee Mohamed Ibrahim 32 shares out of 49 and Sheik Abdul Kadir Rowther 17 out of 49. These partnerships commenced to carry on business immediately after the partnerships were brought into existence and in the fourth chargeable accounting period the new firms earned profits of Rs. 32289 in respect of Erode partnership and Rs. 26817 in respect of the Salem Partnership. Before dissolution the net excess profits of the old firm were only Rs. 803.

The Excess Profits Tax Officer issued a notice under S. 10-A on 22nd July 1946 stating that as there was no break between the dissolution of the old firm and the commencement of the business of the new firms he proposed to treat the business carried by the new firms as merely a continuation of the business of the old firm without any break especially when the capital required by the new business was found from the old business and as the two firms carried on the same kind of business as the old firm. This view was finally upheld by the Appellate Tribunal.

(3) The reason given in the deed of dissolution of partnership was that there were dissensions between the partners and therefore the partnership had to be dissolved and new partnerships had to be constituted after one of the five remaining partners agreed to go out of the business by taking the balance of his capital and profits outstanding in the old partnership. In proof of these dissensions and the consequent arbitration by two persons — one of whom subsequently was appointed as District Judge — a statement of one of them Hajee Chellakani Rowther was filed before the Excess Profits Tax Officer. He stated in that statement that as the partners in C. S. Hajee Mohamed Ibrahim and Co. were having quarrels and in order to have a peaceful division of the Erode and Salem firms, they had him and the other gentleman who was an Advocate at Trichi as arbitrators and effected division and that the reason for the division was only dissension among them. The Appellate Tribunal while adverting to this statement thought that that statement by itself did not conclude the matter and that it was duty of the assessee to have examined the other arbitrator who became a District Judge, or, at any rate, they should have obtained an affidavit from him supporting the statement of Chellikani Rowther. In view of this omission they were not inclined to accept



the case of arbitration and consequent dissolution of the firm. They further added as reason for their conclusion that there was no fresh capital for the business of the new partnerships and that there was no break in the business either at Erode or at Salem. On these grounds they confirmed the view taken by the revenue authorities.

(4) In our opinion, the Tribunal approached the case from a wrong perspective altogether. As has been decided in this court in 'R. C. No. 64 of 1946' the burden of establishing that the transaction in question is within the mischief of S. 10-A of the Act is undoubtedly on the Department and it is for them to establish by cogent and convincing evidence that there were circumstances which point to the conclusion that the main purpose of the transaction was to avoid or reduce the liability to excess profits tax. This view is also supported by the decision in — 'Gangha Sahai Umrao Sing v. Commissioner of Excess Profits Tax', 18 ITR 988, and in — 'Dixon & Gount Ltd., James Dare Ltd. v. Commissioner of Inland Revenue', 29 TC 289. The department made no effort to place any circumstance to establish that the main purpose of the transaction was to avoid or reduce the tax. All that is urged and which has also been stressed before us by Mr. Rama Rao Sahib, the learned advocate for the Income-tax Commissioner, was the time-factor and the result, meaning thereby that if a transaction was brought into existence after the Excess Profits Tax Act came into force and when it continued to operate and if the result of the transaction was in fact to avoid or reduce the tax, it must be presumed that the transaction was within the mischief of S. 10-A of the Act. This argument if accepted would practically shift the burden of proof in every case to the assessee for the section can only apply to transactions which were brought into existence either after the Act came into force or even before the Act came into force when it was fairly well known that the Act would be passed. It would be impossible to conceive of any cause, applying that test, which would not fall within the purview of the section.

It is not enough, in our opinion, for the department in order to discharge the onus on them to establish merely that the transaction was one which came into existence after the Act came into force. There should be additional circumstance or circumstances which would point to the conclusion that the object with which the parties entered into the transaction and the main object was to avoid the tax or to get it reduced. In the present case the other circumstances point to the contrary conclusion rather than supporting the view of the department. That there were dissensions was recited in the deed of dissolution of partnership and was also proved by the statement of Chellikani Rowther. It is difficult to understand what the Tribunal meant when it said that this statement of Chellakani Rowther did not by itself conclude the matter. If the department thought that this statement was not credible it was up to them to have examined the other arbitrator who is now in judicial service as a District Judge. No effort was made on that behalf. On the other hand, the blame was thrown on the assessee for not examining him or for not even obtaining an affidavit from him. The fact of dissensions and of consequent arbitration, in our opinion, is amply established by the evidence on record.

(5) The objection that there was no fresh capital and that there was no break in the continuity of the business is unfounded. The capital, as stated above, of each of the partnerships was as stated in the deed of dissolution the capital which was credited to the personal account of each of the partners as per the schedules appended to the deed of dissolution. Provision was made for bringing in fresh capital by the individual partners whenever it was needed. As regards the break in the continuity of the business, if an existing partnership is dissolved and one of the partners goes out of the business altogether and the remaining partners split up the business at the two places and constitute two distinct partnerships, though of course to carry on the same kind of business, it would undoubtedly constitute a break in the continuity of the business and it is impossible to agree with the conclusion that there was a continuity of the business of the old partnership by these new partnerships. It is the right of every individual to enter into a partnership, to get it dissolved and to constitute new partnerships and merely because the partnership happened to be dissolved and the new partnerships were brought into existence at a time when the Excess Profits Tax Act was in force, from that circumstance itself it cannot be inferred that the motive and object of the person so acting was to avoid the liability for excess profits tax.

(6) We are therefore of opinion that the question referred to us must be answered in the negative and in favour of the assessee. The assessee has succeeded and is entitled to costs which is fixed at Rs. 250.

B/D.H.

Answer in the negative.

**A.I.R. 1953 MADRAS 223 (Vol. 40, C. N. 81)**  
**SATYANARAYANA RAO AND RAJA-**  
**GOPALAN JJ.**

R. Venkataswamy Naidu, Peelamedu, Coimbatore, Appellant v. The Commissioner of Income-tax, Madras, Respondent.

Case Ref. No. 30 of 1950, D/- 15-4-1952.

**Income-tax Act (1922), S. 2(1) — Agricultural income — Income from sale of milk of cows fed on agricultural lands.**

Where the cows are reared on the agricultural lands and are primarily fed on the produce of such lands, the income derived from the sale of their milk is agricultural income. AIR 1938 Rang 260 (FB) and AIR 1950 Mad 566, Rel on. (Para 11)

Anno: Income Tax Act, S. 2 N. 3.

T. M. Krishnaswami Aiyar, for M. Subbaraya Aiyar, for Appellant; C. S. Rama Rao Sahib, for Respondent.

REFERENCES: Courtwise/Chronological/ Paras  
 ('38) 1938-6 ITR 502: (AIR 1938 Rang 260 FB)

('50) 1950-18 ITR 259: (AIR 1950 Mad 566) 3, 8

('22) 45 Mad 710: (AIR 1922 Mad 351) 6

(1933) AC 618: (102 LJKB 456) 6

JUDGMENT: The question that has been referred to us under S. 66 (2) of the Indian Income-tax Act runs:

"Whether on the facts and circumstances of the case, the income from the sale of milk received by the assessee during the accounting year is not 'agricultural income' within the meaning of the Income-tax Act."



The accounting year of the assessee ended with 31st March 1946. The assessment year was 1946-47. The assessee, an undivided Hindu family, owned about 70 acres of agricultural land at Perur near Coimbatore. The family also owned 65 cows & 10 pairs of bulls. With reference to the cows the statement of the assessee furnished to the Income-tax Officer was:

"The cows are purely pasture-fed and not stall-fed. It is not being run as a commercial proposition. The cows are maintained purely for manuring and other purposes connected with agriculture and only surplus milk after satisfying assessee's needs is sold to outsiders."

During the year of account, the assessee received about Rs. 28,000 as sale proceeds of milk. The milk was sold to the Co-operative Milk Supply Union at Coimbatore. The assessee claimed that the profits of the sale of milk constituted agricultural income which was exempt from the payment of income-tax. The Income-tax Officer rejected that contention. In the absence of any accounts with reference to these cattle, the Income-tax Officer estimated the profits of the sale of milk in the year of account at Rs. 4000 and assessed the amount to income-tax. The Assistant Commissioner, & on further appeal, the Appellate Tribunal upheld that assessment.

(2) Income and agricultural income have been defined by S. 2, Income-tax Act. The expression "agriculture", however, has not been defined by the Act. "Agricultural income" has been defined by S. 2(1) of the Act. "Agricultural income" means:

"(a) any rent or revenue derived from land which is used for agricultural purposes, and is either assessed to land revenue in British India or subject to a local rate assessed and collected by officers of the Crown as such;

(b) any income derived from such land by—  
(i) agriculture, or

(ii) the performance by a cultivator or receiver of rent-in-kind of any process ordinarily employed by a cultivator or receiver of rent-in-kind to render the produce raised or received by him fit to be taken to market, or

(iii) the sale by a cultivator or receiver of rent-in-kind of the produce raised or received by him, in respect of which no process has been performed other than a process of the nature described in sub-cl. (ii);

(c) any income derived from any building owned and occupied by the receiver of the rent or revenue of any such land, or occupied by the cultivator, or the receiver of rent in kind, of any land with respect to which, or the produce of which, any operation mentioned in sub-clauses (ii) and (iii) is carried on;"

(3) In — 'Commr. of Incometax, Burma v. Kokine Dairy, Rangoon', 1938-6 I T R 502 Rang. (FB) Roberts C. J. delivering the leading judgment of the Full Bench of the Rangoon High Court, observed at page 509:

"What is exempted from tax by the Income-tax Act is agricultural income and for the purpose of considering the position of a dairy farm and the milk which is derived from it, it is necessary to enquire whether the cattle are kept in an urban area and

stall-fed or whether they are pastured upon the land. Where cattle are wholly stall-fed and not pastured upon the land at all, doubtless it is trade and no agricultural operation is being carried on; where cattle are being exclusively or mainly pastured and are nonetheless fed with small amounts of oil cake or the like, it may well be that the income derived from the sale of their milk is agricultural income."

The learned Chief Justice observed further:

".....the Income-tax Officer has to see whether the cattle derived sustenance to a material extent from the produce of the ground, and whether they did so or not is entirely a question of fact for him and one which cannot be reviewed by this Court."

(4) Those observations were not specifically correlated by the learned Chief Justice to the definition of agricultural income in S. 2 (1) of the Act. However, we respectfully agree with the principles as enunciated by the Full Bench of the Rangoon High Court. On an examination of the implications of the statutory definition of agricultural income in S. 2(1) of the Act, we are satisfied that the principles enunciated in that case and extracted above are correct.

(5) The question that arose for consideration in this case was, whether the income derived from the sale of milk by the assessee in the accounting year was agricultural income. It was neither rent nor revenue within the meaning of S. 2 (1) (a) of the Act, and that clause could not apply; nor can S. 2(1)(b)(ii) or S. 2 (1) (c) of the Act apply to the facts of this case. That leaves S. 2 (1) (b) (i) and 2 (1) (b) (iii). Even before either of these provisions could be invoked, the condition to be satisfied by the assessee was that the income had been derived from "such land" within the meaning of S. 2 (1) (b). The expression "such land" has to be construed with reference to the definition in S. 2 (1) (a), i.e., it must have been land used for agricultural purposes and assessed to land revenue. That this test was satisfied by the assessee in the accounting year was really never in dispute. The 70 acres of land that the assessee owned at Perur were agricultural lands, held obviously on ryotwari tenure, subject to liability for payment of land revenue to the Government.

(6) So the question is, was the income derived during the accounting year by the assessee by the sale of milk, income derived from "such land" by agriculture within the meaning of S. 2 (1) (b) (i)? As we have already pointed out, the expression "agriculture" itself was not defined by the Act. In — 'Commr. of Incometax, Madras v. K. E. Sundara Mudaliar', 1950-18 I T R 259, to which decision one of us was a party, after referring to the meaning given to the word "agriculture" by the Oxford Dictionary, which treated agriculture as synonymous with husbandry, Viswanatha Sastri J. observed at p. 272:

"In my opinion the word 'agriculture' is used in S. 2 of the Income-tax Act in a wide sense so as to denote the raising of useful or valuable products which derive nutriment from the soil with the aid of human skill and labour. It would include horticulture, which involved intensive cultivation of land as garden in the production of fruits, flowers or vegetables. It would also include growing of trees or plants whose growth is effected by the expenditure of human effort, skill and



attention in such operations, as those of ploughing, sowing, planting, pruning, manuring, watering, protecting etc. as held by Spencer J. in — 'Pavadai Pathan v. Ramaswami Chetti', 45 Mad 710. The word 'agriculture' applied to the cultivation of the soil for food produce or any other useful or valuable growth of the field or garden and is wide enough to cover the rearing, feeding, and management of livestock, which live on the land and draw their sustenance from the soil."

We respectfully agree with those observations. It should therefore be unnecessary for us to review again the case law on the subject which was considered in — 'Commr. of Incometax, Madras v. K. E. Sundara Mudaliar', 1950-18 I T R 259 (Mad). We shall content ourselves with a reference to the dicta of Lord Wright at pages 638, 639 in — 'Lord Glanely v. Wightman', 1933 A C 618:

".....equally it is obvious that the rearing of animals, regarded as they must be as products of the soil — since it is from the soil that they draw their sustenance and on the soil that they live — is a source of profit from the occupation of land, whether these animals are for consumption as food (such as bullocks, pigs, or chickens) or for the provision of food (such as cows, goats or fowls), or for recreation (such as hunters or racehorses), or for use (such as draught or plough horses). All these animals are appurtenant to the soil, in the relevant sense for this purpose, as much as trees, wheat crops, flowers or roots, though no doubt they differ in obvious respects."

(7) It is with reference to these principles that we have to answer the primary question that arose for consideration in this case: "Was the milk the assessee sold in the accounting year an agricultural produce?" If it was, the profits of sale of the milk should be viewed either as income derived from "such land" by agriculture within the meaning of S. 2 (1) (b) (i), or as income derived from such land "by the sale by a cultivator of the produce raised .....by him in respect of which no process has been performed other than a process of the nature described in sub-clause (ii)" within the meaning of S. 2 (1) (b) (iii). In fact, it would satisfy the requirements of both the subsections, though even one would be sufficient to treat the income as agricultural income to secure for it the exemption granted by the Act.

(8) While there was nothing in the material before the Tribunal to establish that the milk in this case was not an agricultural produce, the evidence on record really justified only one conclusion, that it was agricultural produce. The assessee had 70 acres of agricultural lands. The cows were fed primarily on the produce of those agricultural lands. There was no indication that they were stall-fed. The assessee satisfied the test formulated by the Full Bench of the Rangoon High Court in — 'Commr. of Incometax, Burma v. Kokine Dairy, Rangoon', 1938-6 I T R 502 Rang. (FB) with which test, as we have pointed out, we agree,

(8) The grounds given by the Tribunal for holding that it was not agricultural income were set out in the statement of the case:

"The Tribunal was not satisfied that this was agricultural income for the reasons inter alia:

(i) it was not explained why 65 cows were necessary for obtaining manure;

(ii) there was nothing to show how much manure was actually required for agricultural operations;

(iii) that the account for the maintenance of these cows had been deliberately withheld;

(iv) that milk sales exceeded Rs. 2000 a month;

(v) that it was difficult to believe that cows just let loose on pasture lands would yield milk of that value; and

(vi) the supply of milk to the Co-operative Milk Supply Union shows that sales were on organised business lines."

(9) Of these, grounds 1, 2, 4 and 6 were not relevant factors at all. Even had the assessee kept the cows primarily for the sale of milk, in the circumstances established in this case, the milk would nonetheless have been agricultural produce, the produce of agricultural lands; and the profits of the sale of such milk would still have been agricultural income. That the sale of that milk was organised on business lines would not affect the real question at issue, was that milk, agricultural produce? In this case, there was the additional claim of the assessee that he maintained cows primarily for the manure he could get out of them, a claim not established to be false. It is rather futile to expect the assessee to maintain a stock book of the manure collected and later expended on his lands. We are unable to see anything inherently suspicious in the claim of the assessee, that he maintained 65 cows in addition to the ploughing bulls for manuring 70 acres of agricultural lands.

(10) Grounds 3 and 5 of the grounds set out by the Tribunal may be considered together. With reference to ground 5 we have to observe that it was not the sale price of the milk but the quantum of yield of milk that the Tribunal should have considered. The primary question that they should have considered was whether the cows were stall-fed or whether they were primarily fed on the produce of the land; and to that question neither the taxing authorities nor the Tribunal ever really addressed themselves. The assessee's failure to produce his accounts was no doubt a relevant factor in deciding whether the cows were primarily fed on the produce of the land. If accounts had been maintained the failure to produce them would justify, in the absence of any other relevant factor, an inference of facts adverse to the assessee. But there was no proof that the assessee maintained any accounts for feeding his cattle. There was for instance no evidence that all the produce of the land, the 70 acres of agricultural lands, was sold by the assessee and none was retained for feeding the cattle.

(11) Even a prima facie view based upon the ownership of such an extent of land, taken in conjunction with the number of cattle maintained, would certainly justify an inference, that cows were primarily fed on the produce of the soil, the produce of those 70 acres of agricultural lands. Investigation by the taxing authorities and by the Appellate Tribunal did not run on those lines at all. The authorities were obsessed with what was really an irrelevant factor, the organised sales of milk on a commercial scale. As we have already pointed out, ground No. 5 was not correlated to the yield of milk but was correlated to the money yield of the sale of milk. There were obviously



no data furnished by any comparable case to show how much milk any given cow or herd of cows yielded when they were pasture-fed and how much they yielded when they were primarily stall-fed. On an examination of the grounds furnished by the Tribunal we have to hold that there was no material on record on which they could come to the conclusion that the milk sold by the assessee in the accounting year was not agricultural produce, i.e., the produce of "husbandry", with its implication, that the cows were reared on the agricultural lands of the assessee and were primarily fed on the produce of those lands. There was no material to show that the profits of the sale of such milk constituted anything but agricultural income in the hands of the assessee.

(12) Our answer to the question referred to us for decision is that there was no material available to the Tribunal to hold that the income received from the sale of milk by the assessee during the accounting year was not "agricultural income" within the meaning of the Income-tax Act.

(13) As the assessee has succeeded in this court, he should get the costs of this reference from the respondent the Commissioner of Income-tax — Rs. 250.

B/G.M.J.

Reference answered.

**A. I. R. 1953 MADRAS 226 (Vol. 40, C. N. 82)**  
**RAMASWAMI J.**

In re R Umanatha Rao, Petitioner.

Criminal Revn. Case No. 302 of 1952 and Criminal Revn. Petn. No. 282 of 1952, D/- 24-3-1952.

**Criminal P. C. (1898), S. 439 — Anticipation of defence by petitions by raising preliminary points — Order passed on such petition — Procedure deprecated — Revision from order — Duty of High Court.**

A system of procedure not contemplated by the Code is developing in the subordinate criminal courts in the State of Madras. In warrant cases (and a fortiori in Sessions cases also) accused persons before they are charged and put upon their defence anticipate their defence by petitions raising preliminary points upon which the Court passes judgment. These are then brought up on revision to the High Court pending which the trial of the case is adjourned. Interlocutory petitions of this nature are deprecated. The result of following such a procedure is that the trial of a case degenerates into trials within a trial, and the trial Judge is compelled to prematurely commit himself to one view or another. When the matter is taken up to the High Court, the High Court by going into the merits of these contentions increases the risk of premature disposals on points which ought to be really disposed of at the end of the case and considered at the time of writing the judgment.

(Para 2)

In a revision petition from such an interlocutory order, the High Court will restrict itself to find whether acceptable or unacceptable reasons have been given by the Judge for his conclusions and whether a *prima facie* case has or has not been made out for interfering or not interfering with these conclusions. If the legality and

propriety of these conclusions are *prima facie* satisfactory there will be no necessity to interfere in revision. (Para 7)

Anno: Cr. P. C., S. 439 N. 26.

S. Mohan Kumaramangalam, for Petitioner;  
The Public Prosecutor, for the State.

**ORDER:** This is an unusual criminal revision case filed against an unusual order made by the learned Additional Sessions Judge of Tiruchirapalli division in Crl. M. P. No. 82 of 1952 in Sessions Case No. 53 of 1951.

(2) Before entering into the merits of this case, I may point out that in a circular issued by the High Court of Madras dated 10th January 1951 interlocutory petitions of this nature are thoroughly deprecated and the Honourable Judges point out as follows:

"Instances have come up to the High Court which disclose that a system of procedure not contemplated by the Code is developing in the subordinate criminal courts. In warrant cases (and a fortiori in Sessions cases also) accused persons before they are charged and put upon their defence anticipate their defence by petitions raising preliminary points upon which the court passes judgment. These are then brought up on revision to the High Court pending which the trial of the case is adjourned. The High Court desires to impress upon the lower courts that this procedure is unwarranted and makes for delay and extra work. An accused person has no right to raise a preliminary point before he is charged. He must wait to defend himself till he is charged and if he is convicted, his first remedy is in most cases by way of appeal."

I need not dwell upon the mischief caused by such a procedure. The trial of a case degenerates into trials within a trial, and the trial Judge is compelled to prematurely commit himself to one view or another, and what is more, when the matter is taken up to the High Court, the High Court by going into the merits of these contentions increases the risk of premature disposals on points which ought to be really disposed of at the end of the case and considered at the time of writing the judgment and the due reasons given for the conclusions arrived at by the Judge, which will enable the appellate court to be fully seised of the matter and bring its own mind to bear upon the points in controversy and satisfactorily dispose of the entire case against the accused, be it one of conviction or of acquittal.

(3) It is, therefore, really astonishing that the learned Additional Sessions Judge, Mr. B. R. Chakravarti, has allowed himself to embark upon such a detailed exposition of the points raised before him, which ought to be really relegated to the time when these matters should be considered, viz., after hearing the defence and while writing the judgment. I must attribute it only to the comparative inexperience in criminal work of the Additional Sessions Judge and it is to be hoped that there will be no further repetition either by him or by other subordinate courts of this State.

(4) The Additional Sessions Judge is trying what is popularly known as the Tiruchirapalli Conspiracy case and the prosecution case has been closed and the Judge has started recording the statements of the accused under S. 342, Criminal P. C. It is at this stage the accused invited the Judge to pass orders on three speci-



fic points before the statements were recorded. I directed the Additional Sessions Judge to get along with the recording of the statements under S. 342, Criminal P. C. and promised to pass orders on Monday on this case.

(5) The three points raised before the Additional Sessions Judge were (1) that the entire proceedings before the committing Magistrate were void for want of necessary sanction as required by Ss. 196 and 196(a), Criminal P. C. and consequently the trial before that court was void; (2) that the court had no jurisdiction to try this case because the conspiracy was hatched in Calcutta and (3) 160 documents which had been admitted in evidence must, on the evidence of the Investigating Officer, be held to have come not from proper custody and therefore a ruling should be given on this matter.

(6) The learned Additional Sessions Judge, I am glad to state, has carefully and temperately and with a wealth of justifiable legal learning discussed all these points and shown that points (1) and (2) are devoid of substance and that point (3) is a matter of assessment of the probative value of these documents and that this aspect of the case will have due regard when the case comes to be decided.

(7) This is not the stage where I should discuss once more the points for and against the three contentions raised by the accused because if I were to decide these points now the learned Sessions Judge would feel himself precluded from going into these matters again at the time he comes to hear the arguments at the Bar after both sides have closed their case. But that is proper stage when all these matters have to be carefully considered even though the learned Additional Sessions Judge has now passed this interlocutory order. Therefore my examination must consist of nothing more than, at this stage, to find whether acceptable or unacceptable reasons have been given by the learned Additional Sessions Judge for his conclusions and whether a prima facie case has or has not been made out for interfering or not interfering with these conclusions at this stage. If the legality and propriety of these conclusions are prima facie satisfactory at this stage, there will be no necessity to interfere in revision now. It is on that basis I shall examine the findings for this limited purpose.

(8) Taking the most important of the three points first, viz., the contentions relating to the 160 documents, the point taken is simply this. These documents were seized by the Police long anterior to this case from different sources and have been in their custody for a shorter while or a longer while before they had been put into court in connection with this case. Be it noted that these documents have all been properly proved and they have been admitted and there is no dispute about their relevancy. The only point taken is that by reason of their being in the custody of the police for a shorter or longer while instead of being produced before the court then and there which it is stated must be done under S. 523, Criminal P. C., a case has been made out for the court to give a ruling. The request is made in this vague language because the lower court has rightly pointed out that the learned counsel for the accused Mr. Kailai Anandar fairly conceded that the mere fact that these documents have been in the custody of the Police officers for

sometime, or that some of the documents being typewritten or cyclostyled and interpolations were possible, was not a ground for rejecting all these documents en bloc or the court being asked to deal with each document and say whether or not it accepts the proof adduced by the prosecution or what weight the court is going to attach to its contents. The learned Additional Sessions Judge has, therefore, pointed out

"Beyond, therefore, observing that the custody of the documents with the Police before they actually came into court will be borne in mind in considering whether the evidence adduced by the prosecution in regard to each of them is sufficient and satisfactory. No further order can be properly made at this stage and I do not therefore make any." This conclusion is prima facie correct and merits no interference in revision.

(9) The second point taken regarding the committal being void for want of necessary sanction as required by Ss. 196 and 196(a), Cr. P. C., has been fully dealt with by the learned Additional Sessions Judge. In fact in regard to this contention, the only aspect pressed before me is that the memorandum of the Government dated 22-8-1950 signed by the Deputy Secretary to Government in modification of Ex. P. 252 was neither properly proved nor admissible and that the lower court ought to have held that the order of His Excellency the Governor could not be modified by the Deputy Secretary. This point has been dealt with in para 20 of the Order of the lower court and the Add. Sessions Judge has shown how the first clause of the sanction clearly covered an offence under S. 120-B read with S. 153-A and similarly the second clause covered an offence under S. 121-A although S. 120-B too has been added to it unnecessarily and that these are the only two offences in regard to which objection can be raised and has been raised. The reasons given by the Additional Sessions Judge for this conclusion are prima facie acceptable and merit no interference in revision.

(10) The final point taken is that the conspiracy was hatched in Calcutta, and that therefore this case could not have been launched in Tiruchirapalli. The learned Additional Sessions Judge has carefully considered this point and states as follows:

"There is little substance in the contention raised under this point, and I am not quite sure if the counsel for the accused himself was very serious in his arguments on this point. It is not the case of the prosecution nor is it the evidence adduced in the case—I am not here referring to the truth or otherwise of the evidence adduced, this being a matter to be dealt with only in the judgment, but only to the trend of it—that the accused are to be convicted in regard to a conspiracy which took place at Calcutta. What took place at Calcutta was the 2nd party congress of the communist party of India. The decision in that congress is referred to in the evidence only for the purpose of rendering the prosecution case probable, namely, that the accused, or many of them, who are communists, were parties to a conspiracy or conspiracies which took place in the District of Tiruchirapalli among other places, for the purpose of implementing the decision of that congress, as also other directives of the party issued from time to time. The purport of



the evidence so far adduced in this case is—I repeat I am not concerned with the truth of the evidence at this stage—that the accused or several of them met or otherwise conspired to commit the offence set out in the charge in the District of Tiruchirapalli. Moreover, where the conspiracy alleged is a continuous thing ranging over a period of two years and the offence is committed in many places including Tiruchirapalli district, this court will have undoubtedly jurisdiction to try this case under S. 182, Cr. P. C."

The reasons given are prima facie correct and merit no interference in revision.

(11) In the result this criminal revision case is dismissed and the learned Additional Sessions Judge is directed to proceed with the disposal of the case expeditiously and according to law.  
C/V.S.B. Revision dismissed.

**A. I. R. 1953 MADRAS 228 (Vol. 40, C.N. 83)  
RAMASWAMI J.**

P. S. Narayanaswamy, Petitioner v. The State of Madras, represented by the Chief Secretary to the Government, Respondent.

Civil Revn. Petn. No. 6 of 1952, D/- 15-4-1952.

**Evidence Act (1872), Ss. 123 and 124 — Scope — Official communications and unpublished official records — Production of — Claim of privilege — Procedure — (Civil P. C. (1908), O. 11, Rr. 12 and 13).**

On an application by a party for the production of documents referred to in Ss. 123 and 124, Evidence Act, summons should be issued to the head of the department concerned. The head of the department must thereupon apply his mind to the documents sought to be disclosed and come to his own conclusion whether public interest would or would not be suffered by such disclosure. He has then to claim privilege if he chooses to do so by means of a communication, preferably in the form of an affidavit, claiming privilege and sufficiently indicating why he is claiming the privilege. It is also desirable but not indispensable that the records should be sent in a sealed cover through an officer of the department claiming privilege. The statement of the head of the department would be considered conclusive unless for compelling reasons to the contrary and the privilege will be upheld. But, in any event, it is the duty of the Court to apply its own mind as to whether the claim is not arbitrary and capricious and if need be it would be open to the Court to look into the documents and come to its own conclusion. The final decision of both the departmental heads as well as the presiding judge will be governed by only one consideration viz., whether the disclosure would result in any injury being caused to the public interest as S. 124 gives effect to the principle that public interest must be paramount and private interest must give way when there is a conflict between public and private interest. (Para 3)

Hence, where the Court, after applying its mind to the documents in respect of which the privilege is claimed, upholds the privilege, its decision will not be interfered with in revision. (Paras 7, 8)

Anno: Evi. Act, S. 123 N. 1 and S. 124 N. 1; Civil P. C., O. 11 Rr. 12 and 13 N. 9, 10.

Arunachalam and Jagannadham, for Petitioner; The Government Pleader, for Respondent.

**ORDER:** This is a civil revision petition filed against the order made by the learned Subordinate Judge of Ootacamund in I. A. No. 335 of 1950 in O. S. No. 74 of 1949.

(2) The facts are: The petitioner P. S. Narayanaswami before us was employed in the Chinchona Directorate located at Ootacamund. He has been dismissed from service. Thereupon, he has filed the suit O. S. No. 74 of 1949 against the State of Madras. This former dismissed employee wanted the production of a considerable quantity of unpublished official records. Therefore, summons was issued to the Director who is the head of this department. He looked into the records asked to be produced. Then he has filed an affidavit classifying the records sought to be produced under two heads, viz., those in regard to which he claimed privilege on the ground that the disclosure of those documents would be prejudicial to public interest and those which might be disclosed. The records were sent to court with an affidavit. The learned Subordinate Judge applied his own mind and upheld the claim of privilege in regard to documents for which privilege was claimed. In regard to documents which the director had no objection to disclose the plaintiff stated them to be irrelevant for his purpose. Thereupon the learned Subordinate Judge has passed an order to that effect and the present petition is preferred against that order.

(3) There are no merits in this petition at all because what has been done in the lower court is in strict compliance with S. 124 of the Indian Evidence Act as interpreted in leading decisions. The substance of these leading decisions can be summarised as follows. On an application by a party for the production of these documents, summons should be issued to the head of the department concerned. That head of the department must thereupon apply his mind to the documents sought to be disclosed and come to his own conclusion whether public interest would or would not be suffered by such disclosure. He has then to claim privilege if he chooses to do so by means of a communication, preferably in the form of an affidavit, claiming privilege and sufficiently indicating why he is claiming the privilege. It is also desirable but not indispensable that the records should be sent in a sealed cover through an officer of the department claiming privilege. The statement of the head of the department would be considered conclusive unless for compelling reasons to the contrary and the privilege will be upheld. But in any event it is the duty of the court to apply its own mind as to whether the claim is not arbitrary and capricious and if need be it would be open to the court to look into the documents and come to its own conclusion.

In other words, under S. 124, Evidence Act, the four stages are, summoning, application of the mind of the head of the department to the documents sought to be disclosed and coming to the conclusion whether the privilege should be claimed or not, communicating this claim of privilege preferably by means of an affidavit and sending wherever possible the concerned documents in a sealed cover through an officer of the department claiming privilege and the application of the presiding Judge's mind to the claim put forward and accepting it unless the claim is arbitrary or capricious or



false. The final decision of both the departmental head as well as the presiding judge will be governed by only one consideration viz., whether the disclosure would result in an injury being caused to the public interest as the section gives effect to the principle that public interest must be paramount and private interest must give way when there is a conflict between public and private interests. The only loyalty which the section contemplates and which must undoubtedly prevail over private interest is the loyalty to the State in the sense that public interest must prevail over private interest and the disclosure of a particular document will damnify public interest and so even though injustice may be done to private interest it is much better that such injustice should be done rather than public interest should be injured by the disclosure of a document: vide — 'Dinbai v. Dominion of India', AIR 1951 Bom 72 decided by Chagla C. J. and Bhagavati J.

(4) The aforesaid principles which constitute the four stages are deducible from the following decisions on this matter which can be grouped into, the decisions of the Madras High Court, the decisions of other High Courts and the decision of the House of Lords. In — 'Nagaraja Pillai v. Secretary of State', 39 Mad 304 a Bench of this court held that the object of S. 124, Evidence Act, is to prevent the disclosures to the detriment of public interests and the decisions as to such detriment rests with the officer to whom the communication is made and does not depend upon the special use of the word "confidential". The decision in — 'Venkatachala Chettiar v. Sampathu Chettiar', 32 Mad 62 was followed.

In — 'Secretary of State v. Saminatha', AIR 1930 Mad 342 (2), Jackson J. held that the public officer concerned and not the Judge is to decide whether the evidence referred to should be given or withheld and if the objection is taken by the proper person the court will not go behind it. Under S. 124, it rested exclusively with the public officer concerned to withhold or give permission as he is the sole judge as to whether public interest will or will not suffer by the disclosure though such discretion must naturally be exercised on well-established principles and not arbitrarily.

In — 'Makky Moithu in re', 1943-1 MLJ 154 Horwill J. on a question whether a certain report made by the Deputy Tahsildar of a Government Forest to the Collector was privileged, held that S. 124, Evidence Act, left it to the court to consider whether the communication was of the nature covered by the section; that is, the court has to decide whether the section can be applied. If it does the court has to exclude the document if the public officer concerned considers that public interest will suffer by the disclosure. Where the report was undoubtedly a confidential document and was not intended to be revealed to the public but only to such persons to whom the Collector thought fit to send it, the court cannot question the decision.

(5) Three other decisions of the other High Courts may be usefully referred to in this connection. In — 'Weston v. Peary', 40 Cal 898 it was laid down that protection under this section is not dependent upon a claim of privilege being put forward. It is the duty of the Judge himself to exclude the evidence. A fortiori if objection is taken it cannot be made a ground of adverse inference as the law allows it. In — 'Governor-General in Council v. Peer Mohd.', AIR 1950 EP 228 a Full Bench of the Punjab

High Court held that where the privilege claimed is attached to state papers which are of an administrative character the disclosure of which would be injurious to the proper functioning of the public services the court can hold an enquiry into the validity of an objection. But it is nevertheless true that once the court comes to the conclusion that the document relates to an affair of the State, the decision of the head of the department to give or withhold permission to its production must be accepted as final. Ordinarily, the head of the department will mean the officer who is in control of the department and in whose custody the records of the department remain. Similarly in — 'I. M. Lall v. Secretary of State', AIR 1944 Lah 209, it was held that the principle or foundation on which S. 123 rests is concern for the public interest. If an affidavit is made by the head of the department that he does not wish to produce certain documents as they constitute unpublished official records relating to affairs of State, he is deposing by implication that the production of those documents will be prejudicial to public interest. The use of the word "concerned" in relation to the head of the department shows that the affidavit must contain a sworn statement by the head of the department in whose custody the documents happen to be at the time when discovery and production is claimed.

(6) These decisions are based upon a long line of English decisions of which the most important is the decision of the House of Lords in — 'Ducan v. Cammell Laird and Co.', 1942 AC 624. Their Lordships have clearly laid down the principles which are embodied for us in Ss. 123 and 124, Evidence Act.

"A court of law should uphold an objection taken by a public department, called on to produce documents in a suit between private citizens, if on grounds of public policy they ought not to be produced. Documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld. The test may be found to be satisfied either (a) by having regard to the contents of the particular documents, or (b) by the fact that the document belongs to a class which, on grounds of public interest, must as such be withheld from production. It is essential that the decision to object should be taken by the minister who is the political head of department concerned and that he should have seen and considered the contents of the documents and himself formed the view that on the grounds of public interest they ought not to be produced. If the question arises before trial the objection would ordinarily be taken by affidavit of the minister. If it arises on 'subpoena' the objection may in the first instance be conveyed to the Court by an official of the department, who produces a certificate signed by the minister stating what is necessary, but if the court is not satisfied it can request the minister's personal attendance.

An objection validly taken to production on the ground that it would be injurious to the public interest is conclusive. The mere fact that the minister or the department does not wish the documents to be produced is not an adequate justification for objecting to their production. Production should only be withheld when the public interest would otherwise be damnified, as where disclosure would be injurious to national de-



fence or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service. In such a case, the court should not require to see the document, for the purpose of ascertaining whether the disclosure would be injurious to the public interest."

(7) So, applying those principles the lower court has correctly decided that documents Nos. 4, 5, 7, 8, 10, 12, 14 and 17 to 20 cannot be asked to be produced and marked as evidence.

(8) There are no merits in this civil revision petition and it is hereby dismissed with costs. Advocate's fee Rs. 50/-.

B/K.S.

Revision dismissed.

**A.I.R. 1953 MADRAS 230 (Vol. 40, C. N. 84)**

**VENKATARAMA AIYAR J.**

Rangaswami Goundar, Appellant v. Marappa Gounder and others, Respondents.

S. A. No. 1580 of 1948, D/- 28-3-1952.

**(a) Hindu law — Gift — Property inherited by minor — Gift by mother to relation — Validity.**

A gift by a widow of the property inherited by her minor son from his father in favour of the daughter of her co-widow out of affection is not binding on the minor son. (Para 4)

**(b) Limitation Act (1908), Art. 44 — Unauthorised alienation by lawful guardian — Setting aside of, within time prescribed by Article.**

When a natural guardian having authority to alienate the properties of the ward for proper purposes effects a transfer which is in excess of that authority it cannot be put in the same position as an alienation by an unauthorised person. An unauthorised alienation by a lawful guardian is only voidable and must be set aside within the time prescribed by Art. 44, unlike an alienation by an unauthorised person, which is void under the law and does not require to be set aside under that Article. (Para 5)

Anno: Limitation Act, Art. 44 N. 3 P. 3.

**(c) Hindu Law — Alienation — Alienation of minor's property — Validity.**

Where there is an alienation of the property of a minor it will not be binding on him unless he is a party thereto. Where the name of the minor is disclosed in the body of the document he must be held to be a party thereto notwithstanding any error or defect in description. Where the guardian alienates the property under an assertion of hostile title, the transfer cannot be regarded as one made by a guardian and it will be void. It is, however, doubtful whether where the name of the minor is not disclosed in the deed of transfer that is not conclusive to show that the transfer was not made on behalf of the minor: 20 Bom 286 Doubted. Case law discussed. (Para 15)

(On construction of the deed of gift by the minor's mother in her own right and not as his guardian held that the alienation was void as being a transfer by a guardian in assertion of a hostile title).

(Para 17)

**(d) Evidence Act (1872), S. 115 — Estoppel by election — Void deed of gift by mother — Attestation by minor.**

A deed of gift by the minor's mother, executed by her, not as a guardian of her son, but in assertion of a hostile title, being void, there is no question of any election to affirm or disaffirm it and the son will not be precluded from recovering the property alienated merely by attesting the deed. (Para 18)

Anno: Evidence Act, S. 115 N. 25.

K. Parasurama Aiyar, for Appellant; B. V. Viswanatha Aiyar and K. K. Gangadhara Aiyar, for Respondents.

**JUDGMENT:** The plaintiff is the appellant in this second appeal. He is the son of one Ramayya Goundan who died sometime in 1931. The family of Ramayya Goundan consisted, at that time, of his two wives, Ponnammal and Ramayee, two daughters by his first wife, Ponnammal, the elder of whom, Marayee, was married to Marappa Goundan the second defendant in the suit and the younger Karupayee was unmarried and the appellant who was his son by the second wife, Ramayee and at that time a minor aged about ten years. The properties which Ramayya Goundan owned were a land known as Kandan Kadu in which he owned 3 acres & 81½ cents & a land called Thattan Kadu in which he owned 2 acres and 82 cents subject to a usufructuary mortgage for Rs. 450 of which half was payable by him, and a house. Shortly after his death, disputes arose between the two widows and it is stated that they were settled by a panchayat.

On 10-12-1932, three documents came into existence and it is the validity of one of them that is in question in the present litigation. Ex. D. 3 is a deed of release executed by Ponnammal in favour of Ramayee giving up her right of maintenance over the estate; and Ex. D. 5 is a deed of maintenance executed by Ramayee in favour of Ponnammal fixing her annual maintenance at Rs. 50 and charging the land known as Kandan Kadu for its payment. Ex. D. 1 is a deed of gift of the land known as Thattan Kadu executed by Ramayee in favour of Karuppayee the second daughter of Ponnammal. It is this alienation that is attacked by the appellant as void and not binding on him. On 14-4-1943, Karupayee sold the properties, gifted to her under Ex. D. 1 to the second defendant her sister's husband for a consideration of Rs. 875, under Ex. D. 2 and he is the contesting defendant in this action.

(2) The plaintiff challenges the validity of the gift under Ex. D. 1 on the ground that Ramayee acted in the transaction on her own behalf and not as his guardian; and that even viewed as an alienation by his guardian, it is not binding on him for the reason that it was beyond the power of the guardian to make a gift and that it could not be supported on the ground of any necessity. The defendant, apart from demurring to these allegations, pleaded that the suit was barred by limitation as it was filed more than three years after the plaintiff had attained majority and that he was further estopped from disputing the transaction as he had attested the sale deed Ex. D. 2. The learned District Munsif of Erode held that Ex. D. 1 was not executed by Ramayee as guardian of the plaintiff, that even otherwise the gift



was invalid as it was greatly disproportionate to the status of the family, that there was no bar of limitation and that further the plaintiff was not estopped by his attestation of Ex. D. 2 from raising the question of the validity of Ex. D. 1. In the result he decreed the suit.

The second defendant appealed against this decree and the District Judge who heard the appeal came to a different conclusion. He held that the gift must be taken to have been made by Ramayee as guardian of the plaintiff and that as the suit had been filed more than three years after the plaintiff had attained majority it was barred under Art. 44 of the Limitation Act. In this view he did not consider it necessary to go into the question whether the alienation was binding on the plaintiff though he indicated that he would be prepared to uphold it as valid. He also held that the plaintiff must have attested Ex. D. 2 with the knowledge of its contents and therefore, he was estopped from disputing the validity of Ex. D. 1. In the result he allowed the appeal and dismissed the suit. Against this judgment, the plaintiff prefers this second appeal.

(3) The first question that arises for determination is whether the suit is barred by limitation. If it is, then no further question arises. It is contended on behalf of the respondent that as Ramayee was the natural guardian of the plaintiff under the Hindu law, any alienation by her must be set aside within the time limited by Art. 44; that the plaintiff attained majority in 1939 and the suit instituted in 1945 is barred by limitation. This is not disputed by Mr. Parasurama Aiyar, the learned advocate for the appellant. He, however, contends that the present suit is not governed by Art. 44 firstly because Ramayee had no power to make a gift under the Hindu law and the transaction was, therefore, beyond her competence and secondly because she did not purport to act as guardian of the plaintiff and there was no alienation by a guardian such as will fall within the purview of Art. 44. Before dealing with these contentions, it is necessary to set out the material recitals in Ex. D. 1. It runs as follows:

"Deed of gift executed on the 19th day of December 1932 in favour of Karupayee Ammal, daughter of Ramayya Gounden, Vellalacaste, ryot, residing at Melapalayam, Attavanaipidariyar village, Erode taluk, by Ramayee Ammal, the junior wife of the said Ramayya Goundan, aforesaid caste and calling, at the aforesaid village.

As you are the daughter of my husband's senior wife and due to the affection I have towards you I have given you the property worth Rs. 500 as a gift for the purpose of celebrating your marriage and making presentations etc. to you. Therefore, you, yourself shall hold and enjoy the said property with absolute rights and powers of alienation by way of gift, sale etc., from son to grandson and so on in succession."

In the schedule of property are included

"Government survey number 212 of the extent of acres 5-97 cents assessed at Rs. 8-3-0 out of which one-twelfth share belonging (to me) punja acre 0-49 9/12 assessed at Re. 0-11-3; punja bearing Government survey No. 213 of the extent of acres 9-34 assessed at Rs. 12-14-0 out of which on the east and to the west of the road, punja of the extent of acres 2-33 2/4 cents assessed at Rs. 3-3-6 belonging (to

me) the lands of the above extents inclusive of the fruit bearing and timber trees therein."

(4) On this deed, the first contention of Mr. Parasurama Aiyar is that it is void because Ramayee had no power as guardian to make any marriage gift. It is conceded that the estate of Ramayya Goundan would be liable to meet the marriage expenses of Karupayee but it is argued that it could not be burdened with a gift to her and that the power of a father or widow to make such a gift could not be exercised by the guardian of a minor. That contention is supported by the decision of a Bench of this court reported in — '*Palaniammal v. Kothandaraman*', ILR 1944 Mad 418 and Ex. D. 1 will, therefore, be prima facie not binding on the plaintiff. Mr. B. V. Viswanatha Aiyar the learned advocate for the respondent contended that Ex. D. 1 was not a gift to a married woman as in — '*K. Palaniammal v. Kothandarama*', ILR 1944 Mad 418 but a transfer made in discharge of an obligation to marry her.

It is somewhat difficult to follow this argument. When the appellant succeeded to the estate of Ramayya Goundan, he took it subject to the obligation of getting Karupayee married. Any alienation made for discharging this obligation will without question be binding on him, but Ex. D. 1 is not of that character. It is not a sale or a mortgage for raising funds for the marriage of Karupayee or for discharging any debts contracted in connection therewith. In fact Karupayee was married only two years later. It is difficult under those circumstances to construe Ex. D. 1 as anything but what it purports to be, that is a gift made to her out of affection, etc. In that view, the decision in — '*Palaniammal v. Kothandaraman*', ILR 1944 Mad 418 will apply and it must be held that it would not be binding on the plaintiff.

(5) But it does not follow from this that the alienation is not one which is required to be set aside under Art. 44 of the Limitation Act. Under the law, when a natural guardian having authority to alienate the properties of the ward for proper purposes effects a transfer which is in excess of that authority it cannot be put in the same position as an alienation by an unauthorised person. An unauthorised alienation by a lawful guardian is only voidable and must be set aside within the time prescribed by Art. 44, unlike an alienation by an unauthorised person, which is void under the law and does not require to be set aside under that article. In — '*Labhamal v. Malakram*', 6 Lah 447: AIR 1925 Lah 619 dealing with an alienation by a mother which was found to be not supported by any necessity, Shadi Lal C. J. observed as follows:

"Now, it is beyond dispute that the mother is, under the Hindu Law, a guardian of the property of her minor sons; and a conveyance by her is not a void transaction but voidable at the instance of the minors. It is true that the courts below have held that the sale was not for necessity, but that finding does not affect the nature of the transaction, which should be treated as an unauthorised transfer by an authorised guardian. If a sale is effected by a person who is not the minor's guardian either according to his personal law or by appointment by the court, such a sale is a nullity and does not affect the minor's property. If on the other hand, the



sale is made by a natural guardian who goes beyond the scope of his authority the transaction cannot be regarded as a nullity and will bind the minor unless he succeeds in impeaching it within the period prescribed by law. There is ample authority for the view that an unauthorised alienation by a guardian recognised by law is voidable and not void, vide *'inter alia'* — *'Lamaya v. Rachappa'*, 42 Bom. 626, — *'Fakirappa Limanna Patil v. Lumanna Bin Mahadu Dhamnekar'*, 44 Bom 742 and — *'Brojendra Chandra Sarma v. Prosunna Kumar Dhar'*, 24 C. W. N. 1016."

(6) This view was reiterated in the decision reported in — *'Khusiah v. Faiz Muhammad Khan'*, 9 Lah 33: AIR 1928 Lah 115, the court observing:

"An alienation by a natural guardian of the minor's property is a voidable and not a void transaction and the fact that it was not for necessity does not alter the nature of the transaction. In other words, it was an unauthorised transfer by an authorised guardian and the limitation to set aside such a transfer is prescribed by Art. 44. Vide *inter alia* — *'Labha v. Malak Ram'*, AIR 1925 Lah. 619."

(7) We are not here concerned with a deed which is void under some other provision of law such as Transfer of Property Act or Registration Act in which case there is in existence no transfer of property and therefore, no question of setting aside such a transfer. But where the transfer is operative and the question is whether it is binding on the ward or not it has to be set aside within the time prescribed by Art. 44—Vide — *'Sri Raja Sobhanadri Apparao Bahadur v. Raja Muganti Venkatarama Rao'*, 54 Mad 352 and — *'Raja Ramasami v. Govindammal'*, 56 M. L. J. 332. It, therefore, follows that though the alienation by Ramayee under Ex. D. 1 was not binding on the plaintiff for the reason that it was not for a proper purpose, it was nevertheless one which had to be set aside under Art. 44 and not having been so set aside the suit would be barred.

(8) It is next contended that Art. 44 does not apply to the present case for the reason that the alienation under Ex. D. 1 was made by Ramayee not as guardian of the plaintiff but in her own personal capacity. This in fact is the substantial contention that arises for determination in this case. It cannot be doubted that if a person is not a party to a deed there is no need on his part to have it set aside and when the property of a minor is transferred under a deed executed by his guardian, he is under no obligation to have it set aside unless he is a party to it. The question, therefore, to be decided is whether on a fair construction of the deed of transfer, the minor can be held to be party to it and whether the transfer thereunder is made on his behalf. If the answer is in the affirmative, he is bound to have it set aside within the time prescribed by Art. 44; if in the negative, he is entitled to ignore the transaction and a suit by him to establish his rights will not be governed by Art. 44. The law on the subject is thus stated by Mulla:

"No act done by a person who is the guardian of a minor binds the minor unless the act was done by him in his capacity of guardian. It is a question of fact in each case whether a particular act done by a person was done

by him in his capacity of guardian or on his own behalf and on his own account. In the former case the act binds the minor provided it was otherwise within the power of the guardian; in the latter case it does not. The mere fact that the name of the minor is not mentioned in a contract or in a deed of sale or mortgage is not conclusive proof that the transaction was not entered into on behalf of the minor."

(9) In — *'Watson & Co. v. Shamlal Mitter'*, 15 Cal 8 the mother and guardian of a minor executed two 'kabuliyats' and they were signed by her "as Haimabathi Dasi mother of Sham Lal Mitter, minor". In holding that the deed was in substance executed by Haimabathi Dasi as guardian of the minor, the Privy Council observed as follows:

"The addition of Haimabathi Dasi's name to the words 'Mother of Sham Lal Mitter' minor' must in their Lordships' opinion be considered as meaning that she was contracting as the mother and guardian of her infant son and it cannot be presumed that Haimabathi Dasi claimed the estate adversely to her son and the substance of the case is that the estate being under her management as his natural guardian and the appellants being able to sue for an enhancement of the rent, she came to what appeared to be, and she was advised was, a proper arrangement with them. If there were any doubt as to the capacity in which she acted it should be presumed that she did so in her lawful capacity."

This decision is authority for the position that if the minor's name is disclosed in some manner in the document it would be proper to presume that the guardian acted on behalf of the minor and not in her own right.

(10) In — *'Murari v. Tayana'*, 20 Bom 286 the facts were that the mother of the minor executed a sale deed in her own name without mentioning the name of the minor in the deed. It was held that though the sale deed did not purport to be on behalf of the minor it would be binding on him as it was the intention of the mother to deal with the interest of the minor. Reliance was placed on the decisions in which alienations by managers of joint Hindu families were upheld if they were for proper purposes, even though the transferor was not described as manager.

(11) In — *'Nathu v. Balwanand Rao'*, 27 Bom 390 the mother alienated the property on the footing that it belonged to her and not to the ward, and debts binding on the minor had been discharged with the sale proceeds. The minor challenged the alienation after he attained majority and it was held that the sale was not binding on him.

(12) In — *'Ammani Ammal v. Ramaswami Naidu'*, 37 M L J 113 the mother sold certain properties of her minor son, asserting that they belonged to her. It was found that the consideration was applied in discharging debts binding on the minor. It was held that the alienation was not binding on the minor and that the decisions in which transfers by managers of joint family were upheld even though there were assertions of an exclusive title by the transferor, were distinguished, the court observing:

"Further in those cases documents of alienations were not mere waste paper conveying no title or interest whatever in the property



alienated as in this case but did affect at least a part-ownership right of the legal alienor."

In that case, there was also a prayer by the plaintiff for cancellation of the sale deed. With reference to this prayer, Sadasiva Aiyar J. observed as follows:

"He also prayed in his plaint for the cancellation, if necessary, of the deed of February 1904 executed by his mother. I might at once say that not only is no such cancellation necessary but that the plaintiff has no legal cause of action to get the relief of the cancellation of a document which was not executed and which does not even purport to have been executed by himself or by anybody from whom he traces his title."

The result of this decision is that when the guardian alienates the property of the minor setting up his or her own title it cannot be upheld as an alienation by that person in the capacity of a guardian and it is wholly void.

(13) In — 'Nandan Prasad v. Abdul Aziz', 45 All 497 the mother mortgaged the properties of her minor sons not as guardian but as the full owner but the amount raised by the mortgage was utilised for the benefit of the sons. In a suit to enforce the mortgage it was held that the mortgage was not binding on the minors as the mother must be taken to have acted not as their guardian but in her own capacity and the decision in — 'Balwant Singh v. Clancy', 34 All 296 was followed. There the alienation was effected by an elder brother who claimed that the property belonged to him exclusively. It was held by the Privy Council that the younger brother who was a minor was not bound by the transaction.

(14) In—'Muthiah Chettiar v. Rayalu Aiyar', 1943-2-M L J 548 which was a case of an alienation of joint family property Patanjali Sastri J. referring to the above cases observed as follows:

"In all these cases it will be observed that the transferor was really asserting an absolute title to the property in himself adversely to another person and could not, therefore, be considered as having represented that other person in making the transfer; for the position assumed by the former was quite inconsistent with any intention to act on behalf of the latter whose interest in the property transferred he was repudiating."

(15) The result of the authorities may thus be summed up:

(1) Where there is an alienation of the property of a minor it will not be binding on him unless he is a party thereto. 'Ammani Ammal v. Ramaswami Naidu', 37 M L J 113.

(2) Where the name of the minor is disclosed in the body of the document he must be held to be a party thereto notwithstanding any error or defect in description. 'Watson & Co. v. Shamlal Mitter', 15 Cal 8.

(3) Where the name of the minor is not disclosed in the deed of transfer, — 'Murari v. Tayana', 20 Bom 286 is an authority for the position that that is not conclusive to show that the transfer was not made on behalf of the minor. This decision goes to the very verge of the law and its correctness is open to doubt in view of the observations in — 'Margaret Lornie v. Abu Bucker Sait'. 1939-1-M L J 664 where it is pointed out that the transaction to be binding on a minor must purport to be on

his behalf and in view of the observations in — 'Ammani Ammal v. Ramaswami Naidu', 37 M L J 113 that alienations by a manager of a joint family do not furnish a proper analogy where there is an alienation by a guardian; which is one of the grounds on which the decision in — 'Murari v. Tayana', 20 Bom 286 is based.

(4) Where the guardian alienates the property under an assertion of hostile title, the transfer cannot be regarded as one made by a guardian and it will be void.

(16) In the light of the above observations, the terms of Ex. D. 1 may now be examined: It is a transfer "by Ramayee Ammal the junior wife of the said Ramayya Goundan" and not by the appellant represented by her as his guardian. His name is not even so much as mentioned anywhere in the deed. In the description of property also it is described as "belonging to me". Though in the original which is in Tamil there is no word equivalent to "to me", that is implied in the context and the official translation correctly brings it out. On these features the appellant argues that the alienation cannot in any sense be treated as effected by Ramayee in her character as guardian of the appellant.

The respondent on the other hand refers to Exs. D. 3 and D. 5 and argues that all the three deeds form part of one transaction and must be read together and that they show that there was one family arrangement with reference to the estate of Ramayya Goundan and as the appellant was the person entitled to it, it is reasonable to infer that Ramayee acted in these transactions on behalf of her minor son. There is considerable force in this reasoning but when we turn to the contents of Ex. D. 3 and Ex. D. 5 it is found that there is no mention of the appellant anywhere in these documents either. He has been sadly ignored. Turning to the description of the properties in those deeds, while Ex. D. 5 is couched in the same terms as Ex. D. 1 the language of Ex. D. 3 is explicit. It expressly declares that the properties belonged to the executant, Poonammal.

The studied omission of any reference to the appellant in all the three documents becomes significant when regard is had to the defence set up by the second defendant. His case is that on the eve of his death Ramayya Goundan gave oral directions as to how the properties are to be taken after him and that the three deeds were executed in pursuance of those directions. This is sought to be established by the evidence of himself and of several witnesses examined on his side. It is also stated that when disputes arose between the two widows, the panchayatdars asked them to act according to the wishes of their husband. Apart from Ex. D. 1, no title is now put forward to the properties on the basis of the directions stated to have been given by Ramayya Goundan treating them as non-curative will.

Indeed such a claim would be void under S. 57, Succession Act, Act 39 of 1925, but it is clear that in executing Ex. D. 1 Ramayee acted not as the guardian of her minor son but as the hand of her deceased husband carrying out his directions. In other words, she acted as the executrix of her husband under the non-curative will and it is for this reason that the minor is altogether ignored. There is, therefore, considerable force in the contentions of the ap-



pellant that Ex. D. 1 is not an alienation of the appellant's property by his legal guardian Ramayee but an alienation by Ramayee in her own right, and, in her assumed character as the executrix under an alleged non-curative will of her deceased husband.

(17) On these facts, the alienation in question must be held to be void, as being a transfer by a guardian in assertion of a hostile title. The present suit is accordingly not governed by Art. 44, Limitation Act, and as the property was in the possession of the usufructuary mortgagee, the suit is in time.

(18) It remains to deal with the question of estoppel. The defendant pleaded that the appellant had himself brought about the sale in his favour, Ex. D. 2, that he attested it, that he had become a major at that time and that, therefore, he is estopped from disputing the alienation. If these facts are established, the plaintiff will be precluded from laying any claim to the property. But what is found is that the appellant must have known about the nature of the transaction when he attested Ex. D. 2 and that he is, therefore, estopped. If the transaction was voidable, that finding will be sufficient to non-suit the plaintiff because attestation with knowledge of the contents of the sale deed must be held to amount to an election to affirm the transaction under Ex. D. 1 and in the view taken by the learned District Judge that in substance the alienation under Ex. D. 1 must be considered as one made by Ramayee as guardian of the plaintiff, the conclusion would be correct.

But when it is held, as I now hold, that Ex. D. 1 is void, then there is no question of any election to affirm or disaffirm it and the plaintiff will not be precluded from recovering the property, merely by attesting Ex. D. 2. If there had been something more than mere attestation, if the plaintiff had himself brought about the transaction and held out Karuppayee as the true owner, then it would strictly be a case of estoppel. Indeed that was the plea of the defendant but that was shattered by the evidence of Karuppayee who admitted as D. W. 2 that the plaintiff did not take part in the negotiations of the sale under Ex. D. 2. Therefore the plaintiff is not disentitled to relief by reason of his attestation.

(19) In the result, the appeal must be allowed and the suit decreed with costs throughout. The plaintiff, however, is bound to pay to the second defendant the amount paid by him for discharging the usufructuary mortgage on the property with interest thereon at six per cent per annum from 13-5-1943, before he can recover possession of the properties. Leave refused.

B/V.R.B.

Appeal allowed.

A. I. R. 1953 MADRAS 234 (Vol 40, C.N. 85)  
KRISHNASWAMI NAYUDU J.

Chockalingam Chettiar, Appellant v. Sivakolandu Achi, Respondent.

Second Appeal No. 959 of 1948, D/- 20-3-1952.

Tenancy Laws — Madras Estates Land Act (1 (I) of 1908), S. 125 — Applicability — Sale of holding in execution of rent decree for costs.

The priority that is given to a purchaser under S. 125 can only enure to him if he is a purchaser of the holding and the said holding is sold for arrears, meaning arrears of rent. Where the sale is not a sale for arrears of rent but in execution of a rent decree for costs, a purchaser of a holding would not be entitled under S. 125, Madras Estates Land Act, to hold the property free from the encumbrances which are created before or after the passing of the Act as the section will have no application to such a purchaser. (Paras 4, 5)

T. S. Santhanam, for Appellant; R. Viswanathan, for K. V. Ramachandra Ayyar, for Respondent.

ORDER: The plaintiff is the appellant and he sued for possession of the suit properties on the ground of his purchase in a revenue court auction held in execution of decree in summary suits filed by the land-holder for recovery of arrears of rent. There are three items of property involved: (1) R. S. No. 315/1 measuring 33 cents dry land, (2) R. S. No. 286/1 measuring 26 cents nanja and (3) R. S. No. 286/12 measuring 42 cents dry land. Under Ex. P. 3, dated 7th August 1945, in execution of summary suit No. 52 of 1933, the plaintiff was granted a sale certificate in respect of item No. 1, and Ex. P. 2 is the sale certificate dated 27th January 1945 granted as purchaser in the sale held in pursuance of the rent decrees in S. S. No. 136 of 1933 in respect of items 2 and 3. The claim to possession is on the basis that the purchaser at an auction in a rent sale is entitled to permanent title and he holds it free from the encumbrances. The defendant claimed to purchase these properties under a private sale Ex. D. 3 dated 16th September 1943, from the owners of the land.

(2) The lower appellate Court held that in so far as item 1 is concerned Ex. P. 3 showed that the purchase was in a rent sale held in a revenue court and the decree is for arrears of rent and therefore the sale passed the property to the purchaser free of all encumbrances except those specified in S. 125, Madras Estates Land Act. The defendants claim as purchasers of item 1 not being subject to any encumbrance of the category of those that are so excepted under S. 125 the sale of item 1 in favour of the appellant was upheld and a decree for possession was granted in respect of that item. But as regards the other two items, namely items 2 and 3, it was held that the rent decree in S. S. No. 136 of 1933 was not for any arrears of rent or interest but was only for costs and the execution petition No. 220 of 1944 on the file of the Deputy Collector, Tanjore showed that the sale was in pursuance of the decree for costs alone. The lower appellate court therefore held that no charge was created under the Madras Estates Land Act in respect of costs under S. 5 of the Act. The charge under that section being only for rent and interest thereon and not for costs, the lower appellate court held that the appellant was not entitled to have priority over the defendants' purchase.

(3) S. 125 of the Madras Estates Land Act states:

"When a holding or part of a holding is sold for arrears due in respect thereof, the purchaser shall take, subject to any right or interest which the ryot has created therein with the land-holder's permission in writing registered and subject also to any encumbrances created before the passing of this



Act but not subject to any arrears of rent due in respect of the holding before the date of sale or to interest on such arrears, whether a decree has been obtained or not for such arrears of interest."

(4) In this case, the appellant is no doubt the purchaser of the holding. But the question is whether the holding was sold for arrears as specified in the said provision. The arrears would necessarily mean arrears of rent and the priority that is given to a purchaser under S. 125 could only enure to him if he is a purchaser of the holding and the said holding is sold for arrears, meaning arrears of rent. The sale in this case is not a sale for arrears of rent but for costs and on a reading of S. 125 it could not be held that the appellant would be entitled to seek the benefit of S. 125. Apart from that, S. 5 provides:

"The rent of ryoti land together with any interest which may be due in respect thereof shall be a first charge upon the holding and upon the produce of the holding or any part thereof, provided that, if gathered, the produce is in the custody or possession of the ryot or deposited on the holding or on a threshing floor or place for treading out grain, or the like, whether in the fields or within the homestead."

The right of the purchaser to hold the property purchased for arrears under S. 125 free from the encumbrances except those created before the passing of the Act is given in pursuance of the charge already created under S. 5 of the Act for rent and also for interest. If the decree was for interest alone and not even rent, then it may be contended that the appellant would be entitled to the benefit under S. 125. But the decree is neither for rent nor for interest and there being no charge — the only charge that is created by the statute being in respect of rent and interest — it cannot be said that a purchaser of a holding in pursuance of a decree which is not either for rent or interest or both would be entitled to contend that he is a charge-holder and therefore entitled to hold the property free from the encumbrances except those created by the Act.

(5) Learned counsel for the appellant relied on the provisions of Ss. 126 and 127. S. 126 which is as follows:

"The portion of the holding brought to sale by the land-holder shall be, as nearly as possible, equal in value to the amount of arrears due and costs"

only provides that the extent of the property that is to be brought to sale may also cover for the costs, which however cannot be taken to mean that a charge for costs is also created though it is not included in S. 5 of the Act. Similarly, S. 127 which provides rules for disposal of the sale proceeds says that in disposing of the proceeds of sale, there shall first be paid to the land-holder the costs incurred by him in bringing the holding to sale and in the next place, the amount due to him for arrears and interest upto date of payment. The costs of sale incurred by the land-holder are not costs of a sale held in pursuance of a decree for sale, but by distraint and other means provided for in the Act with the help of the Collector. In any event, even this provision could not be understood as providing a charge for costs, the same not having been included in S. 5 of the Act where the charge is confined to the rent and to any interest accruing due on the rent. I am therefore of opinion that a purchaser of a holding in execution of a rent de-

cree for costs would not be entitled under S. 125. Madras Estates Land Act, to hold the property free from the encumbrances which are created before or after the passing of the Act. S. 125 will have no application to such a purchaser.

(6) There is a memorandum of cross objections. That arises out of the contention of the respondent that even the purchase by the appellant was benami for the judgment-debtors in O. S. No. 165 of 1944. That was raised as an issue at the trial and the learned District Munsif went into the question and gave a finding that the purchase by the plaintiff was only benami for Nadimuthu and his brothers and that the purchase could not therefore be upheld and in any event not binding on the defendant. The appellate court has not gone into the question and was content with disposing of the appeal on the question of law just dealt with. I consider this is a case which ought to be sent to the lower appellate court for a finding on the issue which was decided by the trial court but was not dealt with by the appellate court. The appeal is remanded for a finding on issue 1. Time for return of the finding one week after the reopening of this court.

B/D.R.R.

Case remanded.

**A.I.R. 1953 MADRAS 235 (Vol. 40, C. N. 86)**  
**GOVINDA MENON J.**

The State of Madras, represented by the Collector of West Godawari, Appellant v. Nadimpalli Subbaraju, Respondent.

Second Appeal No. 1691 of 1948, D/- 22-2-1952.

**Grant — Government through its revenue officers granting darkhast — Order becoming final — Government has no power to revise the order validly and duly made by the Revenue Officer: 26 Mad 268 Rel. on. 1915 M. W. N. 148 Distinguished. — (Madras Revenue Boards Standing Order No. 15).**

(Para 1)

N. S. Srinivasan for the Government Pleader, for Appellant; D. Narasaraju for Respondent.

**JUDGMENT:** Mr. Narasaraju for the respondent conceded that the learned subordinate Judge is in error in thinking that the order in question is one made by the Collector; but it is really and in essence one passed nominally by the Collector but under the directions of the Board of Revenue who themselves have ordered the Collector to act in the manner he did under the behest of the Government. The result comes to this, that when under Ex. B. 20 the Board of Revenue refused to interfere with the order passed by the Collector, the Panchayat Board President had exhausted his remedies and subsequently whatever action has been taken by the Collector the same must be deemed to be passed under the orders of the Government. The question then arises, whether the Government has got any all-pervading or supervening power to interfere, for whatever reason it may be, in the orders passed by the subordinate revenue authority in accordance with the provisions of the Board's Standing Orders in the grant of darkhast. That the Government cannot have any such power and cannot set aside an order of the lower authority when it has become final is evident from the judgment of Bhashyam Aiyangar J., in — 'the Secretary of State for India in Council v. Kasturi Reddi', 26 Mad 268.



There are many passages in that illuminating judgment at pages 273, 277, 278, 279, 280, 281 and 283 wherein the various aspects of the question have been discussed in great detail to show that there is no such residuary or supervisory power vested in the Government. At page 283 the learned Judge observes as follows:

"When the proposal of any applicant is accepted by an officer duly authorised in that behalf by the darkhast rules and the acceptance is communicated to the applicant, there is a valid contract and disposal of the land, unless the grant was procured by fraud, misrepresentation or mutual mistake as to any matter of fact essential to the agreement (Indian Contract Act, Ss. 17, 18 & 20). The grant, therefore, cannot be annulled or revoked by the officer who made the grant, by his successor in office or even by the Governor in Council."

I wish especially to emphasise the words "or even by the Governor in Council." The learned Judge thinks that when there has been valid assignment under dharkhast rules and patta granted to the applicant, the title becomes complete and vested in such assignee and the Government cannot later on revoke or change it. It is as if the Government through its agent the Collector or the Revenue Divisional Officer or the Tahsildar, as the case may be, has sold away or assigned rights in certain land by means of a duly stamped and registered document though according to the Crown Grants Act then in force no such registration or stamp for the document was necessary. The grant of a patta is tantamount to assignment by a registered document and when it is done the title becomes complete in the assignee and cannot later on be revoked by the Government.

Mr. N. S. Srinivasan for the learned Government Pleader strenuously contended that this decision in — 'the Secretary of State for India in Council v. Kasturi Reddi', 26 Mad 268 should no longer be considered as a binding authority because of certain observations in — 'Devaramani Bhugappa v. Pedda Bimakka Gowd', 1915 M. W. N. 148. He further contended that at the time — 'the Secretary of State for India in Council v. Kasturi Reddi', 26 Mad 268 was passed, Board's Standing Order No. 15 did not contain rule No. 18 which empowered the authorities who made the grant to revise their own orders. The fact that rule 18 has later on been incorporated in Standing Order No. 15 would not make any difference because it is conceded here by the respondent that the Collector himself in this case has not revised or reviewed his earlier order. So the only question as I have already stated is whether the Government can set aside an order which has been validly made, for any reason whatever and in my view — 'Devaramani Bhogappa v. Pedd Bhimakka Gowd', 1915 MWN 148 does not say that Government has got that power. As stated by Napier J. — 'the Secretary of State in Council v. Kasturi Reddi', 26 Mad 268, decided two points:

"First, that where Government has given authority to a Tahsildar to grant land subject only to a right of appeal, the grant of such land within the scope of his authority is binding on Government. The other is that a grant like any other disposition arising out of contract can be set aside if it is procured by 'fraud'....."

This decision does not lay down that when the agent of the Government, say the Tahsil-

dar, Revenue Divisional Officer or the Collector has exhausted his rights under the orders, the Government can intervene and what cannot be done by an agent, the principal can. If the contention put forward on behalf of the learned Government Pleader is accepted, then it comes to this, that the Government as the principal can revoke an agreement or grant made by its duly constituted agent without giving any reasons whatever. I do not think that I should go to the extent contended by the learned counsel. When the learned Subordinate Judge found that the Collector has no power to cancel his earlier order after it has become final, I would hold that the Government itself has no power to cancel an order validly and duly made by the Collector. There is no provision for a review or revision by the Government. The second appeal fails and is dismissed with costs. No leave.

B/R.G.D.

Appeal dismissed.

#### A. I. R. 1953 MADRAS 236 (Vol. 40, C. N. 87)

RAMASWAMI J.

S. J. S. Fernandes, Petitioner v. V. Ranganayakulu Chetty, Respondent.

Civil Misc Petn. No. 3123 of 1952, D/- 16-7-1952.

(a) Civil P. C. (1908), S. 151 and O. 47, R. 1 — Power to review is not inherent power — Such right must be conferred by statute — Case under Madras Buildings (Lease and Rent Control) Act — Order in revision by High Court — No provision for review under Act — Order cannot be reviewed under inherent powers — (Houses and Rents — Madras Buildings (Lease and Rent Control) Act (25 of 1949), S. 12 (B) ).

(Para 6)

Anno: C. P. C. S. 151 N. 3 Pt. 5.

(b) Civil P. C. (1908), S. 141 and O. 47, R. 1 — Case under Madras Buildings (Lease and Rent Control) Act — Order in revision by High Court — Review under O. 47, R. 1 — (Houses and Rents — Madras Buildings (Lease and Rent Control) Act (25 of 1949), S. 12B).

S. 141, Civil P. C. is indicative of general enunciation of the principle by the Legislature that to all judicial proceedings the Code is applicable and this arises only where the proceedings reach the Court appealed to as one of the ordinary Courts of the country with regard to whose procedure, orders and decrees the rules of the Code are applicable.

(Para 9)

The Madras Buildings (Lease and Rent Control) Act is itself a self-contained one and the provisions of the Civil P. C. do not apply to a proceeding under that Act by reason of S. 141 and therefore O. 47, R. 1 is not attracted to an order passed by the High Court in revision in respect of such a proceeding.

(Para 9)

Anno: C. P. C. S. 141 N. 2 O. 47 R. 1 N. 21.

K. Krishnaswami Iyengar, for Petitioner; S. Ramachandra Aiyar for T. V. Balakrishnan, for Respondent.

ORDER: This is an application for review of the order passed by me in C. R. P. No. 85 of 1952, dated 23-1-1952.

(2) The short facts are: The petitioner Sri S. J. S. Fernandez is a tenant and the respondent Sri V. Ranganayakulu Chetti is the land-



lord in regard to premises No. 3 Singanna Naicken Street, G. T. Madras. The landlord filed a petition for eviction of the petitioner on the ground of sub-letting. The Rent Controller found the allegation proved and ordered eviction. The Appellate Court upheld the order. There was a revision petition to the High Court and after hearing the learned advocate for the petitioner, I dismissed the revision petition on the foot that there were no grounds to interfere in revision. This review application has been filed on grounds which have been made to fall under O. 47, R. 1, Civil P. C.

(3) The short point for determination is whether this application for review lies.

(4) The Madras Buildings (Lease and Rent Control) Act, 1949, and the rules framed thereunder contain no provision for review and in fact it contained no provision for a revision before that and this Court was holding that no revision lay on account of the fact that the District and Subordinate Judges were appointed under the Act as 'persona designata' and not as courts. It is enough to cite the two decisions, viz., — 'Abdul Wahid Sahib v. Abdul Khader Sahib', 1947-1 MLJ 207 decided by Yahya Ali J. and similar decision by Mack J. in — 'Rajam Aiyar v. Pavanammal', 62 MLW Journal p. 36. Yahya Ali J. held that from the language of S. 12 it seemed clear that the District and Subordinate Judges mentioned by the notification functioned as 'persona designata' and not as courts subordinate to the High Court and as such an application for transfer of an appeal before such authority would not be maintainable. — 'H. A. Aziz v. Kilyoboy', 4 Rang 304 FB and — 'Kiron Chandra v. Kalidas Chatterjee', AIR 1943 Cal 247, were referred to with approval. Therefore when the defects of the Act came to be considered on a suggestion made by the High Court itself, this specific provision for revision was made. But as pointed out just now the Act contains no provision for review.

(5) Inasmuch as the Act contains no explicit provision for review the petitioner has supported his claim to one with reference to (a) the inherent powers of court and (c) the Code of Civil Procedure.

(6) So far as the invocation of the inherent powers of court is concerned, it has been held repeatedly and has now become well settled law that the power to review is not an inherent power of a judicial officer but such a right must be conferred by Statute. This is based upon the common sense principle that prima facie a party who has obtained a decision is entitled to keep it unassailed unless the Legislature has indicated the mode by which it can be set aside. A review is practically the hearing of an appeal by the same officer who decided the case. Therefore, the course of decisions in this country has been to the effect that a right to review is not an inherent power: see — 'David Nadar v. Manicka Vachaka Desika Gnana Sambanda Pandara Sannathi', 33 Mad 65; — 'Lala Prayag Lal v. Jai Narayan Singh', 22 Cal 419; — 'Bajinath Ram Goenka v. Nand Kumar Singh', 34 Cal 677 and — 'Anantharaju Shetty v. Appu Hegade', 37 MLJ 162.

(7) Therefore we have next to consider whether O. 47, R. 1, Civil P. C. applies. It is now well settled once again, that it is only when the court, in this case the High Court, which is appealed to or wherein revision is applied for, is one of the ordinary courts of the country with regard to whose procedure, orders,

and decrees, in this particular matter, the rules of the Code of Civil Procedure are applicable, then only it would attract O. 47, R. 1, Civil P. C., because in such a case the ordinary incidents to litigation under the Civil P. C., viz., review would be found available to the party and even that, so long as it is not excluded by specific provisions to the contrary.

So we have got to see whether in the present proceedings where the High Court is reached that court is appealed to as one of the ordinary courts of the country with regard to whose procedure, orders and decrees the rules of the Civil Procedure Code are applicable. The Act itself does not contain any provision regarding the application of the Civil Procedure Code and in fact the provisions of the Act seem to be self-contained in regard to procedure and the Act has gone to the extent of providing for the bringing in of the legal representatives on record and costs, to mention two instances. If really the provisions of the Code of Civil Procedure are applicable 'mutatis mutandis' to the procedure under this Act, these provisions are wholly superfluous. On the other hand, they clearly indicate that the Code of Civil Procedure was not intended to be generally applicable to the proceedings under this Act.

(8) This is the view which has been held in a series of decisions of this court. I have already mentioned the decision of Yahya Ali J. and it need not be repeated. In — 'Devichand Moolchand v. Dhanraj Kantilal', 1948-1 MLJ 276, decided by a Bench of this court, it has been held that the provisions of the Code of Civil Procedure do not apply to the proceedings under Rent Control Act. The desirability of framing Rules making at least some of the important provisions of the Code applicable to the proceedings under the Madras Buildings (Lease and Rent Control) Act was pointed out. On account of the suggestion, when the Act came to be extensively amended rules have been framed for the bringing in of legal representatives on record. The above decision quoted the observations of Sir Frederick Gentile C. J. and Govindarajachari J. in — 'Abdul Khadir Hadjar v. A. K. Murthi', 1947-2 MLJ 482. The learned Chief Justice remarked:

"It is, in my view, to be regretted that the provisions of the Code have not been made applicable to proceedings under the Control Act."

Again,

"I have already expressed the view that in the absence of incorporation of the provisions of the Code of Civil Procedure in the rules of procedure for the tribunals under the Control Act, there is no justification for the application of the principles of those provisions, otherwise it would mean applying those provisions when they are not made applicable."

Similarly the learned Chief Justice and Raghava Rao J. in C. M. P. No. 6144 of 1948 reported in the journal section of '62 MLW page 36' have pointed out that the appellate authority under the Madras Act 15 of 1946 has not got all the ordinary powers of the appellate court of the land.

(9) In the face of these clear decisions, holding that the provisions of the Code of Civil Procedure do not apply and if the Act itself is a self-contained one there is no point in contending that by reason of S. 141, Civil P. C. the provision for review is attracted. This point was considered in — 'Anantharaju Shetty v.



Appu Hegade', 37 MLJ 162, referred to above and it was pointed out there that the section only empowers the Judge to regulate judicial trials by rules as to summoning of witnesses etc., which are to be found in the Code and not that the Code is to be applied in its entirety to such proceedings, including power of appeal and of review.

This contention however does not really arise in this case because S. 141, Civil P. C., is indicative of general enunciation of the principle by the Legislature that to all judicial proceedings the Code of Civil Procedure is applicable and I have pointed out how the Judicial Committee of the Privy Council has held that this arises only where the proceedings reach the court appealed to as one of the ordinary courts of the country with regard to whose procedure, orders and decrees the rules of the Code of Civil Procedure are applicable, and which is not the case in so far as this special enactment is concerned as was found to be the case with regard to the Madras Hindu Religious Endowments Act in — '*Anantharaju Shetty v. Appu Hegade*', 37 MLJ 162.

(10) Therefore, this application for review does not lie and consequently it is dismissed and in the circumstances without costs.

B/V.R.B.

Application dismissed.

**A. I. R. 1953 MADRAS 238 (Vol. 40, C. N. 88)**  
**RAGHAVA RAO J.**

Ratnam Pillai and others, Appellants v. Ganapathi Subramaniya Aiyar, Respondents.

Second Appeal No. 2590 of 1948, D/- 29-7-1952.

**Hindu Law — Widow's estate — Alienation — Alienation of entire estate for maintenance — Excess of authority.**

Where the widow was a paralytic and also an aged woman, and unless from year to year one bit or other of the estate in her possession should be sold out, the money required for her actual maintenance could not be met by the widow, and therefore instead of going on with alienations of bits of property from year to year she went on with a single alienation of the whole estate making out of the bulk of the consideration for the sale a fund from out of which her future maintenance would come:

Held that this sort of conversion of immoveable estate into a cash fund, although it might be that from out of the fund she meant to maintain herself, was absolutely beyond the powers of the widow. (Para 1)

K. V. Venkatasubramania Iyer and N. K. Vinayagam, for Appellants; M. S. Venkatarama Iyer, for Respondent.

**JUDGMENT:** This, in my opinion, is a clear case in which the appeal has to be allowed. I have, however, since reservation of judgment, carefully considered the pathetic appeal that Mr. M. S. Venkatarama Aiyar, made on behalf of the widow and the alienee from the widow. I still find that the only course which I can take is to allow the appeal. The widow in this case sold practically all the immoveable property in her possession for a sum of Rs. 4800 out of which she utilised a sum of Rs. 1440 for the discharge of debts binding on the estate, and as regards the balance of the consideration of the sale deed, she deposited it with her brother as more or less a fund for her future maintenance.

It has been argued for the alienee that the widow was a paralytic and also an aged woman, and unless from year to year one bit or other of the estate in her possession should be sold out, the money required for her actual maintenance could not be met by the widow, so that if instead of going on with alienations of bits of property from year to year she went on with a single alienation of the whole estate making out of the bulk of the consideration for the sale a fund from out of which her future maintenance would come, there would be nothing objectionable in it, and such an act could not be regarded as an excess of the authority of the widow under the limited estate which she had. It is perfectly clear to my mind that this sort of conversion of immoveable estate into a cash fund, although it may be that from out of the fund she meant to maintain herself is absolutely beyond the powers of the widow.

Ordinarily speaking, an alienation of the corpus is forbidden except for necessity or benefit of the estate, and in the present case except to the extent of the debts binding on the estate, which were, in fact, discharged from out of a part of the consideration for the sale, it cannot be said that there were any circumstances of compelling necessity to justify the widow in converting the corpus into cash.

(2) No doubt, the argument *ad misericordiam* addressed by Mr. Venkatarama Aiyar with his usual ability impressed me somewhat at the time of the hearing of the appeal; but on a careful consideration, I can only say that hard cases make bad law, and if I give effect to the argument of the respondent in this case, it will be no more than to create a bad precedent on the ground of the peculiar hardship of the party in the present case. In fact, the sale deed itself does not state that on account of the impossibility or impracticability of alienations of bits of the estate from year to year, as the need for her maintenance might arise, the widow had to resort to the method of an alienation of the entire estate for a sum of Rs. 4800, and there was set out no circumstance which rendered it impossible or which would render it impossible to make alienations of such bits of the property as might be required for her future maintenance from time to time.

Mr. Venkatarama Aiyar argued that if such recitals were found in the sale deed, they might be construed as recitals deliberately inserted into the sale deed for the purpose of a show of necessity for the transaction. That may or may not be, and I do not know what the court would have done with such recitals, had they been found in the sale deed. The thing that matters is that there are no recitals in the sale deed. No doubt, one witness has been examined to show that in the circumstances in which the widow was situate on account of her getting about 50 kalams of paddy as the residue out of the income of the property from year to year, which as Mr. Venkatarama Aiyar has pointed out, would not be worth more than Rs. 75, there would be every necessity for the widow to alienate a 'mah' or two of the property from year to year.

As I have said, the matter ought to be judged by the condition in which the estate and the widow stood at the time of the alienation and not by reference to the possibility of sales of small bits of property out of the whole estate, instead of which the widow alienated the entire corpus making, as I have already said, of the bulk of the consideration a fund



to be kept by her brother for her future maintenance purposes. In my opinion, it is unnecessary to cite any authority in support of the view that I am taking; but if authority were needed, it would be found in a case, cited by Mr. K. V. Venkatasubramania Aiyar, learned counsel for the appellants, of the Bombay High Court decided by (Beaumont C. J.) and reported in — 'Gyanu Kashiba v. Sarubai Biru', AIR 1943 Bom 266.

(3) The case, in my opinion, is concluded by settled principles of Hindu law, which the Bombay High Court has referred to in the case above noted, and I have no hesitation in allowing the appeal, setting aside the judgment and decree of the lower appellate Court, and restoring the judgment and decree of the trial court with costs throughout. Time for depositing the amount three months from today. No leave.

B/V.R.B.

Appeal allowed.

**A.I.R. 1953 MADRAS 239 (Vol. 40, C. N. 89)**  
**SOMASUNDARAM AND BASHEER**  
**AHMED SAYEED JJ.**

In re Chinnathambi, Appellant.

Criminal Appeal No. 43 of 1952 and Criminal Revn. Case No. 79 of 1952, D/- 23-7-1952.

**Penal Code (1860), Ss. 300, 325 — B rendered unconscious by blow from A — Taking B to be dead A hanging B by rope — Death caused by hanging — Offence not murder.**

A dealt a blow on his wife B who was thereby rendered unconscious. Thinking B to be dead, A tied her by a rope and hanged her to a beam in order to create a false evidence. In the trial of A for murdering B, it was proved that B's death was caused, not by the blow, but by the hanging.

Held that as A did not intend to cause B's death by hanging and he was only hanging a body which was dead already according to his belief, in order to make it appear that the woman got herself hanged by the rope and died as a result thereof, the offence that A had committed would be one of grievous hurt falling under S. 325, I.P.C., and not an offence of murder punishable under S. 302: ILR 42 Mad 547 Foll. (Para 6)

Anno: I.P.C., S. 300 N. 4 S. 325 N. 2.

A. B. Nambiar, for K. Krishna Menon, for Accused; The Asst. Public Prosecutor, for the State.

**BASHEER AHMED SAYEED J.:** The appellant in this case has been convicted for having murdered his wife, one Pappal, on or about the 28th July 1951, at about lamplighting time, at Thiruvagoundanur, and sentenced to transportation for life by the learned Additional Sessions Judge of Salem division.

(2) The prosecution story is that there have been some misunderstanding and quarrels between the appellant and his wife, both being young couple, in respect of certain jewels that had been made for the wife by the appellant. The silver anklet which was made for her by the appellant seems to have been given away to a relation of the wife; and she was questioned about it and then some quarrel ensued in respect thereof. Subsequently, when the wife again went to her parents' house she is said to have parted with silver bangles that were made for her by the appellant. On that occasion the

appellant grew very wild and after rebuking her seems to have dealt a blow as a result of which two injuries were caused to the deceased as spoken to by the medical evidence.

(3) The post-mortem certificate reveals that there were two injuries which were not very serious but were of a simple nature. As a result of the blow on the head, the deceased is said to have become unconscious and after she became unconscious the appellant tied a rope round her neck and tied her to the beam in the room and closed the door. Hearing the noise that had been created in the room, P. Ws. 1, 2 and 3 rushed to the spot one after another. P. W. 1 cried out against the appellant that he had committed such an offence against the young woman. P. W. 2 also who rushed later heard P. W. 1 exclaim that the appellant had committed such an offence. P. W. 3 also heard to a similar effect. At first, they saw the body hanging from the beam by a rope and subsequently they saw the body being brought down by the appellant cutting the rope.

(4) P. W. 1 spoke to these facts in her statement under S. 164, Cr. P. C. P. Ws. 2 and 3 spoke to these facts in the committal Court but in the Sessions Court all these witnesses became hostile and they were treated as such by the prosecution and were allowed to be cross-examined by the Public Prosecutor. The statement of P. W. 1 recorded under S. 164, Cr. P. C. as also the statements of P. Ws. 2 and 3 recorded before the committal magistrate have been marked under S. 288, Cr. P. C. as substantive evidence in the trial before the Sessions court.

(5) There is no direct eye-witness to the beating by the appellant by any stick or any other weapon; but the medical evidence is positive to the effect and that two injuries were found on the person of the deceased. The medical evidence is also positive on the fact that death was not due to these injuries but it was due to asphyxia which was due to the hanging by the rope. That the body was hanging in the room by the rope and that it was brought down have also been made fairly clear from the evidence of the witnesses that have spoken at the earlier stage and whose evidence has been marked. It transpires from the evidence that the appellant having caused a blow as a result of which the deceased woman got unconscious tied her by a rope and then hanged her to the beam being afraid that the blow had caused the death of the woman, while, actually, according to the medical evidence, death had not been caused by the blow dealt by him.

(6) The question is what exactly is the offence that has been committed by the appellant? We are unable to see that the offence that has been committed by the appellant on the facts of this case would be one of murder for, the evidence is, so far as it goes, convincing that the hanging has taken place in order to create a false evidence under the impression and belief that the woman had already died as a result of the blow the appellant dealt on her while in fact death has really been caused by the hanging itself. It cannot be said that the appellant intended to cause the death by hanging. He was only hanging a body which was dead already according to his belief in order to make it appear that the woman got herself hanged by the rope and died as a result thereof. In such a case, the offence that has been committed would be one of grievous hurt which would fall under S. 325 IPC, and not an offence.



under S. 302 of the Code. This case is governed by the ruling given by the Full Bench in—'Palani Goundan v. Emperor', 42 Mad. 547 where the facts have been more or less similar to the facts that emerge in this case. The appellant is, therefore, liable to be punished only under S. 325, I. P. C. as he is proved to be guilty of only that offence and nothing more. He has dealt the blow which made the woman become unconscious, so much so that it created the impression and belief in the mind of the appellant as if she was dead.

(7) The evidence of P. Ws. 6 and 7 also goes to prove that the hanging was done by the appellant under the impression that the deceased woman had died by reason of the blow which he dealt on her. Therefore, taking into consideration the material furnished by Exs. P. 4 and P. 6 and the evidence of P. Ws. 6 & 7, the conclusion could be only that the offence of which the appellant is guilty is one that falls under S. 325 I. P. C. We, therefore, think that the conviction and sentence of transportation for life under S. 302, I. P. C. cannot be sustained. They have, therefore, to be set aside. As we are of the opinion that an offence has been proved only under S. 325 I. P. C. we think the appellant has to be convicted under that section and sentenced to seven years' rigorous imprisonment. The conviction and sentence are accordingly modified and the revision is dismissed.

E/D.R.R.

Order accordingly.

A.I.R. 1953 MADRAS 240 (Vol. 40, C. N. 90)

CHANDRA REDDI J.

*Veeri Chettiar and others, Appellants v. Karion Chettiar and others, Respondents.*

Second Appeal No. 2253 of 1948, D/- 22-7-52.

**Hindu law — Joint Family — Sale of undivided share of member in execution of decree against him — Repurchase of share by joint family — Acquisition is for benefit of whole family including the alienating member — He can share in subsequent partition.**

Despite the sale of the undivided share of a member in the joint family properties, in execution of a decree against him, the member continues to be a member of the joint family, because the alienation of the undivided share of a member of a joint family does not bring about a disruption in the family. The result is that the sale does not make any difference so far as the status of the member, as a member of the joint family is concerned. That being so, the repurchase of his undivided share by the family cannot be said to be only for the benefit of the non-alienating members, unless it is proved to be so with reference to the terms of the document, Ex. B. 1 read in the light of the recitals in the other relevant documents. Where on the other hand the relevant documents show that the acquisition was for the benefit of the whole family and not for the benefit of the non-alienating members only, the member cannot be excluded from a share in the joint family properties. But in allotting his share in the joint family properties to him, he should be debited with the sum paid by the joint family for the purpose of getting back his share. (Paras 4, 5)

S. Ramachandra Aiyar, for Appellants; K. Veeraswami and C. N. Pattabhiraman, for Respondents.

**JUDGMENT:** Defendants 1 to 4 are the appellants. The plaintiff filed the suit for partition of the joint family properties of himself and defendants 1 to 6, defendants 1, 5 and 6 being his brothers and defendants 2 to 4 being the sons of a deceased brother of his, who died even during the lifetime of their father, Peddi Chetti. The joint family properties consisted of 76 acres of land, two houses and vacant sites. In 1929, a creditor of the plaintiff filed a small cause suit, obtained a decree and brought his share of the joint family properties to sale in execution of the decree. The decree-holder himself purchased the share and obtained symbolical delivery of the same. Shortly thereafter, Peddi Chetti, as manager of the joint family, obtained a release of it from the auction purchaser on payment of Rs. 300 as seen from Ex. B. 1 dated 13-9-1933. Peddi Chetti seems to have died in or about 1937 and the members of the family seem to have continued as a joint family. Later on, the defendants denied a share to the plaintiff in the joint family properties on the ground that, by reason of the sale of his share in execution of the small cause decree, he ceased to have any interest therein. This led the plaintiff to bring the present suit.

(2) The defence to the suit was that there was a partition in 1934 at which the family properties were divided between Peddi Chetti and his other sons excluding the plaintiff and that the plaintiff was not given any share in the family properties owing to his having lost all interest therein by virtue of the sale of his share in execution of the small cause decree.

(3) The trial court decreed the plaintiff's claim only for a 1/25th share in the joint family properties on the ground that the release of the plaintiff's share by the auction-purchaser was only for the benefit of Peddi Chetti and, therefore, the plaintiff was entitled only to a 1/5th share in that property after the death of Peddi Chetti. On appeal, the District Judge reversed the decree of the trial court in the view that the release under Ex. B. 1 was for the benefit of the whole joint family. The defendants, who are aggrieved by that decision, have preferred this second appeal.

(4) In support of this appeal, various contentions were raised by Mr. Ramachandra Aiyar, the chief of which is that the repurchase or release of the plaintiff's share under Ex. B. 1 was only for the benefit of the non-alienating members and, therefore, the plaintiff would not be entitled to a 1/5th share in the whole joint family properties but only to a 1/5th share in the share of the father. I do not think that there is much substance in this contention. It cannot be disputed that despite the sale of the undivided share of the plaintiff in the joint family properties, the plaintiff continued to be a member thereof, because the alienation of the undivided share of a member of a joint family does not bring about a disruption in the family. The result is that the sale does not make any difference so far as the status of the plaintiff as a member of the joint family is concerned. That being so, the repurchase of the plaintiff's undivided share by the family cannot be said to be only for the benefit of the non-alienating members, unless it is proved to be so with reference to the terms of the document. Ex. B. 1 read in the light of the recitals in the other relevant documents, shows that the acquisition was for the benefit of



the whole family and not for the benefit of non-alienating members or only for the benefit of the father. Hence, there is no reason why the plaintiff should be excluded from a share in the joint family properties. In this view, I must say that the judgment of the lower appellate court that the plaintiff is entitled to a 1/5th share in the joint family properties is correct and cannot be successfully challenged.

(5) But in allotting 1/5th share in the joint family properties to the plaintiff, the lower appellate court should have debited the plaintiff with the sum of Rs. 300 paid by the joint family for the purpose of getting back the share of the plaintiff.

(6) Mr. Viraswami strenuously argued that the other members of the family are not entitled to ask that this sum of Rs. 300 should be debited to the share of the plaintiff. This objection can be answered by referring to a passage in Mayne's Hindu Law and Usage (11th Edn.) page 516:

"Where advances are made to any member for his separate and exclusive purpose for which he would have no right whatever to call upon the family purse, or to discharge his own personal debts, contracted for his own exclusive benefit without the authority of the other members and there is no intention of making a present of them to him, the moneys advanced might be treated as joint family funds in his hands which are to be brought into the hotchpot at the division."

There is no suggestion that the debt incurred was not for the separate and exclusive purpose of the plaintiff for which he could not legitimately have a charge upon the joint family purse. In these circumstances, the plaintiff is certainly liable to be debited with the money spent on his behalf for the purpose of getting back his share in the joint family property. It follows that the plaintiff will be entitled to 1/5th share in the family properties subject to this liability.

(7) With this modification, the second appeal is dismissed. The plaintiff will get 2/3rds of his costs throughout.

B/R.G.D.

Appeal dismissed.

**A.I.R. 1953 MADRAS 241 (Vol. 40, C. N. 91)**  
**RAMASWAMI J.**

Public Prosecutor, Appellant v. Dada Haji Ebrahim Helari, Respondent.

Criminal Appeal No. 698 of 1951, D/- 24-7-52.

**Madras Prevention of Adulteration Act (3 of 1918), S. 5 (1) (a) and (b) read with Rr. 29 and 28 D — Sanitary Inspector purchasing small quantity of flour for analysis — Price paid and acknowledged by regular receipts — There is sale.**

A Sanitary Inspector went and demanded a small quantity of Bengal gram dhal and flour kept for sale in a godown. He was sold a pavu for two annas and the sale was acknowledged by the clerk of the firm in the receipts which were properly proved. On examination, it was found that they contained artificial, water-soluble-yellow-colouring matter derived from coal-tar.

Held the transaction amounted to a sale and the merchant was guilty of an offence under S. 5 (1) (a) and (b) read with Rr. 29 and 28 D framed under clause (2) of S. 20 (f) and G. O. No. 680 P.H., dated 24-2-50 as amended in G. O. No. 1613 P.H.,

1953 Mad/31 & 32

dated 5-5-50: 1948 MWN Cr. 32 and 1944 MWN Cr. 131, Foll.; AIR 1942 Mad 609, Disting. (Paras 6, 7)

Appellant in person; M. Santosh, for Respondent.

**JUDGMENT:** This is an appeal preferred by the State against the order of acquittal by the Stationary Sub-Magistrate, Mangalore, in C. C. Nos. 14 and 19 of 1951.

(2) The short facts are: On information received, the Sanitary Inspector Sri Sanjeevi Rao went to the shop of Janab Dada Haji Ibrahim Halari on 28-9-1950 at about 10-45 a.m. The Sanitary Inspector demanded and purchased one pavu of Bengal gram dhal and ten palams of flour at two annas each from out of the stock which was kept for sale in the godown situated at door No. 113 of the 20th Ward of Mangalore municipality. This purchase is spoken to not only by this Sanjeevi Rao examined as P. W. 1 but also by two receipts taken from this merchant marked as Exs. P. 1 and P. 2 & which have been signed "per pro. Dada Haji Ibrahim Halari" by a clerk of that firm. The purchases were bottled and then they have been submitted to the Analyst. On examination it has been found that they contained artificial water-soluble-yellow-colouring matter derived from coal-tar. Therefore this merchant has been put up for an offence under S. 5 (1) (a) and (b) of the Madras Act III of 1918 read with Rr. 29 and 28-D framed under Cl. (f) of sub-s. (2) of S. 20 of the aforesaid Act and G. O. No. 680 P.H., dated 24-2-1950 as amended in G. O. No. 1613 Public Health, dated 5-5-1950.

(3) On coming to court, this Haji Ibrahim Hilari who was represented by a special vakalat contended that he was not guilty of the offence with which he was charged and stated nothing more than that and his learned advocate proceeded to argue on the information available without further examination or adduction of evidence on the part of the accused.

(4) The learned Magistrate who tried this case came to the conclusion that the accused should be acquitted on two grounds, viz., that Exs. P. 1 and P. 2 have not been properly proved and secondly, that the sale in this case was not a voluntary transaction. The State has thereupon instructed the learned Public Prosecutor to file this appeal.

(5) In my opinion, both the grounds put forward by the learned Magistrate are totally devoid of any substance. First of all, Exs. P. 1 and P. 2 have been taken from the accused in the presence of the Sanitary Inspector P.W. 1. They have been signed then and there for the accused by one of his clerks. The learned Magistrate seems to have a singular idea of the provisions of the Evidence Act in that he thinks that a document cannot be proved by a person who was present when the statement therein was made and reduced to writing. So the first point taken by the learned Magistrate, beyond exhibiting his own ignorance of the rule of hearsay evidence, merits no attention at our hands and it has got to be rejected.

(6) Turning to the second point the learned advocate on behalf of the accused before me relies upon the decision of Horwill J. in — 'In re Ballamkonda Kanakayya', AIR 1942 Mad 609. In that case what happened was that A was the owner of shop where he kept and offered ghee for sale. B was working in that shop and his duty was to sell the ghee to customers. The Sanitary Inspector entered the



shop, exercised his powers under S. 14 and demanded a sample from B who was then selling articles in his master's absence. The sample was found adulterated ghee and both the accused were prosecuted. The learned Judge remarked as follows:

"The charge against the petitioner was of offering ghee for sale; but it was argued that he would be guilty of selling the ghee. A sale is a voluntary transaction, even when it is preceded by an agreement to sell. When a person exhibits articles in his shop he is making a general offer to sell them, and any person who comes into the shop and offers the price accepts his offer; but the intending purchaser cannot use physical force or threats to compel the owner to part with the goods. If he does, the transaction is not a sale. If the Sanitary Inspector has not exercised his powers under S. 14, but had merely tendered the money and the petitioner had voluntarily handed over the goods, then there would have been a sale; and the fact that it was subsequently found that the goods were required not for consumption but for analysis, would make no difference to the nature of the transaction that had been entered into. In this case, the petitioner would presumably not have parted with the goods voluntarily when he knew that they would be used for the purpose of bringing a case against him and his master. The petitioner was not therefore guilty of selling ghee. Lakshmana Rao J. in a similar case held that the parting with a commodity when it is demanded by the Sanitary Inspector in the exercise of his power under S. 14 of the Act did not amount to a sale."

The facts of this case are however different and fall within the later decision in — 'Public Prosecutor v. Ramachandrayya, 1948 M. W. N. Cr. 32. In that case what happened was that the Sanitary Inspector got a quantity of milk not obviously for his consumption or drinking more milk but only for the purpose of having that milk tested for finding out whether it had been adulterated. This transaction was described as not being a sale by the learned advocate who appeared for the accused in that case. Govinda Menon J. who went into the matter at great length held, following a previous judgment of this court by Kuppuswami Aiyar J. in — 'Public Prosecutor v. Narayan Sing', 1944 MWN Cr. 131, that the transaction was a sale. The learned Judge remarked:

"In — 'Public Prosecutor v. Narayan Sing', 1944 MWN Cr. 131, Kuppuswami Iyer J. has held that when a Sanitary Inspector purchased milk from the accused, tested it and found it was adulterated, the transaction amounted to a purchase and therefore the accused was guilty under rule 29 (b) of the rules and S. 5 (1) (b) read with rule 27 of the Madras Prevention of Adulteration Act. Moreover, in this case Ex. P. 2 the receipt contains an admission by the second accused that he was selling buffalo milk to the Maruthi Vilas Coffee hotel and the transaction by which P.W. 1 got the sample is also admitted to be a sale. Apart from the admission contained in Ex. P. 2 when Mr. Venkatasubbiah exchanged money consideration for the milk, he was acting as a purchaser and the society, a separate legal entity, was performing a contract of sale in delivering milk. Therefore it may even be unnecessary to decide whether the transaction with P.W.

1 was a sale at all, even though I am convinced that it is also a sale."

In this case I have already pointed out how the Sanitary Inspector went and demanded a small quantity of Bengal gram dhal and flour kept for sale in the godown and how he was sold a pavu for two annas and how this is acknowledged in the receipts Exs. P. 1 and P. 2 which have been properly proved. Therefore, the facts of this case fall directly under the decision in — 'Public Prosecutor v. Ramachandrayya', 1948 MWN Cr. 32, cited above and the second ground on which the Magistrate acquitted this accused cannot be supported and has got to be rejected as wholly untenable.

(7) In the result, the acquittal is set aside and the accused is convicted under S. 5(1)(a) and (b) of Madras Act III of 1918 read with rules 29 and 28-D framed under cl. (2) of S. 20 (f) and G. O. No. 680 P.H. dated 24-2-1950 as amended in G. O. No. 1613 P.H. dated 5-5-1950.

(8) The sentence to be awarded remains to be considered and having regard to the time which has elapsed, I think a moderate fine may meet the ends of justice. The accused is fined a sum of Rs. 50.

B./D.R.R.

Acquittal set aside.

**A.I.R. 1953 MADRAS 242 (Vol. 40, C. N. 92)**

**RAMASWAMI J.**

Achammagari Venkata Reddy, Petitioner v. The State, Respondent.

Criminal Revn. Case No. 727 of 1951 and Criminal Revn. Petn. No. 721 of 1951, D/-23-7-1952.

**Penal Code (1860), S. 268 — Public nuisance — Stagnation of water.**

A person commits a public nuisance if he by raising the level and crossbundling a rastha causes stagnation of water leading to breeding of mosquitoes etc., giving rise to offensive smell and causing to the persons living in the vicinity danger to their health and annoyance. (Para 4)

Anno: Penal Code, S. 268 N. 1.

P. Basi Reddi and I. Baliah, for Petitioner; The Public Prosecutor, for the State.

**ORDER:** The short point for determination in this revision is whether the act attributed to the accused amounted to a public nuisance.

(2) The word "nuisance" has been defined by Stephen to be anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another and not amounting to trespass. (Stephen, III, 499). The word "nuisance" is derived from the French word 'nuire', to do hurt or to annoy. Blackstone describes (no cumentum) as something that "worketh hurt, inconvenience or damage". The offence of public nuisance may thus be analysed (i) it may be caused either by an act or illegal omission (ii) the effect thereof must be either injury, danger or annoyance (iii) actually caused either to the public or to that portion of the public who dwell or occupy property in the vicinity or (iv) threatened of necessity to persons who may have occasion to use any public right.

(3) Bearing these principles in mind, let us examine what the accused did. The accusation is that on 2-6-1950, the petitioner before us raised the level of the public rastha in front of his northern house and also constructed a cross bund across the rastha at the boundary bet-



ween the two houses with the result that the flow of rain-water northwards through the rasta was impeded, if not completely obstructed and the water began to stagnate in the rasta in front of the southern house, causing annoyance to the complainant and the other residents of the village entitled to use the rasta.

(4) These facts proved through P. Ws. 1 to 4 and whose evidence was not seriously contradicted by the three D. Ws., establish the acts of the accused, viz., raising the level and cross-bunding and the result therefrom namely stagnation of water leading to breeding of mosquitoes etc., and giving rise to offensive smell and causing to the persons living in the vicinity danger to their health and annoyance and threatening also such injury and annoyance to the persons who would of necessity be compelled to use that part of the rasta.

(5) Therefore a clear case of public nuisance having been made out, there are no merits in this revision petition and it is hereby dismissed.

B/V.S.B.

Revision dismissed.

**A.I.R. 1953 MADRAS 243 (Vol. 40, C. N. 93)**  
**RAMASWAMI J.**

In re, Nimmagadda Raghavalu and others, Petitioners.

Criminal Revn. Case No. 1274 of 1951 (Criminal Revn. Petn. No. 1232 of 1951), D/- 31-7-1952.

**(a) Public Gambling Act (1867), S. 4 — Madras Gaming Act (3 of 1930), Ss. 3 and 9 — Essentials to constitute offence under S. 9 — Gaming on Sankranti day — Absence of evidence that house was common gaming house — No offence.**

In order to make out the offence of gaming in a common gaming house, first of all the gaming must be in a common gaming house. The mere fact that occasionally people used to play cards in a house and perhaps for money does not necessarily make it a "common gaming house". The term "common gaming house" must at least imply that the house was one used as a place of public resort and a common gaming house is one in which a large number of persons are invited habitually to congregate for the purpose of gaming and it makes no difference that the house was not open to all persons who might be desirous of using the same for gaming. Secondly, under the definition of the common gaming house as defined in S. 3, Madras Gaming Act, the element of profit or gain is an essential ingredient and when this is negatived by the evidence there is nothing to warrant a conviction of the persons found in such a house under S. 9 of the said Act which postulates of course the position of persons found gaming or present for the purpose of gaming in a common gaming house. It is unnecessary that the Police Officer should see the persons in the act of gambling. The words "found gaming" have a wider meaning than "seen gaming." The word "found" is more akin to the word "discovered" in its nature and purpose and that therefore if people are found by the police in such circumstances that it is clear that when the police came upon the scene they were engaged in gaming the section applies. (Para 4)

Where the gambling takes place in a house on the Sankranti day on which

such gambling takes place according to local custom and there is no evidence to show that the house is a common gaming house, no offence under S. 9, Madras Gaming Act, is constituted. (Para 5)

Anno: Public Gambling Act, S. 4 N. 1.

**(b) Public Gambling Act (1867), S. 5 — Search warrant — Form of — (Madras Gaming Act (3 of 1930), S. 5).**

There is no prescribed form for warrant under S. 5 and S. 5 does not require the Magistrate to record anywhere his reasons for believing any information the police may have given him nor even the fact that he had reason to believe that any place is used as a common gaming house, and all that it requires is that the Magistrate shall have reason to believe and that if he has, he can issue his warrant not in any particular form but his warrant giving authority to the police officer to do certain things: AIR 1938 Mad 550, Rel. on. (Para 6)

Anno: Public Gam. Act, S. 5 N. 2.

**(c) Criminal P. C. (1898), S. 556 — "Personally interested" — Mere fact that a Magistrate has issued a search warrant under S. 5, Madras Gaming Act, is not sufficient to disqualify him to try the case himself.**

S. 556, Criminal P. C. requires something more than the mere issue of a warrant, under S. 5, Madras Gaming Act, by the Magistrate in order to be considered as a party or personally interested precluding him from hearing the case. It depends upon the nature and extent of the enquiry made by the Magistrate before issuing the search warrant as to whether he should or should not try the case. If the Magistrate had made an elaborate enquiry and had come to express his opinion before the issue of the warrant and his warrant results therefrom then his own judicial conscience should suggest to him that he not being able to bring an open mind, should not try the case: AIR 1938 Nag 63 and AIR 1924 Lah 247 Rel. on. (Para 7)

Anno: Cr. P. C., S. 556 N. 5.

**(d) Public Gambling Act (1867), S. 5 — Search warrant — Misdescription in — Warrant wrongly describing the house in question as standing in name of accused — Warrant giving sufficient particulars to identify that house had been rented and was being occupied by accused — Misdescription is immaterial and does not vitiate the warrant: AIR 1938 All 252; AIR 1933 Bom 79, Ref. (Para 8)**

**(e) Public Gambling Act (1867), S. 5 — Search under Act is not covered by S. 103, Criminal P. C. — Mere fact that search witnesses are not persons living in the vicinity and one of them has not been examined will not vitiate the search. (Criminal P. C. (1898), S. 103). Case law Ref. (Para 9)**

Anno: Cr. P. C., S. 103 N. 16.

A. Subramaniam, for Petitioners; Public Prosecutor, for the State.

**ORDER:** This is a criminal revision case filed against the conviction and sentence of the petitioners in C. A. No. 67 of 1951 on the file of the Sub-Divisional Magistrate of Bandar confirming the conviction and sentence in C.C. Nos. 70 to 76 of 1951 on the file of the Stationary Sub-Magistrate, Avanigadda.

(2) The facts are: On 12-1-1951 the Sub-Inspector of Police of Avanigadda approached



the Stationary Sub Magistrate of Avanigadda with a requisition, Ex. P. 2; in which he stated that he had reliable information that gambling on a large scale was going on in a common gaming house bearing door No. 21/4 in the fourth ward of Avanigadda belonging to Tangiralla Viswanadha Sastri and requested the issue of a search warrant to enable him to search the house. The Sub-Magistrate is stated to have put further questions also to the Sub Inspector of Police as would justify him to issue the warrant and he is said to have after satisfying himself, issued a search warrant, Ex. D. 1. This search warrant was issued on 12-1-1951. In pursuance of this warrant on 14-1-1951 the Sub-Inspector of Police of Avanigadda accompanied by two Panchayatdars of whom one has been examined as P. W. 1, viz., J. D. Jacob., correspondent of the C. B. H. School, Avanigadda, and another who has not been examined, is said to have raided the place. The seven accused persons who are the seven petitioners before us are stated to have been found playing cards for money in the house and the following were found by the Sub Inspector and Jacob. One set of playing cards numbering 52, money amounting to Rs. 152-5-10, two bed lights, two torch lights and two mats etc. The Station House officer arrested the seven accused and seized the above articles and money before the mediators and got a Panchayatnama, Ex. P. 1, written on the spot and charge-sheeted the accused.

(3) The learned Stationary Sub-Magistrate's judgment shows that this case had been tried under the summons procedure because he writes in para 2 of his judgment that when the accused were called on to explain after the substance of the accusation against them were stated to them they stated that that day being the Sankaranthi festival day Thangirala Anjaneya Sarma was performing Satyanarayana Vritam and that on invitation from him they all went to his house and that the house was not a common gaming house and that they did not gamble there.

(4) Gambling is not by itself an offence and it becomes one only when it takes place in a common gaming house or a public place, with the latter of which we are not concerned here. In order to make out the offence three things must concur. First of all the gambling must be in a common gaming house. "Common gaming house" has been defined as meaning any house in which cards are kept or used for the profit or gain of the person owning, occupying, using or keeping such house whether by way of charge for the use of instruments of gaming or of the house. The mere fact that occasionally people used to play cards in a house and perhaps for money does not necessarily make it a common gaming house. See — '*Emperor v. Subramania*', AIR 1935 Mad 648. The term "common gaming house" must at least imply that the house was one used as a place of public resort and a common gaming house is one in which a large number of persons are invited habitually to congregate for the purpose of gaming and it makes no difference that the house was not open to all persons who might be desirous of using the same for gaming; '*In re: Chinniah Naidu*', AIR 1924 Mad 729. Secondly under the definition of the common gaming house as defined in S. 3 Madras Gaming Act, the element of profit or gain

is an essential ingredient and when this is negatived by the evidence in this case there is nothing to warrant a conviction of the persons found in such a house under S. 9 of the said Act which postulates of course the position of persons found gaming or present for the purpose of gaming in a common gaming house. All that S. 6 of the Act says is that the instruments of gaming and the persons found in a place searched under S. 5 shall be evidence that such place is used as a common gaming house and that the persons found therein were there present for the purpose of gaming, although no play was actually seen by the Police officer or any of his assistants.

In this connection, I may point out that it is unnecessary that the Police Officer should see the persons in the act of gambling. The words "found gaming" have a wider meaning than "seen gaming". The word "found" is more akin to the word "discovered" in its nature and purpose and that therefore if people are found by the police in such circumstances that it is clear that when the police came upon the scene they were engaged in gaming the section applies: see — '*Ghanshamdas v. Emperor*', AIR 1936 Sind. 126. It is only a piece of evidence in support of the prosecution for an offence under S. 9. But it would be wrong to treat it as conclusive evidence warranting a finding of guilty of the persons found therein without anything more; see — '*In re Satyanarayana*', 58 Mad L W 642. I have already pointed out that the mere fact that occasionally people used to play cards at a house and perhaps for money does not necessarily make it a common gaming house. This becomes all the more so when the day on which the play takes place, is Sankaranthi or other festival day when by local custom people play cards. The presumption of gambling on Diwali day is not so strong as the gambling at other times; — '*Emperor v. Shankar Dayal*', A I R 1922 Oudh 224. A person simply allowing the use of his house to gamblers during Diwali festival without any idea of demanding rent, etc., cannot be said to keep a common gambling house: — '*Jai Narain v. Emperor*', AIR 1919 All. 345. Gambling in Diwali day should not be considered to be an offence. '*Lachhman v. Emperor*', AIR 1930 Oudh 403 where it was found that a certain number of Hindus were gambling in a house on a Satam day on which, according to the local customs Hindus used to gamble and that no non-Hindus were admitted to the premises, held that the presumption under S. 7 of the Bombay Gambling Act was sufficiently rebutted by the fact that it was the Satam day on which the gambling was going on: — '*Pabumal v. Emperor*', AIR 1933 Sind. 42.

(5) Therefore, we have to bear in mind these three points when we examine the evidence in this case to find out whether the offence had been made out. In this case none of the three conditions concur. First of all, there is no evidence whatsoever that this house was one used as a place of public resort or one in which a large number of persons were being invited habitually to congregate for the purpose of gaming. Secondly, there is not a tittle of evidence regarding the element of profit or gain which is an essential ingredient in the case. Thirdly, the gambling has taken place on Sankaranthi day and from the statement of the accused it would seem that on Sankaranthi day



such gambling takes place in the houses of friends and there is no evidence contra. Therefore, none of the essential ingredients which have to be made out for sustaining a conviction under S. 9 of the Act has been made out in this case.

(6) The learned advocate for the accused has pressed four other points in this case which require consideration at our hands as they arise in this type of cases with monotonous regularity. The first point taken by him is that there is no evidence showing as to how the Magistrate satisfied himself that the place in question was a common gaming house before he issued the search warrant. It was held in '*Subramania Iyer, in re*', 69 Mad L J 835 that a search warrant issued by the Magistrate under S. 5, Madras Gaming Act, in the following terms:

"Whereas information has been laid before me that certain premises are being used as a common gaming house and gambling is also going on there and it has been made to appear that a search of the premises is necessary, I authorise you to search"

and the warrant was issued, on the basis of a letter brought by the Sub-Inspector of Police and after examining that Sub Inspector it was held that the warrant satisfied the provisions of S. 5 of the Gaming Act. In — '*Bontanathila Naranapayya, In re*', 1938-1-Mad L J 509 it was pointed out that there is no prescribed form for warrant under S. 5 and S. 5 does not require the Magistrate to record anywhere his reasons for believing any information the police may have given him nor even the fact that he had reason to believe that any place is used as a common gaming house, and all that it requires is that the Magistrate shall have reason to believe and that if he has, he can issue his warrant not in any particular form but his warrant giving authority to the police officer to do certain things. So point 1 fails.

(7) The second point is that the Magistrate who issued the warrant is a person interested under S. 556, Criminal P. C. & should not have tried this case. S. 556 CrI. P. C. requires something more than the mere issue of a warrant, by the Magistrate in order to be considered as a party or personally interested precluding him from hearing the case. In fact the explanation gives an example, viz.,

"A Judge or Magistrate shall not be deemed a party or personally interested, within the meaning of the section to or in any case by reason only that he is a Municipal Commissioner or otherwise concerned therein in a public capacity or by reason only that he has viewed the place in which an offence is alleged to have been committed, or any other place in which any other transaction material to the case is alleged to have occurred and made an enquiry in connection with the case."

The Illustration to the section states:

"A as Collector upon consideration of information furnished to him, directs the prosecution of B for a breach of the Excise Law. A is disqualified from trying this case as a Magistrate".

Therefore it depends upon the nature and extent of the enquiry made by the Magistrate before issuing the warrant as to whether he should or should not try the case. If the Magistrate had made an elaborate enquiry and had come to express his opinion before the

issue of the warrant and his warrant results therefrom, then his own judicial conscience should suggest to him that he not being able to bring an open mind, should not try the case. This is the underlying reason in regard to the decisions in — '*Khemchand v. Emperor*', AIR 1938 Nag. 63 and — '*Rajaram v. Emperor*', AIR 1924 Lah. 247. In the former, it was held that it is ordinarily undesirable that a Magistrate who believes that the information that a house has been used as a public gambling house is credible should not try the case and in the latter it was held that the Magistrate issuing the warrant may be examined by the accused as to the source of his information and the filling up of the warrant and such Magistrate should not try the case himself. See also — '*Venkobarao v. Emperor*', 1948 Mad. W. N. 153. It all depends upon the circumstances of each case and in this case inasmuch as the magistrate is said to have questioned the Sub Inspector and elicited information to satisfy himself and then believed him and issued the warrant it would have been better if the case had been tried by another Magistrate. Records, however, do not show whether the Magistrate who issued the warrant was the Magistrate who tried this case, though it may be so because our Sub-Magistrates love to describe themselves in the third persons. The second point is not substantial.

(8) The third point urged is that Exs. D. 5 and D. 6 give the house door No. 21/4 as standing in the name of Tagirala Kameswara Rao and not in the name of Venami Subbamma as contended by the prosecution and that Viswanatha Sastri has another house at Avanigadda. This point is without substance as on evidence it has been found that notwithstanding the omission in the warrant sufficient particulars have been given to identify that the house had been rented and was being occupied by T. Viswanatha Sastry. In — '*Emperor v. Vallibhai Ibrahim*', 34 Bom. L. R. 1447 it was held that if a warrant wrongly described the property to be searched it is bad but that a description may be good in part and bad in part and the court may reject the bad part on the principle of '*Falsa demonstratio non nocet*'. Then in — '*Radheylal v. Emperor*', A. I. R. 1938 All. 252 it was held that if the description in the search warrant is otherwise adequate to identify the place without ambiguity, it is immaterial that the boundaries are not specified. Point 3 fails.

(9) The fourth point is that the two mediators are not persons living in the vicinity and that one of them has not been examined. But this point is without any substance because the search under the Gambling Act is not covered by the provisions of S. 103, Cr. P. C. — '*Mehadeo Prasad v. Emperor*', A. I. R. 1934 Oudh 90; '*Khilinda Ram v. Emperor*', AIR 1922 Lah 458 and in re Ramprasad Ganesh Prasad, AIR 1937 Nag 251. The search witnesses need not be residents of the locality and that they need not even be respectable. Such witnesses are not accomplices and their evidence does not require corroboration though it should be submitted to careful scrutiny: In re — '*Ramprasad v. Ganesh Prasad*', AIR 1937 Nag 251. The search under the Gambling Act cannot be said to be vitiated on the ground that the search witnesses live half a mile away from the accused's house: — '*Madan Prasad v. Emperor*', AIR 1934 Oudh 90. Absence of witnesses does not affect the



admissibility but only the weight in regard to searches: — ‘Malak Khan v. Emperor’, 1945 Mad W.N. (Cri) 110. Where there is reasonable explanation why witnesses at site were not employed, viz., on account of ignorance, illiterate people, partisan witnesses who would not stick to truth but are likely to be tampered with and would resile and turn hostile etc. search with the aid of other witnesses from more distant places is not illegal. — ‘Bishnath Raj v. Rex’, AIR 1950 All 147 — ‘Ippili Magatha v. Emperor’, AIR 1920 Mad. 286 (1) and the — ‘State v. Simon Kaitan Fernandex’, 53 Bom LR 713. The fourth point also fails.

(10) The convictions and sentences are set aside and the accused are acquitted and the fine amount, if any, collected from them will be refunded.

B/K.S.

Accused acquitted.

**A.I.R. 1953 MADRAS 246 (Vol. 40, C. N. 94)**

SUBBA RAO AND  
KRISHNASWAMI NAYUDU JJ.

K. Somasundaram and others, Petitioners v. The State of Madras and others, Respondents.

Civil Misc. Petns. Nos. 13245 of 1950 and 2615 and 2616 of 1951, D/- 22-4-1952.

**Tenancy Laws — Madras Estates Land Act (1 of 1908), S. 3 (2) (d) — Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), S. 2 (7) — ‘Inam Estate’ — What is — Confirmation of original grant must be of whole village by single title deed — Proceedings under Act 26 of 1948 in respect of estate which is not inam estate are without jurisdiction.**

An inam village does not become an estate under the Madras Estates Lands Act unless the grant of the village has been made, confirmed or recognised by the British Government. Therefore, in a case where there has already been a grant by a sovereign other than the British Government the inam village granted becomes an estate only on confirmation or recognition by the British Government. (Para 4)

The confirmation or recognition must be of the grant of an inam village. It is not the confirmation of an inam, but of an inam village and the village that is contemplated is a revenue unit or of a whole village. The inam village is what has been usually termed a major inam as contrasted with minor inams, that is the whole inam villages as opposed to grants of lands, in inam villages, which are considered to be minor inams. Minor inams do not come within the definition of an “estate”, but whole inam villages are brought under the Act and come within the definition of “estates”. (Para 6)

It has been established by a number of decisions that for an inam village to constitute an “estate”, it is necessary that the grant must be of a named village, and must comprise the entire area of the village from which only certain lands, which have already been granted for service or other tenure or reserved for communal purposes, could be excluded. If besides these lands there were certain grants of lands from the village, then it would not be a case of grant of a named village. (Para 8)

Where the confirmation is not of the original grant as such in the sense of confirmation of the whole village, but confirmation of parts, it would not be sufficient to

bring it within the language of S. 3(2)(d) of the Act. If at the time of the confirmation, the whole village is not available to the Dharmasanamdars for confirmation and the confirmation takes shape by issue of title deed in respect of a portion of the village, it cannot be confirmation as required under the section. (Para 13)

Thus to constitute an “estate” not only the grant must be of the whole of the named village but the confirmation must be similarly of a whole and named village as required under Explanation I of S. 3(2)(d) of the Estates Land Act, and if there is a grant of a whole village and confirmation only of a part, it could not be an “estate” within the meaning of the Act. (Para 23)

It is the title deed that mainly determines the extent and scope of the grant and from the title deed, one has to find out whether what the title deed covers is the grant of a whole village or only a part of a village. Where there are two separate title deeds for two different portions of the village neither of them can be said to be an “estate”. (Para 24)

Consequently the proceedings taken by Government purporting to act under Madras Act 26 of 1948 and Madras Rent Reduction Act, in respect of estate which is not an “inam estate” within the meaning of Act 26 of 1948, the confirmation being in portions by issue of title deeds for different portions during Inam settlement, are without jurisdiction: Case law discussed.

(Para 24)

M. Sundaram, R. Kesava Aiyangar and K. Parasaram, for Petitioners; Govt. Pleader and T. R. Arunachalam, for Respondents.

**KRISHNASWAMI NAYUDU J.:**— C.M.P. No. 2615 of 1951 and 13245 of 1950: These petitions are for issue of writs of certiorari and they arise out of proceedings taken under the Madras Estates (Abolition and Conversion into Ryotwari) Act 26 of 1948. In C.M.P. No. 2615 of 1951 the village of Sudiur in the Paramakudi taluk of the Ramanathapuram District has been declared to be an Inam Estate under Act 26 of 1948. The contention of the petitioners is that it is not an inam estate and the Government has no jurisdiction to apply the provisions of the Act to the said village. From the Inam Fair Register (Ex. A. 1) it will be seen that the entire village of Sudiur was granted originally as Dharmasanam inam in 1774. In 1794 one Marudu Servakaran the then Dewan of Sivaganga purchased a portion, that is, 11½ vritties, and granted it for the support of Sudiur chatram. A portion of the village was therefore owned as Dharmasanam and the remaining extent was owned by the chatram. At the time of the Inam settlement, two title deeds were issued one for the Dharmasanam portion and the other for the chatram portion to two different persons and for two different purposes. The total extent of the village being 723-66 acres, an extent of 210-56 acres was reserved for communal purposes and a further extent of 4-16 acres was already granted as minor service inam. The remaining extent of 508-94 acres was originally granted as Dharmasanam inam. At the time of the confirmation in view of the subsequent purchase and regrant to the Sudiur chatram, out of 508-94 acres, 398-48 acres was confirmed as belonging to Dharmasanam inamdars, 76-85 acres for the chatram and the balance of 33-61 acres was shown as belonging to the chatram, but enjoyed as Dharmasanam. On these facts, both the Inam Settlement Officer and the Estates Abolition Tribunal held that the



original grant being of a whole village, the confirmation when it recognised the title of the Dharmasanamdars to the portion owned by them, was of the whole village and that therefore it was an inam estate.

(2) In C.M.P. No. 13245 of 1950, the entire village of Perungarai, Paramakudi taluk was granted as Dharmasanam. From the Inam Fair Register, which refers to the copper plate patta of the village, it is found that the Mahajanams said at the time of the Inam Settlement that the Zamindar had arbitrarily resumed a portion of the inam, kept it in his possession, granted a part of the resumed portion in support of the Sudiur chatram & granted the remaining portion to one Muthukakkan as personal inam. The Inam Commissioner found at the time of the inam settlement that the portion held by the chatram was three shares and that the remaining two shares continued as Dharmasanam. In the extract from the inam register, it is found in column 14 that the extent of the Dharmasanam was 512-99 acres and of the chatram was 21-00 acres. It may be noted that in arriving at 512-99 acres it is mentioned as Dharmasanam Perungarai area minus chatram lands, and while arriving at 21 acres, it is mentioned Sudiur chatram minus Dharmasanam lands. In columns 15, 17, 18 and 19 the names of 41 individuals are mentioned as shareholders and the members of the different families, who are entitled to the Dharmasanam, are given. In columns 21 and 22 separate quit rents for the Dharmasanam and the chatram are fixed.

(3) In this case, the Settlement Officer held that the original grant being of a whole village, two title deeds were issued at the time of the Inam Settlement only because subsequent to the original grant two portions of the village were granted for different enjoyment one by the Dharmasanam and the other by the chatram, and that the grant was of a named village as inam and of the whole village and therefore it was an estate. But on a further contention of the Inamdars that both the warams were granted as inam, the Settlement Officer held in their favour declaring that the village was not an estate under S. 2, cl. (7) of the Act 26 of 1948. Though the order of the Settlement Officer is in favour of the petitioners in this petition, it is stated that notwithstanding the said declaration, the revenue officials insist on collection of rents from the ryots, and it is contended that they have no jurisdiction to interfere with the collection as it is not an inam estate.

(4) It is therefore for determination whether the Dharmasanam grants of Sudiur and Perungarai villages are inam estates as defined in S. 2 clause (7) of Act 26 of 1948. "Inam estate" is defined in the said Act "as an estate within the meaning of S. 3 clause (2) (d) of the Estates Land Act, but does not include an inam village which became an estate by virtue of the Madras Estates Land (Third Amendment) Act, 1936." Sec. 3, clause (2) (d) of the Madras Estates Land Act comprises within the term "estate".

"any inam village of which the grant has been made, confirmed or recognised by the British Government, notwithstanding that subsequent to the grant, the village has been partitioned among the grantees or the successors-in-title of the grantee or grantees."

An inam village does not therefore become an estate under the Act unless the grant of the village has been made, confirmed or recognised by the British Government. Therefore, in a case where there has already been a grant by a sovereign other than the British Government the inam

village granted becomes an estate only on confirmation or recognition by the British Government. Sudiur village was granted as Dharmasanam to one Ganapathi Battar and from Ex. A. 1, the extract from the Fair Inam Register, it is seen that the Dharmasanam grant was confirmed on 12-6-1867 and title deed No. 1918 was issued, while the chatram portion of the said village of Sudiur was confirmed earlier on 15-2-1865 and a title deed No. 1806 was granted and a separate jodi was fixed for the chatram portion. Both the Dharmasanam portion and the chatram portion are portions of the village of Sudiur. The original grant was of both the portions in 1774 but in 1794 there was a purchase by the Dewan of Sivaganga and a grant of the chatram with the result that in effect the grantee of the village of Sudiur alienated a portion to the representatives of the grantor, who in turn granted it to the Chatram. It may be taken in so far as Sudiur is concerned that the original grant was of the whole village of Sudiur. In the case of Perungarai also, it was a grant as Dharmasanam by the Zamindar of Sivaganga and it was a hereditary grant. It appears from the copper plate referred to in the Inam Fair register that the entire village was granted as Dharmasanam. There was a subsequent resumption of a portion and a re-grant to the Sudiur chatram. In the case of Perungarai, the original grant was of the whole village. But could it be said in view of the resumption of the portion of the grant that the grant by Sivaganga Zamindar to Dharmasanam was of the entire village? There is no alienation in this case by the grantee, but a resumption and regrant resulting in the grant reducing itself to the portion of the village and not to the whole village.

(5) I will proceed to examine the case of both these villages on the assumption that the original grant for Dharmasanam was of the whole village and that subsequent to the original grant, there have been alienations and re-grants. From the extracts of the Inam Fair Register in respect of both the villages it is seen that the confirmation by the British Government was separately made on different dates in the case of Sudiur village, but at the same time in the case of Perungarai village and in both the cases two separate title deeds were issued. The confirmation was of two extents in the said villages in favour of two different individuals under two separate title deeds. In the case of Sudiur, 398-48 acres in the village and another 33-61 acres have been confirmed for the Dharmasanam under title deed No. 1918 on 12-6-1967 subject to payment of quit rent of Rs. 154 and a jodi of Rs. 172-6-0 while 76-85 acres were confirmed in favour of the Chatram and a title deed No. 1806 was granted on 15-2-1865 subject to a payment of quit rent of Rs. 13 and a jodi of Rs. 311-4-3. In the case of Perungarai similarly 512-99 acres being a portion of the Perungarai village were confirmed for the Dharmasanam and 21 acres being a portion of the same village were confirmed for the Sudiur chatram. The entry in column 14 of the Inam Fair Register relating to the Perungarai village makes it clear that the entire portion of the village excluding lands reserved for communal and other purposes have been divided as such and confirmed in favour of the Dharmasanamdars and the chatramdars. From these documents it will be seen that what is confirmed by the British Government in favour of the Dharmasanamdars is not the whole village of Sudiur or Perungarai, but only portions of those villages and it is therefore a case where the grant was of the whole village, but the confirmation was not of the whole village but portions of the village, as the confir-



mation is expressed in terms of the areas in the villages, not in terms of the names of the villages.

(6) It is for consideration whether this is sufficient to satisfy the requirements of S. 3, clause (2) (d) of the Madras Estates Land Act. A reading of the plain language of S. 3, clause 2(d) would show that the confirmation or recognition must be the grant of an inam village. It is not the confirmation of an inam, but of an inam village, and the village that is contemplated is a revenue unit or of a whole village. The inam village is what has been usually termed a major inam as contrasted with minor inams, that is the whole inam villages as opposed to grants of lands, in inam villages which are considered to be minor inams. Minor inams have been held not to come within the definition of an "estate", but whole inam villages have been brought under the Act and have been held to come within the definition of "estates".

(7) In —*Narayanaswami Naidu v. Subramaniam*, 39 Mad 683, the learned Judges observed as follows:

"The definition in sub-section 2, clause (d) was obviously intended to exclude from the definition of "estate" what are known as minor inams, namely, particular extents of land in a particular village as contrasted with the grant of the whole village by its boundaries. The latter are known as "whole inam villages." The existence of "minor inams" in whole inam villages is very common and if these inam villages do not come within the definition of "estates" almost all the aghaharam, shrotriyam and mokhasa villages will be excluded. This certainly cannot have been the intention of the Legislature. These minor inams are generally granted for services to be rendered to the village or to the owner and that seems to be the nature of the minor inams in this case."

But what is intended to be covered under the definition are whole inam villages and not portions of inam villages and this is made clear by the explanation (1) to Sec. 3(2) (d) of the Act, which is as follows:

"Where a grant as an inam is expressed to be of a named village, the area which forms the subject-matter of the grant shall be deemed to be an estate notwithstanding that it did not include certain lands in the village of that name which have already been granted on service or other tenures or been reserved for communal purposes."

(8) The difficulty having arisen in recognising certain villages as inam villages by reason of the exclusion from the grant itself of certain lands granted on service or other tenure or lands reserved for communal purposes, this explanation was introduced by the Amending Act II of 1945. It has been established by a number of decisions that for an inam village to constitute an "estate", it is necessary that the grant must be of a named village and must comprise the entire area of the village from which only certain lands, which have already been granted for service or other tenure or reserved for communal purposes, could be excluded. If besides these lands there were certain grants of lands from the village, then it would not be a case of grant of a named village. In the present case, the question whether there has already been a grant of a portion of the village for service or other tenure or grant for communal purposes would not arise, as the grant in favour of the chatram was subsequent to the original grant. This exclusion provided for in the Explanation I of Sec. 3(2)(d) has been permitted for the reason that the lands excluded are lands

granted on service or other tenure or reserved for communal purposes, which really are not taken away from the village proper though they are excluded from the grant for the reason that the lands reserved for communal purposes intended for the use of the villagers as also the service of persons to whom the service tenures are granted are similarly utilised for the inhabitants of the village. The exclusion therefore has been restricted to the lands reserved for communal purposes and to service or other tenures.

(9) There is some difference of opinion as regards whether the expression "other tenure" should be considered as 'ejusdem generis' with the words "service tenure" or independent of it. Mahajan J. in — *District Board Tanjore v. Noor Mohamed Rowther*, 65 L. W. 98 holds that,

"The expression 'other tenure' in the Explanation should ordinarily be construed 'ejusdem generis' with a service tenure owing to the reason that these service tenures usually are resumable and in case of resumable tenures the reversionary right in the land remains in the grantee and therefore even if such resumable tenures are excluded from the grant, in substance the grant can be deemed to be of the whole village. The same cannot be said of lands reserved for communal purposes."

(9a) In the same decision Chandrasekhara Aiyar J. observes that it is unnecessary to hold that the words "or other tenure" in the Explanation to clause (d) of sub-sec. (2) of Sec. 3 must be construed 'ejusdem generis' with "service", and that they are, in his opinion, wide enough to include lands granted as personal inams.

(10) In our High Court in — *Suryanarayana v. Venkatadu*, 62 L. W. 279 Panchapagesa Sastri J. observed as follows:

"It is argued for the appellants that as there were minor inams and also some poromboke, which was not included in the grant, the inam could not be taken to be a whole inam village and it was further argued that Madras Act II of 1945 could not apply in favour of the defendants, because the minor inams were not service inams, but were Dharmadayam and personal inams and also because poromboke which was excluded could not be regarded as lands reserved for communal purposes. I do not see why personal inams like Bhattavrihi inams and Dharmadayam inams to the temple would not come under the expression "other tenure" in explanation (1) to Sec. 3(2)(d) of the Estates Land Act."

(11) I am unable to find that poromboke lands are of the same category as Dharmadayam or personal inams and that poromboke lands being lands over which no individual has any right could be regarded as lands reserved for common purposes, whereas personal inams like Bhattavrihi inams are grants which are not for service.

(12) In — *Basavayya v. Theerthaswamilu Varu*, 63 L. W. 921 Viswanatha Sastri J. while not agreeing with Panchapagesa Sastri J. in his observation in — *Suryanarayana v. Venkatadu*, 62 L. W. 279 that personal inams might fall within the category of lands held on service or other tenure within the meaning of explanation (1) to S. 3(2)(d) of the Act, however, does not express any opinion as to whether the term "other tenure" would include in it personal inams.

(13) Bhattavrihi inams are not grants which could be said to be connected with service or intended for communal purposes. Dharmasanam is like an Aghaharam grant, where a village or portion of a village is granted to Brahmins, who might be of different families, but a Dharmas-



sanam like Agraharam grant does not necessarily mean the whole of a village. It is a kind of subsistence grant at a fixed favourable rent held by the grantees and their successors in shares. In the present cases, the confirmation being not of the original grant as such in the sense of confirmation of the whole village, but confirmation of parts, would it be sufficient to bring it within the language of S. 3(2)(d) of the Act? It may be argued that the grant has been confirmed and that what all is required is that there must be confirmation of the grant, but not the confirmation of the grant as such of a whole village. I do not consider that a reading of the section would lend itself to that construction. If the British Government makes the grant, then that would be sufficient to make it an "estate" and the making of the grant must be of an inam village and inam village must be of a whole village and a named village. If that is so, the confirmation must necessarily also pertain to what could be granted to make it an estate, namely, of an inam village being a whole and a named village. The word "confirmation" means to ratify. Ratification has therefore to be complete and not in parts and must therefore refer to the whole and not to a portion. The confirmation that is intended under S. 3(2)(d), is confirmation of the grant of a whole village, and if at the time of the confirmation, the whole village is not available to the Dharma-sanamdars for confirmation and the confirmation taking shape by issue of title deed in respect of a portion of the village, it could not be confirmation as required under the section.

(14) The principle underlying the section is made clear by the explanation that what would constitute an estate is a grant of a named village, which has been held to denote a whole village. A village is defined in S. 3(9) of the Act as

"any local area situated in or constituting an estate which is designated as a village in the revenue accounts and for which the revenue accounts are separately maintained by one or more karnams or which is recognised by the Provincial Government or may hereafter be declared by the Provincial Government for the purpose of this Act to be a village, and includes any hamlet or hamlets which may be attached thereto."

A hamlet, sometimes known as "Khandriga" in some parts of the country, though part of a village, cannot be treated as a village by itself. A grant of a "Khandriga" of a village would not amount to a grant of a village. Similarly, confirmation of a hamlet or "Khandriga" would not amount to confirmation of the grant of a village. Therefore, confirmation of a portion of the area covered by the village, as in the present case, would not amount to confirmation of an inam village.

(15) The position of what are called minor inams grant of portion of lands of a village by the original grantor or grantee as to whether they form part of an estate has been considered in certain decisions, all of which are of single judges.

(16) In — '*Viswanadhan Bros v. Subbaiya*', 1945-1-M.L.J. 443, Kuppaswami Aiyar J. had occasion to consider the case of a grant of a minor inam by the grantee of a Bhattavriti shrotriya inam. In that case, at the time of the inam settlement, the minor inam which comprised one acre was separately treated and confirmed as inam and a separate title deed was issued. On the question whether a lessee of a piece of land which formed part of the minor inam could claim that it was land in an estate within the meaning of s. 3(2)(d), Madras Estates Land Act, it was held that merely

because the land in question formed part of the original grant of an entire village, it cannot be said that at the time when it was recognised, it was part of the Inam in favour of the agraharamdar which was recognised or confirmed by the British Government and hence the land in question cannot be deemed to be part of an estate. After referring to the provision of law, namely, s. 3(2)(d) of the Act, the learned Judge observes:

"The answer to the question as to whether the confirmation or recognition by the British Government was in respect of the entire inam village or of only a portion is the basis for the decision as to whether the land was an estate or not."

(17) It is therefore seen that to make an inam grant an estate, the principle to be applied is whether the confirmation or recognition by the British Government was in respect of the entire inam village or of only a portion. That appears to me, with respect, to be the proper way of approach to the question.

(18) This decision was followed by Happell J. in '*C. R. P. No. 727 of 1945*,' where the land in question formed part of a whole inam village, but had been the subject of a separate grant by the mokhasadar. With reference to a similar contention that it was an estate, the learned Judge observed that "as the minor inam was confirmed separately it was not included in the Inam which was confirmed as a whole and could not be regarded as a part of the estate which that inam is by virtue of the confirmation."

(19) In — '*Mangamma v. Appadu*', 1948 I-M.L.J. 247 where two parcels of lands comprised in an inam village were treated even before the Inam settlement as separate grants and at the time of the settlement the lands were confirmed under two title deeds, it was held that the lands comprised under one of the title deeds did not form part of an "estate" within the meaning of the Madras Estates Land Act, and that the tenant thereof could not claim occupancy rights. Shahabuddin J. says at page 249:

"The contentions of the learned advocate for the petitioner are these: (1) The very fact that the heading of the extract is "extract of inams in the village of Sitharamudupeta Agraharam" indicates that what was mentioned in the extract Ex. P. 8 was not the whole extent of that village but that there were other inams also ..

.....In any case, the note made by the Inam Commissioner clearly indicates that the old accounts showed the five 'writtis' as a separate devadaya grant. This circumstance in itself is sufficient for rejecting the claim of the defendants that the grant was of a whole village. (2) Even if it be considered that the original grant was of the whole village there can be no doubt that at the time of the confirmation, i.e., the inam settlement the whole village was not regarded as a single inam but as two distinct inams and there the lands in question do not form part of an estate".

With reference to the heading which is similar to the extracts filed in the present case as extract of inam in the village the learned Judge observes:

"The heading which has been referred to already is significant. The word "in" does indicate that there were other inams also in that village. In — '*Suri Reddi v. Agnihotrudu*', 1943-2 M.L.J. 528 relied upon by the petitioner with regard to a similar heading it was observed that it itself indicates that various lands in the village were held under inam grants ..... In any case the second contention of the learn-



ed counsel for the petitioner has to prevail. According to the definition of an estate mentioned above what has to be seen is whether the confirmation or recognition by the British Government was in respect of the entire inam village or of only a portion".

After referring to the observation of Kuppuswami Aiyar J. in — '*Viswanatham Bros v. Subbayya*', 1915 I-M LJ 443 already quoted here and to the decision of Happe J. in C. R. P. No. 727 of 1945 and agreeing with the same, the learned Judge says:

"In both these cases there were two title deeds issued at the time of the Inam Commission & in those cases the original grant was of a whole village. In the present case as stated already the accounts prior to the Inam settlement indicated to the Inam Commissioner that the two extents were treated as two separate grants, thereby indicating that the grant was not a single one at the outset. However, there were two title deeds at the time of the settlement. In my opinion these decisions apply to the facts of this case also and the lands in question did not form parts of an estate".

Satyanarayana Rao J. in S. A. Nos. 1771 and 1772 of 1945 agreed with the view taken by Kuppuswami Aiyar J., in — '*Viswanatham Bros v. Subbaiya*', 1945 I-M LJ 443. In that case the question was whether an extent of 3 acres 84 cents formed part of an estate or not. It was held that it did not, for the reason that when these two grants were confirmed it must be taken that the Government did not treat the minor inam as part of the Agharam grant but as being outside its purview.

(20) In — '*Ramaswami v. Jagannathasami*', 1950-1-M. L. J. 18, where the question for decision was whether 7 acres and 33 cents in Sankarashanapuram agharam was an estate, following the decision of Kuppuswami Aiyar J. in — '*Viswanatham Bros v. Subbaiya*', 1945-1-M. L. J. 443, I held that it would not be part of the inam village simply because it is situated in the village of Sankarashanapuram and that such property would not come under the definition of "estate" in S. 3 (2) (d) of the Act.

(21) Certain observations of mine in that decision are relied upon by the learned Government Pleader and he points out that while I held that 7 acres 33 cents which was a minor inam did not form part of the estate, I observed that the Agharam of Sankarashanapuram minus 7 acres and 33 cents would be an estate. What I said was:

"The question for decision is whether this item of 7 acres 33 cents would come under the definition of "estate" as defined in S. 3 (2) (d) of the Madras Estates Land Act. S. 3 (2) (d) includes in the word "estate" any inam village of which the grant has been made, confirmed or recognised by the British Government notwithstanding that subsequent to the grant, the village has been partitioned among the grantees or the successors in title of the grantee or grantees. The village of Sankarashanapuram has not been granted by the British Government as it is found that it was granted by Kamadana Rayanam Garu in about 1731 A. D. But it has been recognised by the British Government, by the Inam Commission, and the recognition is in respect of the village of Sankarashanapuram to the extent of 247 acres 35 cents in any event excluding 59 acres 53 cents of which the 7 acres 33 cents is a portion. It cannot therefore be said that this is part of the inam village of Sankarashanapuram. Further these lands cannot be said to be a named village as defined in S. 3 (2) (d) and Explanation I read together".

But I further observed as follows:

"The village of Sankarashanapuram would be an inam village coming under the definition of the word "estate" since it is a village the grant of which was recognised by the British Government and a separate title deed was issued and would still be an estate because it is a grant of an inam village notwithstanding that it did not include certain lands such as poromboke and other lands mentioned in the title deed. But that would not make the 7 acres 33 cents also part of that Sankarashanapuram inam village. It is not a named village and since a separate title deed has been issued in respect of the minor agharamdar it cannot be said to be part of the major inam of Sankarashanapuram".

What had to be determined in these cases was as to whether the 7 acres 33 cents would be an estate. Applying the principle of S. 3 (2) (d) and Explanation I, it was assumed that the village of Sankarashanapuram excluding 7 acres 33 cents was the grant of a whole village and therefore an "estate". That observation, however, was not really necessary for the decision of the case excepting to support the argument that 7 acres 33 cents is part of a village and not the whole village. It could not be said that in that case the question was as to whether confirmation of the Agharam portion was of an estate or not, as it did not fall to be decided in that case. But I made it clear by referring to the observation of Kuppuswami Aiyar J. in — '*Viswanatham Bros v. Subbaiya*', 1945-1-M. L. J. 443, namely that the question as to whether the confirmation or recognition by the British Government was in respect of the entire inam village or only of a portion would be the basis for a decision as to whether the land is an estate or not. I consider that is the real and proper test and applying that test to the present case, there can be no doubt that the Dharmasanam portion which was confirmed by the British Government could not be an "estate" within the meaning of the Act.

(22) The grant in C. M. P. No. 13245 of 1950 relating to Dharmasanam grant of Perungarai will stand on a stronger footing, as there has not been any alienation by the grantee, but there is a resumption of a portion of the village by the grantor and re-grant to the chatram. In that case, even the grant could not be said to be of a whole village and a named village as the result of the resumption and re-grant to the chatram would reduce itself to the grant being of a portion of the village and not of the whole village of Perungarai.

(23) To constitute an "estate" not only the grant must be of the whole of the named village but the confirmation must be similarly of a whole and named village as required under Explanation I of S. 3 (2) (d) of the Act, and if there is a grant of a whole village and confirmation only of a part, it could not be an "estate" within meaning of the Act.

(24) But it is contended that, if subsequent to the grant, the village has been partitioned among the grantees or the successors in title of the grantee or grantees that would not take away the village from being an estate. The partition among the grantees or the successors in title may be after the grant that is the original grant. In the case of Perungarai, from the extract from the register of Inams it is found that so far as Dharmasanam portion of the village is concerned in columns 16, 17, 18 and 19, 41 persons are mentioned as members of the families that are entitled to the inam for which one title deed is granted and for the chatram portion a separate title deed



is granted. The fact that it is owned by several shareholders in severalty has not therefore affected confirmation, but the confirmation is made by the grant of one title deed. But that would not be sufficient to hold that the portion of the grant confirmed by the title deed would be an "estate" since it does not comprise the whole village. Whether the alienees from the grantees after the original grant would be successors in title or whether the words "successor in title" refer only to the heirs do not really arise as affecting the decision of the question raised, since assuming that under the term "successors in title" alienees are included, the crucial point of time is the confirmation; when in spite of alienations it would have been open to the British Government to confirm the title of the alienees by the grant of a single title deed. The existence of any partition or of any alienations subsequent to the grant could not have any material bearing in considering as to whether the grant which is confirmed is an "estate" or not. It is the title deed that mainly determines the extent and scope of the grant and from the title deed, one has to find out whether what the title deed covers is the grant of a whole village or only a part of a village. In this case, there being, two separate title deeds for two different portions of the village neither of them could be said to be an "estate". In the view I am taking of this question as to whether Dharmasanam grants in these villages are inam estates within the meaning of the Estates Abolition Act, the other question as to whether the grants comprise of both the warams or not does not require to be considered. In the result, the proceedings taken by the Government purporting to act under the Madras Estates Abolition Act and the Madras Rent Reduction Act are without jurisdiction and are liable to be quashed.

(25) SUBBA RAO J.: I have the advantage of reading the judgment prepared by my learned brother. The facts have been fully stated therein and it is not necessary to restate them. The applications are argued on the assumption that the original grant was of the whole village, but the Inam Commissioner confirmed them in different parts and issued separate title deeds. It is also disputed that the separate title deeds exhausted the entire village. The question is whether the lands covered by either of the title deeds are parts of an estate within the definition of Sec. 3(2) (d) of the Madras Estates Land Act before the said section was amended by the Madras Estates Land (Third Amendment) Act, 1936. Sec. 3(2) (d) before the said amendment read as follows:

"Any village of which the land revenue alone has been granted in inam to a person not owning the kudiwaram provided that the grant has been made, confirmed or recognised by the British Government or any separate part of such village."

(26) Unhampered by judicial decisions, I shall now proceed to consider the scope of the definition on a construction of the plain words used in the said sub-section and in the light of the historic background of the inam grants.

(27) To come under the definition vis-a-vis the question raised in the case, the grant of the village should have been made, confirmed or recognised by the British Government. During the rule by Hindu rajahs, they used to make grants of land either rent-free or on favourable rent for the support of charitable institutions, for the sustenance of Brahmins and for the maintenance of officers etc. This practice was

followed by the Moghul Government. The British Government also made similar grants but they were very few and that system was discontinued. The British Government found that there were various grants of inams the original whereof was lost in antiquity and made various attempts to investigate their title and systematise the tenures. Finally, in the year 1858, they appointed the Madras Inam Commission. The commissioner made an elaborate enquiry, formulated rules and to a large extent investigated the titles and stabilised the tenures. The preparation of the inam register was described by the judicial committee as a great act of State. The investigation was based upon not only oral evidence but on the Collectors' records, the standard inam registers and the accounts of the taluks from the earliest to the most recent period. The Inam Commissioner after satisfying himself about the origin of the tenure either on the basis of the original grants or on the ground of long possession, confirmed the inam grants and, in some cases, enfranchised them. It is not necessary to go into details of the investigation or the manner in which the rate of quit rent was ascertained and fixed. Suffice to say that the Inam Commissioner after satisfying himself, in accordance with the rules framed for the purpose, confirmed the grants or enfranchised them as the case may be, and issued a title deed to the inamdar, or if they were in the hands of different persons, different title deeds to them. The word "confirmed" in the sub-section has always been understood to be the confirmation of the grant by the Inam Commissioner.

(28) The other word "recognised" is not free from ambiguity. One of the attempts made by the British Government for regularising the inams unauthorisedly made by earlier Native Rulers was to issue Regulation 31 of 1802 where under all grants made prior to 26th February 1768 were deemed to be valid and all persons holding such lands would continue to hold them without let or molestation. It has been held that the lands before that specified date were recognised by the Government within the meaning of S. 3(2)(d) of the Madras Estates Land Act. See — '*Ramalinga v. Ramaswami*', AIR 1929 Mad 529. There was a conflict of judicial opinion on the question whether any positive act on the part of the Government was necessary to bring in a case within the meaning of the word "recognition" or whether it was enough if the Government acquiesced in continuance of the inam. It is not necessary in this case to consider that question or express my definite opinion thereon. But the decisions indicate that the acceptance of service or the jodi by the Government would be an act of recognition by the Government. It therefore follows that the grant of a village should have been made by the Government, and in a case where the grant was made by some other ruling power, it should have been "confirmed or recognised" by the British Government in the sense indicated above. The emphasis lies on the fact that the grant of a village so made must be confirmed or recognised. The section does not prescribe the mode of confirmation or recognition; nor does it say that the confirmation must be by a single act of the Government. The essential factor is that the entire grant should be confirmed; not parts of the grant.

(29) The definition itself indicates that if in the origin the grant was of a whole village, notwithstanding the fact that separate parts went into the hands of different persons by partition or alienation, nonetheless the parts continued to be



parts of an estate. This emphasises the aspect that the origin of the grant is the decisive factor not the subsequent treatment of it. If the inam Commissioner found the village in possession of different individuals with derivative titles, what was more natural and equitable than his issuing separate title deeds? He confirmed the grant of the entire village, but recognising the existing facts, issued separate title deeds. The subtle distinction in the mental process adopted by the Commissioner, namely, confirmation of the whole village but issuing two distinct title deeds does not appeal to me if it is admitted that the original grant was of the whole village. The resultant was the same. The grant of the entire village was confirmed; the process adopted by the Commissioner for convenience or in recognition of the subsequent titles is not a relevant circumstance.

(30) The aforesaid view will be further reinforced and clarified if the steps in the process of recognition are pursued. Suppose there was a grant of an entire village and that subsequent to the grant, by reason of various alienations it was in possession of different persons. The Government continued to collect the quit rent in proportionate shares from the owners of the different parts. It is difficult to argue that the grant of the village was not recognised from the mere fact that the Government realised the revenue due to the Government separately from the various holders. The separate collection of the revenue by the Government on the basis of the jodi originally fixed would certainly constitute recognition of the original grant of the village.

(31) If the construction suggested by the learned counsel for the petitioners is accepted, it will lead to many anomalies. It is now settled law that notwithstanding the existence of certain minor inams, the subsequent grant of an entire village and its confirmation by the British Government would bring it within the definition of an estate. But if the entire village was granted but the minor inams were carved out subsequent to the grant and if the minor inams were separately confirmed, the rest of the village, even though confirmed, would not be an estate. If the British Government made a grant of the village and the village so granted was split up into different parts by alienations, every bit would be part of an estate. If the British Government confirmed and recognised by issuing one title deed, every bit of it would be part of an estate; but if it confirmed it but issued separate title deeds recognising the pre-existing alienations, the entire village would cease to be an estate within the meaning of the Act. In my view all these anomalies can be avoided if the emphasis is laid on the grant and its confirmation and not on the process adopted by the Commissioner. I would like to lay down the following simple formula which would steer clear of all the difficulties: First find out whether the original grant was of the whole village. If it is established, the next question is whether the confirmation or recognition was of the entire grant or a part of the grant. If the entire grant was confirmed or recognised, the process of confirmation or recognition or the fact that different title deeds were issued, or the grant was recognised by separate acts should not matter, for, in either case, the original grant which was of the entire village should be confirmed or recognised by the British Government. Anyhow as I am not differing from my learned brother, it is not necessary for me to pursue the line of reasoning suggested to me in greater detail.

(32) My learned brother relied upon the judgments of single Judge, Kuppuswami Aiyar J. Shahabuddin J. Happell J. and Satyanarayana Rao J. in support of his judgment. He has added his weighty opinion to the views expressed in the long catena of cases cited. The legislature in enacting Act 26 of 1948 must be deemed to have knowledge of the case law and interpretation the learned Judges of this Court put upon the provisions of Sec. 3(2)(e) and with that knowledge adopted the definition of an estate in the Estates Land Act before the Third Amendment in Act 26 of 1948. They must be presumed, therefore, to have accepted the interpretation put upon the definition by the courts. In view of the consensus of judicial opinion on the interpretation of the section and in view of the fact that the legislature presumably accepted that opinion, I do not think I am justified at this stage to strike a different note for it may unsettle or at any rate, introduce confusion in the settled law on the subject. With great reluctance, for the aforesaid reasons, I am not prepared to disagree with the conclusion arrived at by my learned brother.

B/R.G.D.

Order accordingly.

A. I. R. 1953 MADRAS 252 (Vol. 40, C.N. 95)

SUBBA RAO J.

C. Nataraja Mudaliar, Petitioner v. The Madras State represented by the Accommodation Controller, Madras, Respondent.

Civil Misc. Petn. No. 6628 of 1951 D/- 6-8-1952.

(a) Houses and Rents — Madras Buildings (Lease and Rent Control) Act (25 of 1949) (as amended by Madras Act 8 of 1951), Ss. 3 (1) (a), (3) and (4) and 7(3) (a) and (c) — Power of authorised officer to requisition building against landlord's will.

Section 3 (3) clearly indicates that the landlord's intention to let out is not a condition precedent for invoking the power of requisition, for his right to occupy the same accrues to him only if the State or the authorised officer does not require for the purposes stated in the prescribed time. Similarly, S. 3(7) (a) establishes beyond any reasonable doubt that the landlord's intention to let a house is not a condition precedent for the exercise of the authorised officer's jurisdiction. The authorised officer has, therefore, power to requisition a building notwithstanding the fact that the landlord is not willing to let out the same.

(Para 4)

† (b) Constitution of India Arts. 19(1) (f) and 31 (2) and Sch. 7 list II, item 36 — Public purpose — Requisition of house for housing Government servant — Taking possession — Possession taken under S. 3 (3) of Madras Act 25 of 1949 — Exclusion of Art. 19 by Art. 31 — (Houses and Rents — Madras Buildings (Lease and Rent Control Act (25 of 1949) (as amended by Mad. Act 8 of 1951), S. 3 (3) ).

The difficulty to place a right infringed under one or other of Arts. 19 or 31 is often a difficult one. The following three principles may be borne in mind in approaching the question: The general provision must give place to the specific provision; the pith and substance or the directness of legislation, and whether the



right sought to be protected under Art. 19 has been taken away by legislation under another appropriate article.

(Paras 6 and 9)

The requisition of a house for housing a Government servant is a public purpose, for the interests of the Government and that of the public would necessarily suffer if their officers are not properly housed.

(Para 10)

It is not correct to say that Art. 31 deals only with total deprivation of property. Art. 31 (2) deals with acquisition and taking possession. Acquisition means actual transference of property whereas taking possession of property need not imply a total deprivation of the ownership of property. The title to the property may continue in the owner but he may be dispossessed for a public purpose. Item 36 of List II provides both for acquisition and requisition of property. Therefore requisition of property, which does not involve a total deprivation of the property from the owner, does come within the meaning of Art. 31. Therefore it cannot be contended that the Madras Buildings (Lease and Rent Control) Act 1949, does not deal with the subject-matter covered by Art. 31 of the Constitution of India. S. 3(3) specifically enables the Government or the authorised officer to require any building for the purpose of the State. They can take possession of the same subject to the terms prescribed thereunder. The taking of possession under S. 3(3) is certainly covered by the words "taken possession of" in Art. 31(2). The subject-matter directly comes under Art. 31 which being a special article, excludes the operation of the general article, Art. 19. Hence, where a building is taken possession of under the Madras Buildings (Lease and Rent Control) Act, the landlord is not protected by the provisions of Art. 19, for Art. 19 (i) (f) can be invoked only if he is legally entitled to use his property.

(Paras 11 and 12)

V. V. Srinivasa Aiyangar and N. Krishnamachari for Petitioner, V. P. Sarathi for the Govt. Pleader for Respondent.

**REFERENCES:** Courtwise/Chronological/ paras  
(50) AIR 1950 SC 27: (51 Cri LJ 1383 SC) 6  
(50) 1950 SCR 869: (AIR 1951 SC 41) 8  
(51) 87 Cal LJ 140: (AIR 1952 Cal 65) 8  
(51) AIR 1951 Nag 33: (ILR (1951) Nag 791) 9  
(50) AIR 1950 Pat 392: (29 Pat 790 SB) 7

**ORDER:** This is an application for issuing a 'writ of certiorari' to quash the order of the Accommodation Controller, Madras, made in respect of the ground floor of the house and premises No. 9 Krishnapuram Street, Royapettah. The petitioner is the owner of the said house. He and his wife with their two sons were living in the said house from the year 1935. For about nine years they occupied the entire building. In June 1944 he let out the ground floor to Miss E. T. Rajeswari M. A., Professor of Physics in Lady Wellington Training College, Triplicane, Madras. It is said that the ground floor was let to her to oblige his friends. In June 1945 the petitioner's son died. Professor Rajeswari vacated the ground floor of the house on 27th April 1951.

The petitioner gave the notice of vacancy to the Accommodation Controller on 28th April

1951. He intimated to the officer his intention not to let it to any other tenants, as he required it for himself. Therein it was also stated that because of their old age and heart troubles, he and his wife were not in a position to get up and down the stair case of the house. The notice of vacancy was received by the Accommodation Controller on 1st May 1951. Thereupon on 7-5-1951 he issued a notice under S. 3(3) of the Madras Buildings (Lease and Rent Control) Act, 1949, as amended by Act 8 of 1951, allotting the said premises to Sri K. G. Lakshmivenkataraman, Inspector of Police, Crime Branch. The contentions of the learned counsel for the petitioner may be stated thus:

1. The Accommodation Controller has no power under S. 3(3) of the Act to allot a house to a Government servant if the landlord does not intend to let out his house;

2. The allotment of the ground floor of the house in the circumstances of the case is not only arbitrary, but is an unreasonable restriction on the petitioner's fundamental right guaranteed to him under Art. 19(i) (f) of the Constitution of India.

(2) The relevant provisions of the Madras Buildings (Lease and Rent Control) Act, 1949 bearing on the first contention read as follows:

S. 3(i) (a): Every landlord shall, within seven days after the building becomes vacant by his ceasing to occupy it, or by the termination of a tenancy, or by a release from requisition give notice of the vacancy in writing to the officer authorised in that behalf by the State Government (hereinafter in this section referred to as the 'Authorised officer.')

S. 3(3): If within the ten days of the receipt by the authorised officer of a notice under sub-sec. (i) or sub-sec (2), the State Government or the authorised officer does not intimate to the landlord in writing that the building is required for the purposes of the State or Central Government or any local authority or of any public institution under the control of any such Government or for the occupation of any officer of such Government, the landlord shall be at liberty to let the building to any tenant or to occupy it himself.

S. 3(4): The landlord shall not let the building to a tenant or occupy it himself, before the expiry of the period of ten days specified in sub-sec. (3), unless in the meantime he has received intimation that the building is not required for the purpose, or for occupation by any of the officers, specified in that sub-section.

S. 7(3)(a): A landlord may, subject to the provisions of clause (d), apply to the controller for an order directing the tenant to put the landlord in possession of the building—

(i) in case it is a residential building, if the landlord requires it for his own occupation if he is not occupying a residential building of his own in the City, town or village concerned.....

S. 7(3)(c): A landlord who is occupying only a part of a building, whether residential or non-residential may, notwithstanding anything contained in clause (a), apply to the Controller for an order directing any tenant occupying the whole or any portion of the remaining part of the building to put



the landlord in possession thereof, if he requires additional accommodation for residential purposes or for the purposes of a business which he is carrying on, as the case may be."

(3) The first argument is that unless the landlord intends to let out a house, the authorised officer has no power to requisition the same. To put in other words, the volition of the landlord is paramount and the jurisdiction of the authorised officer to allot houses for the purposes mentioned in S. 3(3) of the Act is confined only to those houses intended to be let by the landlords and voluntarily thrown out for allotment. If a landlord has a hundred houses and is rich enough not to care to get any income from them by letting them out, the authorised officer will not have any power to allot them, however convenient and necessary they may be for the purposes of the State. This construction would limit the field of selection and enable wealthy landlords to circumvent the provisions of S. 3 by subterfuges. The conception of a requisition implies compulsion. It is intended to meet an emergency. The emergency necessitated the enacting of the drastic provisions and the construction suggested would defeat the purpose to a large extent.

(4) The relevant provisions of the Act do not yield to any such construction. Under S. 3 (1) (a) every landlord shall give the requisite notice to the authorised officer if the building becomes vacant by his ceasing to occupy it, or by the termination of a tenancy or by release from requisition. This section does not say that the landlord need not give such a notice if he has no intention to let it out. If the Legislature intended to confine the scope of this provision only to such buildings intended to be let by the landlord, they would have said so. Under sub-s. (3) the landlord shall be at liberty to let the building to any tenant or to occupy it himself if the State Government or the authorised officer does not intimate to the owner in writing within ten days of the receipt of the said notice their intention to requisition the building for the purposes mentioned therein. The landlord cannot, therefore, occupy his house till the State or the authorised officer sent the said communication to him.

This clearly indicates that the landlord's intention to let out is not a condition precedent for invoking the power of requisition, for his right to occupy the same accrues to him only if the State or the authorised officer does not require for the purposes stated in the prescribed time. Section 3 (4) prohibits the landlord from letting the building to a tenant or occupying it himself before the expiry of the period of the ten days specified in sub-s. (3). This provision contains a prohibition which flows from the provisions of S. 3 (3). Under S. 3 (7) (a) when a landlord has two or more residential buildings, he is given the option to choose one of such buildings for his occupation and to give notice to the authorised officer of the building so chosen by him and of every other building not so chosen.

This provision, limiting the power of the landlord to choose one building for himself, establishes beyond any reasonable doubt that his intention to let a house is not a condition precedent for the exercise of the authorised officer's jurisdiction. If his intention was paramount, the Legislature would not have given

this option to him, for it would have been within his power to reserve as many houses as he liked for himself. Section 7 (3) (a) on which reliance was placed by the learned counsel for the petitioner enables a landlord to apply to the Controller for an order directing the tenant to put him in possession if the landlord requires it for his occupation and is not occupying a residential building of his own in the city, town or village concerned. Section 7 (3) (c) enables a landlord who is occupying only a part of a building, whether residential or non-residential notwithstanding anything contained in clause (a) to apply to the Controller for an order directing any tenant occupying the whole or any portion of the remaining part of the building to put the landlord in possession thereof, if he requires additional accommodation for residential purposes or for the purposes of a business which he is carrying on, as the case may be. These provisions enable the landlord to get possession of his house for his occupation if he is not occupying another house of his own and also enables him to occupy the entire house if he requires additional accommodation.

These provisions are obviously made to allay the hardship and inconvenience that would be felt by a landlord if he was not allowed to occupy at least one of his houses and if he was not given the additional accommodation required by him. The fact that these provisions had to be made to meet a particular contingency shows beyond any reasonable doubt that but for these provisions he might not be in a position to secure one of his own houses for his accommodation or to occupy the entire house if circumstances have changed. If it was within his uncontrolled discretion whether to let his house or not, these provisions would be unnecessary for he can by so intending exclude at least one house from the operation of the provisions of the Act. It is not necessary to pursue this argument further and to scrutinise the other provisions of the Act for it is clear that the landlord's discretion is not the guiding factor. I therefore hold that the authorised officer has power to requisition a building notwithstanding the fact that the landlord is not willing to let out the same.

(5) Learned counsel then contended that the order of the Accommodation Controller allotting the ground floor to a Government servant ignoring the circumstances of the case such as the petitioner's and his wife's old age, heart troubles etc. is an infringement of his fundamental right under Art. 19 (i) (f) read with Art. 19 (5) of the Constitution, whereas the learned Government Pleader contended that the appropriate article applicable is Art. 31(2) of the Constitution and the requisition in question satisfied the conditions laid therein. The relevant provisions read as follows:

" Art. 19 (i): All citizens shall have the right — (f) to acquire, hold and dispose of property;

Art. 19 (5): Nothing in sub-clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.



Art. 31 (1): No person shall be deprived of his property save by authority of law:

(2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless, the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given.

Item 36, List II, 7th Schedule: Acquisition or requisitioning of property, except for the purposes of the Union, subject to the provisions of entry 42 of List III.

Entry 42, List III: Principles on which compensation for property acquired or requisitioned for the purposes of the Union or of a State or for any other public purpose is to be determined and the form and the manner in which such compensation is to be given."

(6) It will be seen that both Arts. 19 and 31 appear in Part. III dealing with fundamental rights. The rights under Art. 19 are placed under the heading "Right to freedom". Article 19 is confined only to citizens whereas Art. 31 applies to any person. Both are fundamental rights. The difficulty to place a right infringed under one or other of the articles is often a difficult one. Before attempting to do so in the present case, it may be convenient at this stage to consider the relevant decisions. In — 'A. K. Gopalan v. State of Madras', AIR 1950 SC 27, the Supreme Court of India have laid down certain principles which in my view can usefully be applied to the present case.

There the question was whether the Preventive Detention Act, 1950, was 'ultra vires' the Constitution. The Supreme Court held that the said Act is 'intra vires' the Constitution, with the exception of S. 14 which is illegal and 'ultra vires'. It was contended in that case that the detention came within the provisions of Art. 22 relating to preventive detention and therefore Art. 19 (i) (d) would not apply. At page 35, Kania C. J. says:

"In my opinion, such result is clearly not the outcome of the Constitution. The article has to be read without any pre-conceived notions. So read, it clearly means that the legislation to be examined must be directly in respect of one of the rights mentioned in the sub-clauses. If there is a legislation directly attempting to control a citizen's freedom of speech or expression, or his right to assemble peacefully and without arms, etc., the question whether that legislation is saved by the relevant saving clause of Art. 19 will arise. If, however, the legislation is not directly in respect of any of these subjects, but as a result of the operation of other legislation for instance for punitive or preventive detention, his right under any of these sub-clauses is abridged, the question of the application of Art. 19 does not arise. The true approach is only to consider the directness of the legislation and not what will be the result of the detention otherwise valid, on the mode of the detenu's life."

(7) Das J. resolves the conflict in a slightly different way. The learned Judge observed at page 113:

"To summarise, the freedom of the person is not the result of Art. 19. Article 19 only deals with certain particular rights which, in their origin and inception, are attributes of the freedom of the person but being of great importance are regarded as specific and independent rights. It does not deal with the freedom of the person as such. Article 19 (i) (d) protected a specific aspect of the right of free locomotion, namely, the right to move freely throughout the territory of India which is regarded as a special privilege or right of an Indian citizen and is protected as such. The protection of Art. 19 is conterminous with the legal capacity of a citizen to exercise the rights protected thereby, for sub-clauses (a) to (e) and (g) of Art. 19 (i) postulate the freedom of the person which alone can ensure the capacity to exercise the rights protected by those sub-clauses. A citizen who loses the freedom of his person by being lawfully detained whether as a result of a conviction for an offence or as a result of preventive detention loses his capacity to exercise those rights and, therefore, has none of the rights which sub-clauses (a) to (e) and (g) may protect. In my judgment, Art. 19 has no bearing on the question of the validity or otherwise of preventive detention and that being so, cl. (5) which prescribed a test of reasonableness to be defined and applied by the court has no application at all."

In — 'Kameshwar Singh v. Province of Bihar', AIR 1950 Pat 392 (SB), the question of the Bihar State Management of Estates and Tenures Act was raised. It was argued in that case that Art. 31 is in the nature of an exception to the general rule laid down in Article 19 (i) (f). Sinha J. in repelling that argument made the following observations at page 418:

"Article 31 cannot be read as an exception to the fundamental rights as declared in Art. 19 (i) (f). But certainly the two articles have got to be read together in order to give full effect to the intention of the Constituent Assembly. Article 31 is as much a part of the fundamental rights contained in Part III of the Constitution as Art. 19; but, whereas Art. 19 comes under "Right to Freedom", Article 31 comes under "Right to Property". Hence, according to the well-established rule of interpretation, where the same statute makes general provisions in respect of a particular subject-matter, and makes specific provisions with respect to a special category, the latter must prevail over the general. It is also well settled that different provisions of the same statute, which are apparently inconsistent with each other, should be so construed as to give effect to all the provisions, so as to avoid a repugnancy."

(8) In this connection the observations of the learned Judges of the Supreme Court in — 'Chiranjit Lal v. Union of India', 1950 SCR 869, and that of the High Court of Calcutta in — 'Sudhindranath v. Sailendranath', 87 Cal LJ 140, may also be usefully referred to.

(9) The following three principles may therefore be borne in mind in approaching the question to be decided in this case:



1. The general provision must give place to the specific provision;

2. The pith and substance or the directness of the legislation, and

3. Whether the right sought to be protected under Art. 19 has been taken away by legislation under another appropriate article?

In the instant case, under S. 3 (3), Madras Buildings (Lease and Rent Control) Act, 1949, the authorised officer requisitioned the ground floor of the petitioner's house for the occupation of Sri Lakshmi Venkataraman, Inspector of Police, Crime Branch, Madras, for residential purposes. Under Article 31 (2) no property shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession unless the law provides a compensation for the property taken possession of and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given. Item 32 of the Second List read with entry 42 of the III list gives power to the legislature to make such a law. The Legislature, therefore, can make a law, as in the present case, empowering the authorised officer to requisition the property of a person. It would be valid if it were for a public purpose and if the law provides for compensation.

Under S. 3 (3) the authorised officer can require the property for purposes of the State or Central Government or of any local authority or of any public institution under the control of any such Government or for the occupation of any officer of such Government. The question is whether the requisition of a house or a building for the occupation of an officer of Government is a public purpose within the meaning of Art. 31. In — *Manohar Ramakrishna v. G. G. Desai*, AIR 1951 Nag 33, the learned Judges in dealing with the provisions of the C. P. and Berar Accommodation (Requisition) Act (63 of 1948), expressed the view that a requisition for accommodating a Government servant is a public purpose. At page 36 the learned Judge stated:

"It is said that the 'public purpose' contemplated by the clause must be read such as would 'bring a return to the public'. Section 3 (1) enables the requisitioning accommodation only for the purposes of 'providing residence for any person holding an office of profit under the Crown or for locating any public office of the Central or the Provincial Government or local authority'. Indubitably a public office, whether of the Central or Provincial (now Union or State) Government or a local authority exists for the benefit of the public and requisitioning accommodation for locating such office is a 'public purpose'. Similarly, a person holding an office of profit under the Government is charged with the performance of public duties. Such a person must, for enabling him to discharge his duties, be housed and so, in our opinion, requisitioning accommodation for him would be as much a public purpose as would be the location of a public office."

(10) I agree with the said observations. An officer of Government cannot satisfactorily discharge his duties if he is not given accommodation in the place where he is employed. In an over-populated city like Madras, when it is very difficult to find houses for accommodation, I cannot say that the requisition of a house

for housing a Government servant is not a public purpose, for the interests of the Government and that of the public would necessarily suffer if their officers are not properly housed. As regards compensation, suitable provisions are made in the Madras Buildings (Lease and Rent Control) Act, 1949 for fixing the rent. The terms of the tenancy may be fixed by agreement, and if it is not possible, through civil courts. The Act also lays down the principles for fixing the rent.

(11) Learned counsel for the petitioner contended that Art. 31 has no application as it deals with a total deprivation of property, whereas the Madras Buildings (Lease and Rent Control) Act, 1949, regulates the letting of residential and non-residential buildings and controls the rents of such buildings and prevents unreasonable eviction of tenants therefrom. It is not correct to say that Art. 31 deals only with total deprivation of property. Under Art. 31 (1) no person shall be deprived of his property save by authority of law. Article 31 (2) deals with acquisition and taking possession. Acquisition means actual transference of property whereas taking possession of property need not imply a total deprivation of the ownership of property. The title to the property may continue in the owner but he may be dispossessed for a public purpose. Item 36 of List II provides both for acquisition and requisition of property.

I cannot therefore agree with the contention that requisition of property, which does not involve a total deprivation of the property from the owner, does not come within the meaning of Art. 31. Nor can I agree with the contention that the Madras Buildings (Lease and Rent Control) Act, 1949, does not deal with the subject-matter covered by Art. 31 of the Constitution of India. Section 3 (3) specifically enables the Government or the authorised officer to require any building for the purpose of the State. They can take possession of the same subject to the terms prescribed thereunder. The taking of possession under S. 3(3) is certainly covered by the words "taken possession of" in Art. 31 (2) of the Constitution of India.

(12) The subject-matter directly comes under Art. 31. Article 31 being a special article, excludes the operation of the general article, Art. 19. As the building was taken possession of under the law validly made, the petitioner is not protected by the provisions of Art. 19, for Art. 19 (i) (f) can be invoked only if the petitioner is legally entitled to use his property.

(13) I therefore hold that no right under Art. 19 has been infringed by the order of the Accommodation Controller.

(14) In this view it is not necessary to express my opinion on the connotation of the word "hold" in Art. 19 (i) (f) or on the question whether in the circumstances of the case the requisition of the property for a police officer is a reasonable restriction in the interests of the general public on the right of the petitioner to use his premises. In the result the petition is dismissed with costs. Advocate's fee Rs. 100.

A/V.R.B.

Petition dismissed.



A.I.R. 1953 MADRAS 257 (Vol. 40, C. N. 96)

SUBBA RAO J.

Fathima Bi, Petitioner v. The State of Madras, represented by the Accommodation Controller, Madras, Respondent.

Writ Petn. No. 280 of 1951, D/- 7-8-1952.

(a) Houses and Rents — Madras Buildings (Lease and Rent Control) Act (25 of 1949) (as amended by Madras Act 8 of 1951), S. 3(1)(a) and (8) — Tenant in possession in contravention of S. 3(1)(a) — Eviction under S. 3(8).

Occupation of a building by a landlord or his tenant without issuing notice under S. 3(1)(a), which is a part of the general scheme of requisition, is certainly a contravention of the provisions of the section and a tenant in possession in contravention of that sub-section is liable to be summarily evicted under S. 3(8).

(Para 5)

(b) Houses and Rents — Madras Buildings (Lease and Rent Control) Act (25 of 1949) (as amended by Madras Act 8 of 1951), S. 3(8) — Section does not infringe Art. 19(1)(f) of Constitution — (Constitution of India, Arts. 19(1)(f) and 31(2)).

Section 3(8) is not bad as being an unreasonable restriction on the exercise of the fundamental rights guaranteed under Art. 19(1)(f) of the Constitution. The subject-matter of requisition directly comes under Art. 31 which excludes the general Art. 19.

(Para 6)

(c) Houses and Rents — Madras Buildings (Lease and Rent Control) Act (25 of 1949) (as amended by Madras Act 8 of 1951), S. 3(8) — Tenant's possession under void lease — Right to compensate — (Constitution of India, Art. 31(2)).

A lease in contravention of S. 3 is void. The possession of a tenant under such a void lease would only be permissive possession not in his own right, but for and on behalf of the landlord, in which case it would be the dispossession of the landlord who would be compensated under the provisions of the Act and the tenant can be dispossessed without any compensation being paid to him.

(Para 7)

(d) Houses and Rents — Madras Buildings (Lease and Rent Control) Act (25 of 1949) (as amended by Madras Act 8 of 1951), S. 3(8) — Section does not offend Art. 20 of Constitution — (Constitution of India, Art. 20). (Para 8)

(e) Houses and Rents — Madras Buildings (Lease and Rent Control) Act (25 of 1949) (as amended by Madras Act 8 of 1951), S. 3(8)(a) and Explanation — Retrospective operation.

In view of the clear provisions of the Explanation, S. 3(8)(a) must be given retrospective operation.

(Para 9)

R. Mathrubhutham, for Petitioner; V. P. Sarathi, for the Govt. Pleader, for the State.

REFERENCE.....

Para.

('52) C. M. P. No. 6628 of 1951, D/- 6-8-1952:

(AIR 1953 Mad 252)

6

ORDER: This is an application for issuing a writ of certiorari to quash the order of the

1953 Mad./33 &amp; 34

Accommodation Controller dated 17-7-1951 and 4-8-1951. The petitioner is the owner of the house and premises No. 1/3 Jones Street, G. T. Madras. On 15-1-1951 one Fernando wrote a letter to the Accommodation Controller stating that he was a tenant of the said premises and that he was vacating the same on 15-1-1951. After making some enquiries, on 7-2-1951, the Accommodation Controller issued a notice to the petitioner under S. 3(1), Madras Buildings (Lease and Rent Control) Act, 1949, (hereinafter called the Act) calling for particulars and intimating her that the premises have to be kept vacant for seven days from the date of the furnishing of the particulars. The petitioner did not reply to that notice. On 25-4-1951 a complaint was filed in the court of the Chief Presidency Magistrate and the petitioner was fined a sum of Rs. 75.

(2) The Accommodation Controller allotted the house to one Waters. As the petitioner did not give peaceful possession, on 4-8-1951 the respondent issued a notice under S. 3(8) of the Act directing the petitioner to deliver possession and also stating that if no vacant possession was given necessary steps would be taken to obtain the same. The petitioner states that the said premises is a non-residential house and that she has let the same to one Abdulla Sait in or about the end of 1950 and since that time he has been carrying on business in the said premises. She further alleges that the monthly rent of the building is less than Rs. 50 and therefore she is not bound in law to give the notice to the Accommodation Controller.

(3) Learned counsel appearing for the petitioner raised before me various legal contentions questioning the validity of the requisition. I shall proceed to deal with them 'in seriatim'.

(4) The first argument is that the tenant has not occupied the building in contravention of the provisions of S. 3(4) prohibiting the letting of the building, which would come into play only if the statutory notice was given and that in the instant case such notice was not given. This argument appears to be plausible, but, in my view, not sound. To appreciate this contention the following provisions of the Act may be read:

" S. 3(1)(a): Every landlord shall, within seven days after the building becomes vacant by his ceasing to occupy it, or by the termination of a tenancy, or by release from requisition give notice of the vacancy in writing to the Officer authorised in that behalf by the State Government (hereinafter in the section referred to as the 'authorised officer').

S. 3(3): If, within ten days of the receipt by the authorised officer of a notice under sub-s. (1) or sub-s. (2), the State Government or the authorised officer does not intimate to the landlord in writing that the building is required for the purposes of the State or Central Government or of any local authority or of any public institution under the control of any such Government or for the occupation of any officer of such Government, the landlord shall be at liberty to let the building to any tenant or to occupy it himself.

S. 3(4): The landlord shall not let the building to a tenant or occupy it himself, before the expiry of the period of ten days specified in sub-s. (3), unless in the mean-



time he has received intimation that the building is not required for the purposes or for occupation by any of the officers, specified in that sub-section.

S. 3 (8) (a): Any officer empowered by the State Government in this behalf may summarily dispossess:

(i) any landlord, tenant or other person occupying any building in contravention of the provisions of this section or any landlord who fails to deliver to the State Government possession of any building in respect of which they are deemed to be the tenants by virtue of this section,..... and take possession of the building including any portion thereof which may have been sub-let;

Explanation: The provisions of this clause shall apply also to cases which arose before the commencement of the Madras Buildings (Lease and Rent Control) Act, 1951.

(5) Sections 3 (1), (3) and (4) are component parts of the scheme of requisition. The scheme comprises five stages:

1. The landlord gives notice of the vacancy to the authorised officer within seven days of the vacancy;

2. Within ten days of the receipt of the notice the State Government or authorised officer intimates to the landlord in writing that the building is required for the purpose of the State;

3. During the prescribed period the landlord is prohibited from letting the house;

4. If no intimation is given within the prescribed period the landlord is at liberty to let the same to whomsoever he likes;

5. If the landlord or any person occupying the building fails to deliver possession in contravention of the provisions of the Act, an officer appointed by the State may summarily dispossess him.

It will be seen from the other provisions of S. 3 (8) that an officer appointed by the State can dispossess a person occupying a house in contravention of the provisions of the section, be it noted not in contravention of S. 3 (3) or S. 3 (4) alone. Occupation of the building by a landlord or his tenant without issuing notice under S. 3 (1) (a), which, as I already stated, is a part of the general scheme of requisition, is certainly a contravention of the provisions of the section. As the tenant is now in possession in contravention of that sub-section, he is liable to be summarily evicted under S. 3 (8).

(6) Learned counsel then questioned the constitutional validity of S. 3 (8) read with its explanation giving it retrospective operation. He argued that the said section is bad as being an unreasonable restriction on the exercise of the fundamental rights guaranteed under Art. 19 (1) (f), Constitution of India. It is not necessary to consider this argument as I held in — *Nataraja Mudaliar v. Madras State*, C. M. P. No. 6628 of 1951 (Mad), that the requisition of a house under the Act does not offend the fundamental right under Art. 19, as the subject-matter directly comes under Art. 31 of the Constitution. In that judgment I observed:

"The subject-matter directly comes under Art. 31. Article 31 being a special Article, excludes the operation of a general Article, Art. 19. As the building was taken possession under a law validly made, the petnr.

is not protected by the provisions of Art. 19 for Art. 19 (1) (f) can be invoked only if the petitioner is legally entitled to use his property. I therefore hold that no right under Art. 19 has been infringed by the order of the Accommodation Controller."

Following that judgment I negative this contention.

(7) Even so it was contended that the provisions of that section in so far as they authorise an officer to take possession of the property from the tenant without paying or providing for the payment of the compensation contravene the provisions of Art. 31 (2), Constitution of India, and, therefore, 'ultra vires', the Constitution. Article 31 (2) reads:

"No property, movable or immovable, including any interest in, or in any company, owning any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given."

This article therefore prohibits taking possession of any property without compensation. The contention is that the tenant has a legal interest in the leasehold property and the State cannot dispossess him without paying compensation. There would be considerable force in this argument if a person was in legal possession as a tenant and he was dispossessed; but if the tenancy was void, the possession of the tenant would only be permissive possession not in his own right, but for and on behalf of the landlord, in which case it would be the dispossession of the landlord who would be compensated under the provisions of the Act. The question therefore turns upon the subsidiary question whether the lease in contravention of the provisions of S. 3 was void.

In my view, the object of the agreement of lease in the present case was not only forbidden by law, but if permitted, it would defeat the provisions of the Act within the meaning of S. 23, Contract Act. The landlord was prohibited from letting the building before the expiry of ten days from the receipt of notice by the authorised officer. She was liable to be prosecuted for contravention of sub-ss. (1), (2) and (4) of S. 3 of the Act and indeed she was prosecuted and fined. She therefore let her building by committing an offence and also in the teeth of an express prohibition not to let till certain conditions were complied with. The lease was therefore void. In the circumstances the possession of the tenant must be deemed to be the possession of the landlord. The tenant has no separate and distinct right to be compensated for within the meaning of Art. 31 of the Constitution.

(8) The constitutional competence of the impugned provision was also based on the provisions of Art. 20, Constitution of India. Under Art. 20

"No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been in-



flicted under the law in force at the time of the commission of the offence."

Under this Article, a subsequent enactment cannot impose a greater penalty on an individual than that which could have been inflicted at the time he committed the offence. It was said that under Madras Act 8 of 1951, the provisions of S. 3 (8) of the Act were given retrospective operation and the effect of the amendment was that for an offence committed prior to the passing of that Act, a person could not only be convicted but could summarily be evicted, and therefore the penalty was greater than that could have been inflicted on him at the time when he committed the offence. There would be force in this argument if the power of summary eviction conferred on an officer empowered by the State under S. 3 (8) of the Act could be equated to the infliction of penalty for the commission of an offence. Under S. 16 of the Act, if any person contravenes any of the provisions of sub-ss. (1), (2), (4), (5) and (7) of S. 3 he shall be punishable with simple imprisonment for a term which may extend to three months or with the fine which may extend to two thousand rupees or with both.

That section was not amended by Act 8 of 1951. The punishment for the offence remains the same as it was before the amendment. The Amending Act only conferred the necessary executive power on the officer concerned to carry out the intention of the Legislature. Before the Amendment, the authorised officer can allot a house to an officer but cannot put him in possession if a recalcitrant landlord refused to comply with the order. The landlord might be punished in a criminal court; but there was no procedure to expel him summarily. That power of summary eviction is now given under S. 3 (8). An existing lacuna was filled up for the smooth working of the provisions of the Act. I cannot therefore hold that the impugned provision offends Art. 20, Constitution of India.

(9) It was then argued that S. 3 (8) (a) should not be given retrospective operation. This contention is obviously untenable in view of the clear provisions of the Explanation which says

"the provisions of this clause shall apply also to cases which arose before the commencement of the Madras Buildings (Lease and Rent Control) Amendment Act, 1951."

(10) The last argument was that the house was a non-residential house and that the rent for the same was below Rs. 50 and therefore the Accommodation Controller had no jurisdiction to requisition the same.

(11) Section 3 (9) says:

"Nothing contained in this section shall apply—

(a) to a residential building the monthly rent of which does not exceed twenty-five rupees; or

(b) to a non-residential building the monthly rent of which does not exceed fifty rupees."

In the affidavit filed in support of the petition, it was specifically stated that the building is a non-residential building. In the counter though there is an allegation that the house has always been used for residential purposes, the Accommodation Controller does not say definitely that he has decided the question having regard to the materials placed before him. In this case

the Accommodation Controller's jurisdiction to requisition the building mainly depends upon the question whether the building is a residential building; for it is not disputed that if it is a non-residential building, there is no power to requisition the same as the rent is below Rs. 50. His order, therefore, is set aside and he is directed to decide on the material that may be placed before him by the petitioner whether the building is a residential or non-residential building. As the petitioner failed on her main contentions, this is a fit case for directing the parties to bear their costs.

A/V.R.B.

Order set aside.

**A.I.R. 1953 MADRAS 259 (Vol. 40, C. N. 97)**

PANCHAPAKESA AYYAR J.

In re Simhadri Krishnamurthi, Accused.

Criminal Revn. Case No. 1561 of 1950 and Case Ref. No. 78 of 1950, D/- 27-7-1951.

Criminal P. C. (1898), Ss. 438, 417 — Reference by Sessions Judge in case of acquittal — Competency.

An Assistant Sessions Judge, relying upon an uncorrected copy of the Penal Code, took 16 years instead of 18 years as the relevant age and acquitted the accused of a charge of kidnapping a girl from the custody of her lawful guardian. There was no appeal by the Government nor any revision on behalf of the girl. The Sessions Judge discovered the patent error and referred the case to the High Court:

Held, as the referring officer was the Sessions Judge and not a District Magistrate it was certainly competent for him to refer the case to High Court under S. 438, Cr. P. C. He was not a person expected to move the State to file an appeal under S. 417, Cr. P. C. (The acquittal was set aside.): (1951) MWN (Cri) 16 Disting.

(Para 1)

Anno: Cr. P. C., S. 438 N. 3.

The Public Prosecutor, for State.

ORDER: I have perused the records and heard the learned Public Prosecutor. Nobody appears for the accused. No doubt there was an error committed by the learned Assistant Sessions Judge, Tenali, as he himself has admitted when he took 16 years instead of 18 years, (relying on an uncorrected copy of the Penal Code in his office not incorporating the amendment in this respect in 1949) as the relevant age. So he took the girl's consent to be valid and committed errors right along the line on that basis and acquitted the accused Simhadri Krishnamurthi who was charged with kidnapping the girl Tulasamma from the custody of her lawful guardian with intent to marry her against her will. The learned Sessions Judge, Guntur, discovered this patent error on perusing the calendar in the case and after calling for the records and examining them. He has made this reference. The Government had not filed an appeal under S. 417, Cr. P. C., and the aggrieved girl or her guardian has not filed a revision petition against the acquittal. The learned Public Prosecutor drew my attention to the decision of Somasundaram J. in — *Eravadu and others v. The State*, 1951 MWN Cri p. 16 (Referred Case No. 22 of 1950) wherein



the learned Judge held that a reference by a District Magistrate under S. 438, Cr. P. C. was not competent as his remedy was only by way of moving the State to file an appeal under S. 417, Cr. P. C. Here the referring officer is the Sessions Judge and not a District Magistrate and it is certainly competent for him to refer this case to this court under S. 438, Cr. P. C. as he is not the person expected to move the State to file an appeal under S. 417, Cr. P. C. So I accept the reference of the learned Sessions Judge and set aside the acquittal of Simhadri Krishnamurthi in S. C. No. 38 of 1950 by the Assistant Sessions Judge of Tenali and direct the case to be tried afresh by the Sessions Judge, Guntur.

B/D.R.R.

Reference accepted.

A.I.R. 1953 MADRAS 260 (Vol. 40, C. N. 98)

RAJAMANNAR C. J. AND VENKATARAMA AIYAR J.

N. Gopalan, Appellant v. The State of Madras, by the Collector of Tanjore, Respondent.

Letters Patent Appeal No. 263 of 1952, D/- 17-9-1952, from judgment of Subba Rao J., in W. P. No. 674 of 1952, D/- 16-9-1952.

†(a) Tenancy Laws — Madras Estates Land (Reduction of Rent) Second Amendment Act (35 of 1951), S. 1(2) — Act is not invalid as being inconsistent with Art. 372(1) of the Constitution — (Constitution of India, Art. 372(1)).

Section 1(2) of the Amending Act in so far as it makes the provisions of the Act retrospective is not inconsistent with Art. 372(1) of the Constitution and is not unconstitutional on that ground. Article 372(1) of the Constitution clearly recognises the contingency of an enactment which is declared to continue in force, being altered, repealed or amended by a competent Legislature. Since an alteration, repeal or amendment can be retrospective, it follows that Art. 372(1) would not render any alteration, repeal or amendment which is declared to be retrospective, invalid. (Para 3)

†(b) Tenancy Laws — Madras Estates Land (Reduction of Rent) Second Amendment Act (35 of 1951), S. 4 — Provision is not confiscatory and unconstitutional — (Constitution of India, Art. 31).

Section 4 of the Amending Act which provides for the adjustment of rent paid by a ryot before the commencement of the Amending Act is not confiscatory in nature and as such is not unconstitutional. There is no acquisition by the Government of any portion of the rent. The impugned provision is only a provision adjusting the account between landholder and tenant. Such a provision would be a provision pertaining to the relationship of landlord and tenant but would in no sense be a provision for acquisition of any interest in land by the Government. There is, therefore, no question of confiscation. AIR 1952 SC 252, Ref. (Para 4)

R. Kesava Iyengar and K. Parasaram, for Appellant.

REFERENCE .....

/Para  
(52) AIR 1952 SC 252: (65 Mad LW 527) 4

RAJAMANNAR C. J.: In this Appeal under the Letters Patent against the decision of Subba Rao J. dismissing the appellant's application for a writ of certiorari, the only ground taken is the invalidity of Madras Estates Land (Reduction of Rent) Second Amendment Act, 1951. That Act inserted a sub-section in S. 3 of the original Act and substituted a clause for a clause already existing in S. 4 of the principal Act and by S. 4 made provision for adjustment of rent paid by a ryot before the commencement of the amending Act. The excess was to be adjusted towards the rent payable by the ryot to the landholder for subsequent faslis. The ryot was in certain circumstances entitled to claim a refund of the amount remaining unadjusted from the landholder to whom it was paid.

(2) Mr. R. Kesava Aiyangar contended that the Act is unconstitutional for two reasons:

(1) because it was retrospective and to that extent was inconsistent with the provisions of Art. 372(1) of the Constitution and (2) because it was confiscatory in so far as it directed the adjustment of rent already paid before the commencement of the Constitution.

(3) Section 1(2) of the Amended Act runs thus:

"Sections 2 and 3 shall be deemed to have come into force on 7th January 1948."

That is the date on which the principal Act came into force. The argument of learned counsel is that Madras Act 30 of 1947 continued to be in force only by virtue of Art. 372(1) of the Constitution and any amendment, alteration or repeal of any provisions of that Act after 26th January 1950 can only be prospective from the date on which the amendment, alteration or repeal is made, or in any event only from 26th January 1950, but it cannot affect the Act as it stood on the date of the commencement of the Constitution in respect of a period prior to the Constitution. Article 372(1) runs thus:

"Notwithstanding the repeal by this Constitution of the enactments referred to in Art. 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority."

We are unable to agree with learned counsel that there is anything in this Article to support his contention. That Article clearly recognises the contingency of an enactment which is declared to continue in force, being altered, repealed or amended by a competent Legislature. Undeniably in this case the amendment in question has been made by a competent Legislature. It was not suggested that the Madras Legislature is not competent to pass any legislation which would have a retrospective effect. When an alteration, repeal or amendment is itself contemplated under Art. 372(1) and an alteration, repeal or amendment can be retrospective, it follows that Art. 372(1) would not render any alteration, repeal or amendment which is declared to be retrospective, invalid. We therefore reject this contention on behalf of the appellant.



(4) It was next contended that the provision in the Amending Act for adjustment of rents already paid is confiscatory in nature and therefore unconstitutional. Reliance was placed on the observations in the recent decision of the Supreme Court in — 'The State of Bihar v. Kameswar Singh', AIR 1952 SC 252, made in connection with the provision of the Bihar Act under which 50 per cent. of the arrears of rent collected by the Government was appropriated by the Government without payment of any compensation to the landholder. We fail to see how these observations can be of any help to the appellants here. There is no acquisition by the Government of any portion of the rent. The impugned provision is only a provision adjusting the account between landholder and tenant. Such a provision would be a provision pertaining to the relationship of landlord and tenant but would in no sense be a provision for acquisition of any interest in land by the Government. There is therefore no question of confiscation. It is true that the result of the enactment may be to prejudicially affect the rights of the appellants, but that itself would not make the provision illegal or unconstitutional.

(5) The appeal is therefore dismissed.

A/K.S.

Appeal dismissed.

**A.I.R. 1953 MADRAS 261 (Vol. 40, C. N. 99)**

**GOVINDA MENON**

**AND PANCHAPAKESA AYYAR JJ.**

Ruku-ul-Mulk S. Abdul Wazid and others, Appellants v. R. Viswanathan and others, Respondents.

O. S. Appeals Nos. 67 and 84 of 1950, D/- 1-11-1951.

**(a) Civil P. C. (1908), S. 13 — 'Foreign judgment' — Meaning of — (Civil P. C. (1908), S. 2 (9) and O. 20 R. 1).**

The expression 'foreign judgment' means 'an adjudication by a foreign Court upon the matter before it'. It does not mean a statement by a foreign judge of the reasons for his order, since, if that were the meaning of the judgment, S. 13 would not apply to an order where no reasons were given. AIR 1947 PC 192, Rel. on; AIR 1943 Bom 201, Ref. (Para 13)

Anno: Civil P. C., S. 13 N. 3.

**(b) Civil P. C. (1908), Ss. 13 and 11 — Matter directly adjudicated — Some of the items left unadjudicated — No res judicata with regard to them.**

The clause "the matter directly adjudicated upon" in S. 13 is narrower than the clause "the matter directly and substantially in issue" in S. 11. Thus, where a foreign judgment has directly adjudicated upon all the properties except four items of immovable properties the judgment would not operate as res judicata in respect of these four items. 1891-1 Ch 83 (sic); 1911-1 Ch 179; 1948-1 Ch 118, Disting. (Para 13)

Anno: Civil P. C., S. 13 N. 2; S. 11 N. 7.

**(c) Civil P. C. (1908), S. 13, Exceptions — Foreign judgment, when not conclusive — Scope of enquiry — Proof — Necessity of.**

Foreign judgment of a Court of competent jurisdiction regarding movables will

be conclusive unless it is vitiated by fraud, or is opposed to fundamental principles of natural justice such as want of due notice to the party affected thereby or denial of an opportunity to a party of presenting his case to the Court. Opposed to natural justice does not mean opposed to the notions of natural justice entertained by the Courts where the foreign judgment is sought to be used as a bar to a suit.

The fraud invalidating a foreign judgment may be either fraud on the part of the party in whose favour the judgment is given or fraud on the part of the Court pronouncing the judgment. AIR 1947 PC 192, Followed. (Paras 13, 14)

There is a distinction between vitiating judgments of Courts subordinate to one's jurisdiction on the grounds of suspected bias, interest etc. and vitiating the judgments of the foreign Courts. The foreign judgments are recognised by private international law only on the principles of comity between the nations, reciprocity, acquired rights and obligations, international usage and custom etc. and not on fundamental rights guaranteed by any world Constitution or world Court. Therefore, a foreign judgment of a competent Court not falling within the exceptions to S. 13 could be conclusive even if it gave no reasons for the judgment, which of course would be unthinkable in the case of Courts subordinate to the High Court. (1924) 1 KB 256; (1927) 2 KB 475; (1930) 143 LT 235; 1937-2 KB 1, Disting.; AIR 1947 PC 192, Relied on. (Para 15)

A mere error in procedure in a foreign Court will not affect its conclusive nature under S. 13, provided that error in procedure does not amount to a violation of natural justice under S. 13 (d) e.g. where a party is not given a notice of hearing of the case, or is not allowed an opportunity of representing his case to the Court. Errors in procedure, interest of slight nature (like using cars, eating dinners etc.) mere suspected bias, pungent observations of Judges at the hearings, a non-liberal attitude towards requests for constituting another Bench and not granting adjournments will be inadequate grounds for vitiating a foreign judgment of a competent Court, as not affecting the jurisdiction or coming under any other exceptions in S. 13. (Para 17)

Moreover, mere allegations and apprehensions will not do to vitiate a judgment because, mere assertion is not proof.

(Para 18)

Anno: Civil P. C., S. 13 N. 15 and 16.

**(d) Civil P. C. (1908), O. 41 R. 2 — New plea — Plea of fraud — (Civil P. C. (1908), Ss. 11 and 13).**

The point that a previous foreign judgment which was pleaded as a bar to the suit was already prepared and was ready before the hearing began but was delivered after the hearing, fraudulently pretending that it had been prepared only after the hearing and therefore was vitiated by fraud and should be treated as null and void, cannot be urged in appeal for the first time if not raised before the trial Court previously. (Para 14)

Anno: Civil P. C., O. 41 R. 2 N. 1.



Advocate General, for Appellants; C. E. Padmanabhan of Short Bawes and Co., for Respondents.

REFERENCES: Courtwise/Chronological/ Paras

(47) AIR 1947 PC 192: (74 Ind App 203)	13, 14, 15
(50) ILR (1950) Mad 862: (AIR 1950 PC 34)	17
(43) AIR 1943 Bom 201: (ILR (1943) Bom 366)	13
(45) 49 Cal WN 754	13
(51) 1951-1 Mad LJ 488: (AIR 1951 Mad 890)	12
(1891) 1 Ch 83 (Sic)	13
(1899) 1 Ch 781: (68 LJ Ch 281)	15, 16
(1911) 1 Ch 179: (80 LJCh 274)	13
(1930) 1 Ch 377: (99 LJCh 67)	13
(1948) 1 Ch 118: (1947-2 All ER 864)	13
(1870) 4 HL 414: (39 LJCP 350)	14
(1924) 1 KB 256: (93 LJKB 129)	15
(1927) 2 KB 475: (96 LJKB 530)	15
(1937) 2 KB 1: (106 LJKB 344)	15
(1930) 143 LT 235: (1930-2 KB 29)	15
(1894) 2 QB 667: (71 LT 308)	15
(1882) 10 QBD 295: (52 LJQB 1)	14
(1890) 25 QBD 310: (63 LT 128)	14
(1837) 8 Sim 279: (6 LJ (NS) Ch 226)	16

**JUDGMENT:** These are two appeals against the judgment of our learned brother, Rajagopalan, J., in C. S. No. 214 of 1944 on the Original Side of this Court, holding that the judgment of the Mysore High Court, consisting of Medappa C. J., and Balakrishnaiya and Mallappa JJ., operated as *res judicata* in this suit regarding the movable properties mentioned therein, subject to proof of pecuniary or other interest of Medappa C. J., in a 'Mercedes' Car, belonging to the estate of the deceased Ramalinga, and proof of his having attempted, in October 1945 and the beginning of 1946, to dissuade Mr. L. S. Raju, Advocate for the plaintiffs, from appearing for the plaintiffs, Ramalinga's sons, and making strong and unwarranted remarks against them, which two facts, if proved, would, in the opinion of our learned Brother, make Medappa C. J., so interested in the subject-matter of the suit or in the parties to the suit as to make him disqualified to be a Judge in the matter, as he would be practically judging his own cause and violating the principle of '*audi alteram partem*', and make the trial '*coram non iudice*', and the judgment a nullity. Regarding the four items of immovables situated in Madras and included in C. S. No. 214 of 1944, our learned brother held that there was no question of applying the principle of '*res judicata*' under S. 13, C. P. C., since there was no attempt at any adjudication of the title to those four items by the Mysore Courts, as three of them (included in the Bangalore City Suit) were specifically excluded from the decree, on objection being taken by the defendants (executors) to the inclusion of properties outside the jurisdiction of the Mysore Courts, and the fourth item had not been included in the Mysore suits at all.

(2) The facts may briefly be stated. V. Ramalinga, the father of the plaintiffs, was a resident of Bangalore in Mysore State. He died at Bangalore on 18-12-1942. He had been extremely affectionate and considerate towards his wife, eldest son, Viswanathan, and other members of the family in the earlier stages and had tried to establish his eldest son, Viswanathan, in his prosperous business, he being worth over 20 lakhs of rupees and having in-

fluent connections and friends, but, it is said that he became, later on, disappointed with his eldest son's conduct and application to business, and felt himself insulted by the conduct of his wife, eldest son and other children, and so executed a will, dated 10-9-1942, some three months before his death, leaving to his wife, sons etc. only a comparatively paltry pittance and bequeathing almost his entire properties to charities claiming them all to be his self-acquired properties and therefore devisable by him by will. The properties were admittedly worth more than 20 lakhs and consisted of immovable properties situated in Bangalore cantonment, administered in those days by the British Resident in Mysore and subject to his Court, but admittedly part of Mysore State for purposes of sovereignty though appeals from the Resident's Court lay to the Privy Council till independence and retrocession, in Bangalore City, within the State of Mysore, and in Hospet, Madras City and other parts of Madras State. Ramalinga appointed three persons as executors to administer his estate after his death and conduct the charities he prescribed in the will. Those are the defendants in C. S. No. 214 of 1944.

(3) The executors obtained probate of the will from the District Judge, Civil and Military Station Bangalore Cantonment. An appeal to the Resident's Court by the sons and daughters of Ramalinga (plaintiffs here and others), who had entered 'caveat' failed. A further appeal was preferred by them to the Privy Council. Before that appeal came on for hearing before the Privy Council, the Cantonment area was retroceded to His Highness the Maharajah of Mysore. The Privy Council held, therefore, that they had no more jurisdiction to hear the appeal because Mysore had become an independent State not subject to their jurisdiction any more. An attempt was made to induce them to reconsider the matter, but they refused, by their order dated 12-12-1949, to reconsider the decision. The attempt of the plaintiffs and other members of Ramalinga's family to get the appeals taken on file by the Supreme Court of India and decided there, also failed, apparently because the Supreme Court considered that Mysore had not yet come within its jurisdiction by the relevant date. So, the Privy Council refused to deal with the appeals as it had lost its jurisdiction and the Supreme Court refused to deal with the appeals as it had 'not got' jurisdiction by the relevant date. So, the plaintiffs fell between two stools and remained remediless in that matter.

(4) The Executors applied also to this Court for probate with reference to the properties situated within the jurisdiction of this Court, and Chandrasekhara Aiyar J., on 17-7-1944 in O. P. No. 45 of 1944, granted probate to the executors regarding the properties situated within the jurisdiction of this Court. There was no appeal against that grant by any member of Ramalinga's family, apparently because the proceedings here were merely complementary to those instituted in the Court of the District Judge, Bangalore Cantonment, and appeals were filed in the Privy Council regarding the very same matter.

(5) The plaintiffs here, the three sons of Ramalinga, contended that the properties dealt with under the will of Ramalinga were the properties of the undivided Hindu family, of which he and they were members, and, so could



not be bequeathed under the will under the Hindu law applicable to the parties, which is admitted to be the same in Mysore State as well as in Madras State. They at first instituted two suits, O. S. No. 56 of 1942-1943 in the District Court, Bangalore and O. S. 60 of 1944 in the District Court, Bangalore Cantonment, for establishing their contention that the properties were joint family properties, and that the will was null and void and not binding on them, and for directing the executors (defendants 1 to 3) to deliver possession of the properties to them and the 4th defendant, their mother, and for rendering an account to them of their dealings with the properties and the profits, etc., and for costs. The Cantonment suit, of course, comprised only the movables and immovables of Ramalinga situated within the Bangalore Cantonment limits. The Bangalore City suit comprised not only the movables and immovables situated in Mysore State, but also the movables and immovables of Ramalinga situated in Madras State with the exception of one item of immovable property.

On objection being taken by the executors-defendants that the Bangalore City Court had no jurisdiction over the movables and immovables situated in Madras State, the plaintiffs filed C. S. No. 214 of 1944 in this Court, regarding the movables and immovables situated in Madras State, for the same reliefs. These movables consist of sugar shares, Oriental Assurance Company's shares, etc., valued at 4 to 6 lakhs now, and of all four items of immovable properties (one of which has been converted into cash subsequently) worth some four lakhs. The trial of the Madras suit was deferred until the completion of the trial of the suits in Bangalore City and Bangalore Cantonment, as the same witnesses and documents would obviously be required in all the three suits. Before the Cantonment suit was ready for trial, the retrocession intervened. So, both the Cantonment and the Bangalore City suits were tried by the same Judge, Mr. Ramakrishna Iyengar, the Bangalore City suit being renumbered as O. S. No. 61A of 1947. They were disposed of by him by a single judgment, though, of course, there were separate decrees in each of these suits. The District Judge, Mr. Ramakrishna Iyengar, accepted the plaintiff's case and decreed both the suits, on 5-12-1947, but excluded the four items of immovable properties situated in Madras State from the scope of his decree, obviously because of the rule of private international law that a Court has no jurisdiction to entertain an action for the determination of the title to or the right to the possession of any immovable property situated outside its jurisdiction (mentioned by Dicey as Rules 20 and 66 in his book, *Conflict of Laws*).

(6) The executors-defendants in both the suits appealed to the Mysore High Court against both the decrees. The appeal against the Cantonment suit was numbered as R. A. No. 104 and the appeal against the Bangalore City suit was numbered as R. A. No. 109 of 1947-48 on the file of the Mysore High Court. These two appeals were consolidated, and heard, in the first instance, by a Bench of the Mysore High Court, consisting of Balakrishnaiya and Kandaswami Pillai, JJ. Before the appeals were heard, the plaintiffs-respondents applied to the Mysore High Court, in I. A. No. 6, for a stay of the hearing of the appeal till the disposal

of the appeals to the Privy Council against the grant of the probate. That prayer was not granted, though I. A. No. 6 itself was formally dismissed only on 15-3-1949, after the appeals before the Division Bench were heard. The plaintiffs-respondents filed also I. A. No. 8 to record a compromise, which had according to them, been arrived at between them and the appellants. That application also was dismissed On 15-3-1949. On 2-4-1949, the Bench of the Mysore High Court delivered its judgment in the two appeals. Kandaswami Pillai J., held that the decrees of the District Judge in favour of the plaintiffs should be confirmed, while Balakrishnaiya J., held that the appeals should be allowed and the two suits dismissed. Balakrishnaiya J., the senior Judge, directed, under S. 15 (3) of the Mysore High Court Act, as follows:

"Since a difference of opinion is expressed by my learned colleague on material questions involved in the appeals, these appeals are referred to a Full Bench for decision under S. 15(3) of the High Court Act."

(7) A Full Bench of the Mysore High Court had, therefore, to be constituted to hear the matter in Law and on the facts. The plaintiffs strongly objected to the Full Bench being constituted of Medappa C. J., Balakrishnaiya J., and Mallappa J., as proposed, on various grounds. Mallappa J., was not objected to on any specific ground carrying conviction even to the plaintiffs themselves, and, so, the objection to his sitting in the Full Bench was eventually dropped. Balakrishnaiya J., was objected to as having already formed an opinion against the plaintiffs' contentions in the case and delivered judgment against them in the Bench decision, and therefore unfit to sit on the Full Bench which had to consider not merely the law but also the very facts on which he had come to a definite conclusion against the plaintiffs but no interest or bias or partiality or misconduct was alleged against him. Medappa C. J., was objected to on the ground that he had heard the application for probate of Ramalinga's will when he was District Judge of Bangalore Cantonment, and had formed an opinion against the plaintiffs' contentions and overruled their contention that the will had been brought about by undue influence on Ramalinga by two enemies of theirs, converting Ramalinga's expressed original intention to bequeath at least 3/4ths of his properties to his wife and children into a decision to practically cut them off with a pittance. It was also alleged that Medappa C. J., was unfit to sit on the Full Bench, because he and his wife and children had, during the probate proceedings in the Cantonment in 1943 and subsequently, (till 1945, when the car was sold) been using the 'Mercedes' car of Ramalinga's estate for going to Court, school, etc., practically as if the car belonged to him, and had thus a strong reason for favouring the executors who had allowed him the use of the car, and also because, in October 1945 and the beginning of 1946, he had attempted to dissuade Mr. L. S. Raju, the plaintiffs' Counsel, from appearing for them, and had made strong and unwarranted remarks to him against them. The plaintiffs filed I. A. No. 14 for a re-constitution of the Bench on the above grounds. That petition was dismissed, and a Full Bench was constituted of these three learned Judges alone. The attempt of the plaintiffs to move the Government of Mysore to



change the constitution of the Full Bench, and to constitute another Full Bench consisting of 'ad hoc' Judges, if necessary, also failed.

(8) The plaintiffs next asked for an adjournment of the hearing of the appeals in I. A. No. 15, so that, they might get Sir Alladi Krishnaswami Ayyar, who was then said to be in Delhi and could not appear at the hearing, or Sri Sarat Chandra Bose who was intended to be briefed, failing Sir Alladi Krishnaswami Ayyar. Neither of these eminent Counsel had requested the Court for an adjournment. I. A. No. 15 was rejected on 20-7-49 by the learned C. J. I. A. No. 16 was then filed by the plffs. for another adjournment. All the three Judges of the Full Bench heard it. In that very application, the plaintiffs had objected at first to the presence of every one of the three Judges on the Full Bench. At the time of the hearing, they withdrew their objection to Mallappa J., being on the Full Bench, but persisted in their objections to the presence of the other two learned Judges. The three learned Judges overruled the objections of the plaintiffs and dismissed I. A. No. 16. Thereupon the Counsel for the plaintiffs asked for permission to withdraw from their appearance. That request also was rejected. All the same, when the two appeals were heard by the Full Bench, on 27-7-1949, the Plaintiffs and their Counsel did not participate in the hearing of the appeals. The appeals were thus virtually heard *ex parte*, and the judgment of the Full Bench in the appeals was delivered, by Mallappa, J. on 29-7-1949, allowing both the appeals of the executors and dismissing both the suits of the plaintiffs' the other two Judges concurred with him. The plaintiffs then filed I. A. Nos. 49, 50, 61 and 62 for reviewing the judgment of the Full Bench and for setting it aside on various grounds. All those petitions were heard by the same Full Bench and were dismissed. That marks the termination of the proceedings in Mysore State.

(9) In C. S. No. 214 of 1944, the judgment of the above Full Bench was contended, by the executors' Counsel, to operate as '*res judicata*' and to be conclusive, under S. 13, C. P. C. regarding the properties comprised in this suit, and to preclude the contention of the plaintiffs, that they were ancestral properties, from being gone into by this Court. It is on this preliminary issue, regarding '*res judicata*' under S. 13, that Rajagopalan J., delivered the judgment which is in appeal before us. The plaintiffs, who seem to have succeeded more than the defendants, under the decision on this issue, have filed O. S. A. No. 84 of 1950, contending that Rajagopalan J. ought not to have restricted the scope of the enquiry into proof of bias, interest partiality, misconduct, etc., vitiating the judgment of the Full Bench regarding the movables, to actual proof of bias, partiality, etc., or probable proof thereof, but should have acted on several well-known decisions of the House of the Lords, the Privy Council, and our High Courts, that a mere suspicion of partiality, bias, or misconduct on the part of the Judge by a party would be enough, and ought to have at least allowed the plaintiffs full scope for proving every one of their allegations of partiality, bias, misconduct, pre-formed opinion, etc., against Medappa C. J., and of pre-formed opinion against Balakrishnaiya, J. O. S. A. No. 67 of 1950 has been filed by the defendants-executors and is against the exclusion of the immovable properties from the scope of '*res*

*judicata*' in Rajagopalan J.'s order, and against the enquiry directed regarding the proof of interest, and bias by proof of possession of the estate 'Mercedes' Car by Medappa C. J., and his asking the plaintiffs counsel Mr. Raju to withdraw from his appearance for the plaintiffs in the Bangalore suit and making allegations to him against the plaintiffs, it was urged that, under private inter-national law, the contention of the plaintiffs regarding even the immovable properties could not be gone into as the finding of the Full Bench of the Mysore High Court that all the properties of Ramalinga were his self-acquired properties would be conclusive under S. 13, C. P. C., as it related to a matter directly adjudicated upon between the same parties and would not be affected by any of the exceptions and as the enquiry regarding the use of the motor car and the alleged attempt by Medappa C. J. to dissuade Mr. L. S. Raju from appearing for the plaintiffs and the allegations to him against the plaintiffs would be inexpedient and unwarranted under the rules of private inter-national law, though permissible, if alleged against a subordinate Judge, under the municipal law of a State.

(10) So, these appeals raise very important questions of private International Law which require careful consideration. Before proceeding further we may state a few well-settled principles of private inter-national law. As observed by Wolff, in his Private International Law, 1945 Edition, the recognition of foreign judgments and their enforcement is an important problem arising in international intercourse by reason of the extensive foreign trade between a country and foreign countries in these days, and the judgments obtained by merchants of one country in respect of their debts and claims, in foreign Courts, and also because of world wars 1 and 2 having made millions of people migrate from their home country to other countries (like the vast migrations from Pakistan to India and '*vice versa*' after partition) and the migrations of the Jews, Poles, etc., from their home-lands and the need to recognise various foreign judgments got by these unfortunate persons.

As Wolff observes, it is impossible to recognise all judgments of all Courts in any country all over the world, despite its manifest advantages, as the disadvantages are equally manifest in so unrestricted a recognition. In his own words,

"It is not advisable to trust every Court in the world to administer justice irreproachably. Bribery of Judges may have become so rare as to reduce this risk to a minimum; but in some countries unsatisfactory legal education, appointment of Judges from political motives, and the influence which the state or some powerful criminal organization within the State brings to bear on the Judges are considerable obstacles to a universal recognition of judgments. Further, even where there is no danger of any kind of corruption of courts, differences between two countries in their fundamental attitude to questions of morality or public policy must often make the recognition of some individual judgments seem undesirable. Finally, general recognition might result in grave injustice where the same relationship was regarded differently by the courts of two countries", as in cases of marriage, divorce, inheritance, etc.



(11) The extent to which foreign judgments will be recognised as conclusive in India has been clearly stated in S. 13, C. P. C. which runs as follows:

"A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim, litigating under the same title, except—

(a) where it has not been pronounced by a Court of competent jurisdiction;

(b) where it has not been given on the merits of the case;

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of British India in cases in which such law is applicable;

(d) where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) where it has been obtained by fraud;

(f) where it sustains a claim founded on a breach of any law in force in British India."

(12) Needless to say, S. 13, C. P. C. is based on well-known decisions of the House of Lords, Privy Council and other Courts in England and abroad, and the High Courts in India. Though, after the coming into force of the Constitution of India on 26-1-1950, and the Independence of India and the severance of India's dependence on the King of England and the Privy Council, the rulings of the Privy Council are not legally binding on Courts in India, they are treated with very great respect, as held by the Federal Court and the Supreme Court and various High Courts including our own, see the Bench decision in — '*Lakshmi Narasa Reddi v. Official Receiver, Sree Films, Ltd.*', 1951-1 Mad L J 488 at p. 492. That is why counsel on both sides have profusely quoted from English rulings and text-books, Indian rulings being few, as India was not having this question of 'foreign judgments' frequently till she became independent in 1947. We may add that the qualities required in Judges, and regarding a court of competent jurisdiction and rules of natural justice, and what constitutes fraud and the effect of fraud on judgments, do not differ appreciably in English law and the law of the Indian Republic. The Constitution of India accords the same recognition to foreign judgments as S. 13 C. P. C. does, and has not altered the law of India in this respect. We may go further and say that even under the immemorial Hindu Law the views held regarding the qualities required in Judges and judgments and the views about natural justice were much the same as held in Indian courts now, and judgments were held to be null and void in cases of proved perjury, bribery and fraud and also where the party was not given an opportunity to be heard.

(13) We shall now state the well-settled principles of international private law regarding the recognition of judgments and the application to S. 13 to them, and discuss the merits of the contentions in these appeals. A "foreign judgment" has been defined by the Privy Council in — '*Brijlal v. Govindram*', AIR 1947 P C 192, confirming the view expressed by Beaumont, C. J. and Weston J., in the Bench decision of the Bombay High Court reported in — '*Brijlal v. Govindram*', AIR 1943 Bom 201, the Privy Council decision being given on appeal. The Privy Council has said that the expression

'foreign judgment' must be understood to mean 'an adjudication by a foreign Court upon the matter before it', and has added that it would be quite impracticable to hold that a foreign judgment means a statement by a foreign Judge of the reasons for his order, since, if that were the meaning of the judgment, S. 13, C. P. C., would not apply to an order where no reasons were given. It is clear to us that the Full Bench judgment is a foreign judgment, as mentioned in S. 13 within the definition accepted by the Privy Council. The phrase 'directly adjudicated upon between the same parties' in S. 13 also admits of little difficulty. It is clear from the Full Bench judgment that all the properties included in C. S. No. 214 of 1944 and the properties in Mysore State, including the Bangalore Cantonment, were directly adjudicated upon, except the four items of immovable properties included in this suit, regarding which there was no direct adjudication at all. We cannot agree with the learned Advocate-General, who appeared for the executors-appellants in O. S. A. No. 67 of 1950, that simply because all the properties of Ramalinga, movable and immovable, were held by the Full Bench to be the self-acquired properties of Ramalinga, and no exception was made, there was an adjudication that these four items of immovable properties, which were not covered by the decree of the trial Court, Bench Court or Full Bench, would be a matter directly adjudicated upon. When there was no decree at all regarding them, there cannot be any adjudication.

Besides, Dicey, Wolff and other authorities on private international law are emphatic that a municipal Court of a country has no jurisdiction to entertain an action for the determination of the title to or the right to the possession of immovables situated in foreign lands. The exception that where a municipal Court has jurisdiction to entertain a suit for administering an estate or trust and the property includes moveables or immovables situated abroad, the municipal Court may have jurisdiction to determine questions of title to the foreign immovables for purposes of the administration, mentioned as an exception to rule 20 by Dicey, and relied on by the learned Advocate-General, will have no application to this case for three reasons. First of all, the trial Court's decision and the decision of the Bench and the Full Bench in these cases were not in administration suits or proceedings, but in regular suits for recovery of properties from the executors, claiming them to be ancestral properties not devisable by Ramalinga by will. Secondly there was 'no decree or adjudication' regarding 'these four items', one of them not being included in the suits at all, and the other three being omitted from the decree after objection taken to jurisdiction. Thirdly, the learned Advocate-General had to confess that there was no direct decision in his favour. The decisions relied on by the learned Advocate-General, namely, — '*In re Piercy*', (1891) 1 Ch 83(Sic); — '*In re Hoyles*', (1911) 1 Ch 179 and — '*In re Duke of Wellington*', (1948) 1 Ch 118, will not prove the point raised by the appellants in O. S. A. No. 67 of 1950, as, though the lands in those cases were situated in Italy, Canada (Ontario), and Spain, the jurisdiction was assumed by the Courts in England and the party submitted to their jurisdiction, and there was 'no consideration or recognition of a foreign judgment and its applicability to lands in England at all'.



Besides, as already mentioned, the lands were 'covered' by the decree in those cases, and were 'not left out' of the decrees, as in our case, 'expressly owing to want of jurisdiction'. In — *In re Ross*, (1930) 1 Ch 377; it has been held that the 'lex loci' (local law) or 'lex situs' (law of country where the lands are situated) will govern immovables, though the law of domicile will govern movables. That is also the view taken in India, as in all civilised countries, see — *Khur Singh v. Achar Khasia*, 49 Cal W N 754.

It follows, therefore, that Rajagopalan J.'s judgment holding that 'res judicata' did not operate by virtue of the Full Bench judgment of the Mysore High Court regarding the four immovables was right, and must be confirmed, and the appeal, O. S. A. No. 67 of 1950, dismissed, regarding that matter. We may add that the clause "the matter directly adjudicated upon" in S. 13 C. P. C. is narrower than the clause "the matter directly and substantially in issue" in S. 11.

(14) We now come to the contention of the learned Advocate-General, in O. S. A. 67 of 1950, that Rajagopalan, J., was not justified in ordering any enquiry regarding the motor car allegation or the alleged attempt to dissuade Mr. L. S. Raju from appearing for the plaintiffs, and the contention of Mr. Padmanabha Mudaliar in O. S. A. No. 84 of 1950, that Rajagopalan, J., should have ignored the Full Bench judgment 'in toto' regarding the movables also, or, at least, directed a full and unrestricted enquiry into all allegations of interest, bias, partiality, misconduct, preconceived notions, and errors in procedure, on the part of Medappa, C. J., and Balakrishnayya, J. who took part in the Full Bench. The scope of an enquiry into a foreign judgment, for holding it not to be conclusive, has been laid down in the exceptions to S. 13, C. P. C., which will be conclusive in the matter, as can be inferred from the judgment of the Privy Council in — *Brijlal v. Govindram*, AIR 1947 P C 192. Dicey and Wolff also expressly say that the foreign judgment of a court of competent jurisdiction regarding movables will be conclusive unless it is vitiated by fraud, or, is opposed to fundamental principles of natural justice, as, for example, by want of due notice to the party affected thereby, or denial of an opportunity to a party of presenting his case to the Court, (under which last heading the alleged attempt of Medappa, C. J., to dissuade Mr. L. S. Raju, if proved, will fall.) Dicey says that the fraud invalidating a foreign judgment may be either 'fraud on the part of the party' in whose favour the judgment is given (as by bringing the Judge to give a decision in his favour, misleading the Judge into giving a decision in his favour, by proved false evidence, etc.), or 'fraud on the part of the Court' pronouncing the judgment (as, for example, by writing a judgment before hearing the parties and delivering that judgment after hearing the parties & pretending that it was written only after hearing the parties, or taking a bribe for delivering a corrupt and untenable decision in favour of a party).

Dicey says:

"There are two rules relating to these matters which have to be borne in mind and the joint operation of which gives rise to difficulty. First of all, there is the rule, which is perfectly well established and well known, that a party to an action can impeach the judg-

ment in it for fraud. Whether it is the judgment of an English Court or of a foreign Court does not matter; using general language, that is a general proposition, 'unconditional and undisputed'. Another general proposition which, speaking in equally general language, is perfectly well settled is, that when you bring an action on a foreign judgment, you cannot go into the merits which have been tried in the foreign Court."

Relying on the ruling in — *Abouloof v. Oppenheimer*, (1882) 10 Q B D 295 and — *Vadala v. Lawes*, (1890) 25 Q B D 310, he says that in cases of fraud bringing about a foreign judgment, the Municipal Court will have to go into the very facts which were investigated and which were in issue in the foreign Court. Mr. Padmanabha Mudaliar, for the appellants in O. S. A. No. 84 of 1950, urged before us that the Full Bench judgment was already prepared and was ready before the hearing before it began, and was delivered after the hearing, fraudulently pretending that it had been prepared only after the hearing, and, so, was vitiated by fraud and should be treated as null & void & as not operating as 'res judicata' even regarding the movables. The learned Advocate General urged before us that this point was not raised before Rajagopalan, J., and, so should not be allowed to be raised before us. We agree. The only thing urged by the plaintiffs, even according to Mr. Padmanabha Mudaliar, in their affidavit dated 28-1-1950, before Rajagopalan, J., was the following passage in the affidavit:

"One other feature which makes his judgment unacceptable is that, within 24 hours of the closing of arguments in the case I refused to appear or to be represented by counsel, he pronounces judgment on a complicated matter and accounts, requiring days of laborious study and research, thus giving room for suspicion that the judgment was a foregone conclusion, and that the Full Bench hearing was a farce. Memorials against such an unjudicial performance have been forwarded to the authorities concerned and we are awaiting their decision and action. In these circumstances, which I beg leave of Court to prove by evidence, the said Full Bench judgment is a nullity and the rights of the parties said to have been acquired thereunder are equally null and void."

It is clear to us that that passage only mentioned a preconceived opinion by the Judges, and that it has not actually covered the point of 'fraud' now raised before us, which is much wider and would have been stated in that form had that been the contention relied on, especially seeing that Dicey's rule would have covered it and invalidated the judgment, S. 13(d), C. P. C., also invalidating it, as the proceedings, in which the judgment was obtained, would then be clearly opposed to natural justice. So, we cannot allow the plaintiff-appellants to raise this point before us, and reject this argument, though, we agree that fraud, if alleged and proved, will indeed, vitiate every judgment, as held by the House of Lords in — *Castrique v. Imrie*, (1870) 4 H. L. 414 at p. 433 and accepted by all courts and text book writers.

(15) The next argument of Mr. Padmanabha Mudaliar, for the plaintiffs-appellants, was that, as per the ruling in — *Pemberton v. Hughes*, (1899) 1 Ch 781, a foreign judgment would only be recognised and acted upon in England, notwithstanding any irregularity of procedure



under the local law, provided the foreign Court had jurisdiction over the subject-matter and over the persons brought before it and the proceedings did not offend against 'English views of substantial justice'. He urged that the clause 'opposed to natural justice' in S. 13(d) would also mean 'opposed to notions of justice entertained in this Court'. He then relied on the rulings in — 'The King v. Sussex Justices; Ex parte McCarthy', (1924) 1 K B 256; — 'The King v. Essex Justice; Ex parte Perkins', (1927) 2 K B 475; — 'Rex v. Divine, Ex parte Walton', (1930) 143 L T 235 and — 'The King v. Salford Assessment Committee; Ex parte Ogden', (1937) 2 K B 1 and urged that, as per those rulings, justice must not only be done, but must also seem to be done, and that a mere apprehension in the minds of the parties that the decision would not be delivered by a Judge impartially, and without bias or partiality, is enough to vitiate a judgment delivered by such a Judge, especially when the party had protested before the Judge himself, as here, against his hearing the case, and that, therefore, the Full Bench judgment of the Mysore High Court would be null and void and would not operate as 'res judicata' even regarding the movables, and that even proof of the alleged acts of bias, partiality, misconduct, pre-conceived notion, etc., would be unnecessary in such a case.

We cannot agree. The rulings relied on by him are all 'rulings of a municipal Court' about courts subordinate to it, and simply vitiated the rulings of subordinate Courts, and 'not any foreign judgments'. The learned Advocate-General rightly urged that there is a distinction in this matter between vitiating the judgments of 'courts subordinate to one's jurisdiction' on the grounds of suspected bias, interest etc., initiating (sic) (and vitiating) the judgments of 'foreign Courts'. As he urged, foreign judgments are recognised by private international law only on the principle of 'comity between the nations, reciprocity, acquired rights, acquired obligations, international usage and custom' etc., and 'not as fundamental rights guaranteed by any world constitution or world court', the world not having reached that stage yet. That is why, as already noticed, the Privy Council in — 'Brijlal v. Govindram', AIR 1947 P. C. 192, agreeing with the Bombay High Court, held that a foreign judgment of a competent Court, not falling within the exceptions to S. 13, C. P. C., would be conclusive, even if it gave 'no reasons for the judgment', which, of course, would be unthinkable in the case of courts subordinate to the High Court or Privy Council. That is also why the Privy Council and the Bombay High Court held in that case an Indian Court cannot go into the question of the misconduct of arbitrators appointed by a foreign Court, by allowing unauthorised persons to approach them and discuss the merits of the arbitration matter with them, to be not vitiating the foreign judgment, as it did not go to the 'jurisdiction' of the foreign Court. Needless to say, the decision would have been different if the misconduct was of arbitrators appointed by a Court subordinate to the municipal Courts, and not by a foreign Court, though in — 'Eckersley v. Mersy Docks and Harbour Board', (1894) 2 Q B 667, it was held that the rule which applies to a Judge or other person holding judicial office, namely, that he ought not to hear cases in which he might be suspected of a bias

in favour of one of the parties does not apply to an arbitrator named in a contract, to whom both of the parties have agreed to refer disputes which might arise between them under it. The view of the Bombay High Court and the Privy Council in 'Brijlal v. Govindram', AIR 1947 P C 192, in the case of a foreign judgment, is in favour of the executors, and precludes, in our opinion, an enquiry into mere bias, interest, etc., of the Judges in a 'foreign' judgment.

(16) The learned Advocate-General urged that it is 'neither expedient nor proper' to apply to judgments of foreign Courts, which may be Courts of U. S. A., United Kingdom, U. S. S. R., or other powerful foreign country, in future, (and not merely of near-by Mysore, Pudukkottai, Indore or Bikaner, now part of India), now that India has attained independence and is having ambassadors in those countries and close relations with them, and that, therefore, any principle invalidating 'foreign judgments' not warranted by specific rulings or by authoritative text-book writers like Dicey and Wolff, and merely resting on an alleged bias, partiality, pre-conceived opinion, procedural irregularity, or alleged misconduct of Judges, like those raised by Mr. Padmanabha Mudaliar for the plaintiffs and not recognized by any rulings or responsible text-books writers should not be recognized, by any theory of logical extension, as that would act like a boomerang, recoils on Indian Courts and their judgments when relied on in foreign Courts to the great detriment of private international law and the worsening of relations between nations and countries. On this ground, he vigorously opposed the "logical extension" of the well-established principles of private international law, attempted by Rajagopalan, J., in directing an enquiry into the car episode and the attempt to dissuade Mr. L. S. Raju.

There is force in what he says so far as the car episode is concerned. The alleged attempt to dissuade Mr. L. S. Raju for the plaintiffs, if proved, will fall within the scope of well-established rules. We are not disposed to agree with Mr. Padmanabha Mudaliar in his extreme contentions. It is well settled that a mere error in procedure in a foreign court will not affect its conclusive nature under S. 13, C. P. C., provided that error in procedure does not amount to a violation of natural justice under S. 13 (d), C. P. C., as held in — 'Pemberton v. Hughes', (1899) 1 Ch. 781. If a judgment is pronounced by a foreign Court over persons within its jurisdiction and in a matter with which it is competent to deal, it was held in that case that English Courts will never investigate the propriety of the proceedings of the foreign Court unless they offend against the English views of substantial justice. Of course, one of the rules of 'substantial justice' all over the world is that a man shall not be a judge in his own cause, and that is the basis of the ruling in — 'Price v. Dewhurst', (1837) 3 Sim 279, where a judgment of a Danish Court, consisting of persons interested in the property in dispute, was held to be vitiated and was disregarded by the English Court. That is also the basis of disregarding foreign judgments where a party is not given notice of the hearing of the case, or is not allowed an opportunity of representing his case to the Court. This will all be opposed to natural justice under S. 13 (d), and will make the Court, in most cases, not



a Court of competent jurisdiction also, under S. 13 (a), C. P. C.

(17) It is, therefore, clear to us that errors in procedure, interest of slight nature (like using cars, eating marriage dinners etc.), mere suspected bias, pungent observations of judges at hearings, a non-liberal attitude towards requests for constituting another Bench and not hearing the case themselves, and not granting adjournments for engaging eminent counsel, will all be 'inadequate for vitiating' A Foreign Judgment of a competent court, as not affecting the jurisdiction or coming under any other exception mentioned in S. 13, C. P. C. The Full Bench had given its judgment regarding the movables on the merits of the case, under S. 13(b). That judgment was not founded on any incorrect view of international law, or a refusal to recognise the law of British India in cases in which such law is applicable, under S. 13(c), it being admitted before us that the Hindu law applicable to the parties and concerning the matter is the same in Mysore State as in Madras. Under the ruling of the Privy Council in — '*Nataraja v. Subbaraya*', ILR (1950) Mad. 862 (PC), where the law is the same, the judgment of the foreign Court regarding 'movables', over which it has jurisdiction, will be 'conclusive' under S. 13, C. P. C., unless vitiated by one of the exceptions in S. 13, C. P. C., like being opposed to natural justice etc.

(18) It follows from the above discussion that we do not agree with the view of Rajagopalan, J., that a 'logical extension' can be made of the well-settled principles of private international law on the point, and an enquiry into the motor car incident justified in order to show that Medappa, C. J. had so identified himself with the executors, who were alleged to have allowed him the use of the car, as to make him practically a person deciding his own cause, he having made the plaintiffs' cause his own. It is not as if the plaintiffs had alleged that Medappa, C. J., had claimed the Mercedes car to be 'his own' and was, therefore not a person competent to decide on the title to the properties under S. 13(a). It was merely alleged that he 'used the car' for himself and his wife and children. It was not even stated whether he had used the car 'free or for hire'. There was 'no claim' by the plaintiffs or others on Medappa, C. J. for any dues in respect of the alleged use of the car. The car itself was alleged to have been used in 1943-45 when Medappa, C. J. was District Judge, Bangalore Cantonment, and was hearing the probate application. It was sold away in 1945 or 1946, long before Medappa, C. J., sat on this Full Bench. It is too much to say that, from these facts, Medappa, C. J., would be 'coram non judice', or had identified himself with the executors, and that his taking part in the Full Bench would be opposed to 'natural justice'. Nor in our opinion, can the contention that Medappa, C. J., and Balakrishnayya J., were disqualified to sit on the Full Bench by reason of previous acquaintance with the matters in dispute and forming opinions regarding the matters in dispute, come within any of the exceptions to S. 13, C. P. C. as interpreted by the Privy Council or our High Courts.

Regarding Mallappa, J., nothing was alleged before us, and 'he' was the person who wrote the judgment of the Full Bench in question. Incidentally, that will also militate against the

allegation that the judgment of the Full Bench was ready before the hearing began, as it is 'this Judge', against whom nothing is alleged, who wrote the judgment, and not Medappa, C. J., or Balakrishnaiya, J. However, we entirely agree with Rajagopalan, J. that the matter of the attempt to dissuade Mr. L. S. Raju from appearing for the plaintiffs, and alleged statements to him defaming the plaintiffs, will fall within S. 13(a) and S. 13(b), C. P. C. and amount to a denial of an opportunity to a party of presenting his case to the Court properly, and make Medappa, C. J., 'coram non judice' and vitiate the Full Bench judgment, 'if proved'. We cannot agree with Mr. Padmanabha Mudaliar that a 'mere allegation' to that effect without enquiring into it, or proof of it, will do to vitiate the judgment. Allegations and apprehensions will not do to vitiate a judgment (municipal or foreign) under our law. It is one thing for a Judge himself to decide not to hear a case which the party does not want him to hear, because of alleged fears of the party that he will not get an impartial hearing and judgment; it is quite another thing to hold a judgment to be vitiated when such a request is refused, as here. So too, it is one thing for the executors to decide not to raise the question of 'res judicata' in this suit and rely on it, but to prove, by evidence let in in this suit, that the properties are the self-acquired properties of Ramalinga and not ancestral properties; it is quite another thing to compel them not to raise and rely on 'res judicata'. It is obvious that a party is entitled to rely on 'res judicata', and burke a trial, if he can do so under the law, and many reasons will operate on his mind in deciding on his course of action. What the law allows, a Court cannot disallow. So too, 'a mere statement' by a party of alleged misconduct disentitling a Judge (like Medappa, C. J.) to sit on a Full Bench, on the ground of incompetency or incongruity with natural justice, will not do. As observed by 'Jaimini', the Hindu expert on 'Mimamsa' and Evidence, two thousand years ago, 'mere assertion is not proof', and 'repeated assertions' cannot take the place of 'proof'. So, Rajagopalan J. was fully justified in holding that, even regarding the alleged attempt of Medappa, C. J., to dissuade Mr. L. S. Raju from appearing for the plaintiffs, and presenting their case to the Court, and thus disentitling him from sitting on the Full Bench, 'proof was necessary', and 'mere allegation or assertion would not do'.

(19) In the end, therefore, we are of opinion that O.S.A. No. 84 of 1950 deserves to be dismissed with costs, and that O. S. A. No. 67 of 1950 deserves to be allowed in part, regarding the deletion of the enquiry ordered by Rajagopalan, J. into the 'Mercedes' car incident, but has to be dismissed regarding all other findings, and we do so accordingly. The judgment of Rajagopalan, J., will be modified by deleting the enquiry into the 'Mercedes' car episode, and confirmed in all other respects. In O. S. A. No. 67 of 1950, all the parties are directed to bear their own costs.

A/H.G.P.

Order accordingly.

**A.I.R. 1953 MADRAS 268 (Vol. 40, C. N. 100)**  
GOVINDA MENON J.

Aravamudha Chettiar, Petitioner v. M. Abdul Khader Rowther, Respondent.

Civil Revn. Petn. No. 1577 of 1951, D/- 18-7-1952.



**Houses and Rents — Madras Buildings (Lease and Rent Control) Act (25 of 1949), S. 7 (2), Proviso and S. 20 — Controller advising eviction for non-payment of rent — Appellate Court can condone the default.**

An appeal is a continuation of the proceedings in the Court of first instance, and hence even after an order for eviction has been made by the Controller for non-payment of rent, if the tenant is able to satisfy the appellate Court that the non-payment was not due to any wilful neglect on his part, it is open to the appellate Court to condone the default and allow the tenant reasonable time to pay the rent under the Proviso to S. 7 (2): (1951) 2 MLJ 477, Rel. on. (Para 2)

K. Raman and K. S. Desikan, for Petitioner.

**JUDGMENT:** Both the lower courts have held that during the pendency of an appeal against an order made by the Rent Controller for eviction as a result of non-payment of rent, the appellate authority has no power to condone the non-payment by acceptance of rent. The proviso added to S. 7, sub-s. (2) of the Madras Buildings (Lease and Rent Control) Act states that when an application for eviction is made on the ground of the tenant's default to pay rent in time, if the Controller is satisfied that the default to pay rent was not wilful, the Controller may give the tenant a reasonable time not exceeding 15 days to pay or tender the rent due by him to the landlord upto the date of such payment or tender. This shows that the Controller has got to explain for the non-payment of rent and thereby condone the temporary default on the part of the tenant. If such condonation is made, then, the application by the landlord will be dismissed.

(2) Mr. K. Raman relies upon S. 7 (A) introduced by Madras Act, VIII of 1951 for the contention that this power vested in the Controller can be exercised also by the appellate court in an appeal from the order of eviction made by the Controller. Thus, his argument is to the effect that even after an order for eviction has been made by the Controller for non-payment of rent, if the tenant is able to satisfy the appellate court that the non-payment was not due to any wilful neglect on his part, it is open to the appellate Court to condone the default and allow the tenant to pay the rent. For this purpose, he relies upon the decision — '*Satyanarayana v. Venkataratnam*', 1951-2-MLJ 477. The facts of this case are somewhat similar to what we have to consider here and the question which was considered by the learned Chief Justice and Soma-sundaram J. was whether under the circumstances of that case, S. 20 of the Act applied and the learned Judges came to the conclusion that S. 20 applied. If S. 20 applied, it may be said that, during the pendency of the appeal, the order for eviction cannot be deemed to be final. It is common ground that an appeal is a continuation of the proceedings in the court of first instance and I am of opinion that the proviso can be made applicable to the facts of the present case. I therefore set aside the order of the lower Court and direct that the default for non-payment of rent be condoned. There will be no order as to costs.

B/D.R.R.

Application allowed.

\*A.I.R. 1953 MADRAS 269 (Vol. 40, C.N. 101)

GOVINDA MENON AND BASHEER  
AHMED SAYEED JJ.

In re K. V. V. Sarma, Manager, Gemini Studios, Madras, Accused-Appellant.

Criminal Appeal No. 252 of 1951, D/- 18-8-1952.

(a) Cinematograph Act (37 of 1952), Ss. 2 (c) and 10 — Production of films for exhibition — Movies — Nature of.

As regards the production of the films for exhibition, Court can take judicial notice of the fact that the completed production of a film is a highly technical and scientific process which requires the services of persons who are experts in that line. Movies are generally media of expression. What is finally distributed to the various picture houses for exhibition is not what existed at the initial stage, but it is the story, the plot or the idea that are worked up and knit into a continuous version that constitutes the entertainment that is catered to the public. (Paras 7, 8)

(b) Factories Act (1948), S. 2(m) — Difference between definitions of "factory" contained in Indian and English Act — English Factories Act (1937), S. 151(1).

According to the interpretation of the term "factory" in S. 151(1), English Factories Act, 1937, if an establishment satisfies the general words of the definition and if manual labour is employed in such an establishment it becomes a factory. But even if such an establishment cannot be brought within the wide terms of that definition, still as specifically bringing it within the definition are the various defined institutions in items (i) to (xii) of that section. The Indian Factories Act, 1948 does not borrow from the English Act the various amplifications mentioned as items (i) to (x) and (xii) and (xiii) of S. 151(1) of the English Act. (Para 10)

(c) Factories Act (1948), S. 2(k) — Exhibition of films by means of cinematograph — Conversion of raw film into finished product.

The definition of the term "manufacturing process" in S. 2(k) is very wide. The raw film used in the preparation of movies is an article or a substance and when by the process of treating or adapting, after the sounds are absorbed and the photos imprinted, it is rendered fit to be screened in a cinema theatre, then such a change would come within the meaning of the term "treating or adapting any articles or substance with a view to its use." Thus, the conversion of a raw film into a finished product comes within the definition of manufacturing process in the section: (1919) 2 B & Ald 345, Rel. on.

(Paras 13, 14)

(d) Factories Act (1948), S. 2(m) — Comparison between Indian and English Act.

It is futile to make comparisons between the English Factories Act and the Indian Factories Act; for one thing the idea underlying the Factories Act in England is the regulation of the employment of manual labour. There is no such restriction in the Factories Act prevalent in India. The salient fact that with the English statute before them the framers of the Indian Act did not restrict the operation



of the Act to manual labour, cannot be lost sight of. It is not surprising that the sponsors of the legislation in India thought it necessary to include intellectual as well as aesthetic and artistic portions of labour within the purview of the Factories Act. (Para 15)

(e) Factories Act (1948), S. 2(1) — "Whether for wages or not" — Construction.

The antithesis "or not" in the expression "whether for wages or not" in S. 2(1) is not intended to bring within the ambit of the definition persons who receive emoluments which cannot be termed as wages. The expression "whether for wages or not" means whether the person receives as remuneration for his services wages, or whether such a person is an apprentice learning work or is an honorary worker. (Para 17)

(f) Payment of Wages Act (1936), S. 2(vi) — "Wages" — Meaning of — Wages is compensation paid for work done for period less than a month — Factories Act (1948), S. 2(1).

The term 'wages' is not intended to apply to persons who receive a fairly good sum of money as monthly salary. On a construction of the various provisions of the Payment of Wages Act, the underlying idea is that the term "wages" should be understood as compensation paid for work done for a period less than a month. It may be either daily or weekly but where the payment is to be made monthly, one finds it difficult to apply the provisions of the Payment of Wages Act to such state of circumstances. Moreover, S. 4, sub-sec. (2) says that no wage period shall exceed one month. That makes it very plain that the Act is not intended to apply to any kind of salaries payable monthly. (Para 32)

Anno: P. W. Act, S. 2 N. 1.

(g) Workmen's Compensation Act (1923), S. 2(1)(m) — "Wages" — Provision whether analogous to that contained in Factories Act (1948), S. 2(1).

The sections of the Workmen's Compensation Act are not in any way in 'pari materia' or even analogous to the provisions of the Factories Act. No useful guidance can be got by considering the provisions of the Workmen's Compensation Act in determining what meaning should be given to the term "wages" in the Factories Act. (Para 32)

Anno: W. C. Act, S. 2(1)(m) N. 1.

\*(h) Factories Act (1948), S. 2(1) and (m) — Studio producing films to be exhibited by means of cinematograph — Workers employed in Studio — 'Wages', meaning of — Studio whether factory.

In finding out whether a person employed directly or through any agency in a manufacturing process, is receiving wages, the question has to be determined with regard to the period for which the amount is settled to be paid. If the remuneration is to be paid daily or weekly, it can be called wages. But where it is monthly remuneration payable on the last day of the month or after that date and where the remuneration, considering the general standards of payment, is fairly high, then it has to be understood as salary. It is not necessary that in order to bring the

compensation within the term "salary" any lower limit need be fixed. However, even if the compensation is paid at the end of the month is less than Rs. 200 as laid down in the Payment of Wages Act, it would be more appropriate to call it as wages. But where it is Rs. 200 or more the same may be termed as "salary". If, therefore, in a studio where the films are produced, ten or more workers are receiving wages in the sense mentioned above then each of the departments would be a factory. But if there be any departments in which less than ten persons receive wages and the rest receive salary, as defined above, such departments would not be factories within the meaning of the term. Case law referred. (Para 33)

(i) Factories Act (1948), S. 2(m) — "Precincts" — Meaning of.

The term "precincts" is usually understood as a space enclosed by walls. (Para 34)

V. C. Gopalaratnam and B. T. Sundararajan, for Appellant; State Prosecutor, for the State.

REFERENCES: Courtwise/Chronological/ Paras  
(30) 32 Bom LR 329: (AIR 1930 Bom 162: 34

31 Cri LJ 1094)

(42) 1LR (1942) Bom 287: (AIR 1942 Bom 191) 22

(46) AIR 1946 Bom 102: (ILR (1945) Bom 899) 22

(34) AIR 1934 Cal 730: (152 Ind cas 566) 33

(27) 8 Lah 666: (AIR 1928 Lah 78: 29 Cri LJ 583) 34

(27) 50 Mad 834: (AIR 1927 Mad 345: 28 Cri LJ 267) 34

(42) AIR 1942 Pat 194: (20 Pat 866) 22

(1819) 2 B & Ald 345: (106 ER 392) 16

(1853) 13 CB 166: (22 LJCP 86) 19

(1901) 1 KB 700: (70 LJKB 571) 20

(1905) 1 KB 453: (74 LJKB 347) 20, 21

(1907) 1 KB 531: (76 LJKB 234) 20, 21

(1911) 1 KB 445: (80 LJKB 141) 23

(1848) 18 LJ Ex 120: (1848-2 Ex 59) 19

(1857) 26 LJQB 319: (110 RR 524) 19

(1882) 51 LJQB 417: 9 QBD 45 18

GOVINDA MENON J.: This is an appeal against the conviction of the manager of the Gemini Studios, Madras, by the Chief Presidency Magistrate, for having contravened the provisions of the Factories Act and having thereby committed an offence under S. 92 of the said Act.

(2) The appellant has been found guilty of the following three offences: (1) under S. 61 and S. 108(2) read with Rule 79 for having failed to specify, or enter, in the notice of periods of work exhibited at the main entrance of the studio, the working hours of the workers engaged in the departments, of directors and artists, cameramen and sound engineers, make-up artists, electricians, editors, laboratorians and still photographers and their assistants; (2) under S. 62 read with Rule 80 for having failed to enter the particulars of all the workers engaged in the said department in Form No. 12 register; and (3) under S. 20 read with Rule 51 for having failed to provide spittoons in the factory as per the type prescribed under Rule 51.

(3) The main question that has been argued is whether the studio in which the films are produced is a "factory" within the meaning of the term in the Factories Act and whether the persons employed there are "workers" as defined



in the Act. The Factories Act (63 of 1948) is the Act in force which is said to have been contravened; but the studio in question was in existence before this Act was passed and had been registered when the earlier Act 25 of 1934 which was replaced by Act 63 of 1948 was in vogue. The appellant contends that except for the three departments, viz., those connected with carpenters, moulders and tinkers, the rest of the portions of the studio cannot be called a "factory" and that these three departments are housed in a separate building where all the requirements of the Factories Act have already been attended to. The learned Chief Presidency Magistrate did not accept the contentions put forward on behalf of the appellant, but agreeing with the prosecution, convicted the appellant and sentenced him as stated above.

(4) Exhibit P. 1 is the notice of occupation and notice of work periods relating to this factory given by the appellant on the 7th June 1949 under the provisions of the Act whereunder the appellant styles himself as the manager of this factory. It is evidently a notice sent to the Chief Inspector of Factories under S. 7(1) of Act 63 of 1948 which corresponds to S. 9(1) of the Act of 1934. Ex. P. 2 in Form No. 11 prescribed under Rule 79 is the notice of the periods of work for the adult workers. Reading Exs. P. 1 and P. 2 together, it is clear that the appellant has restricted those portions of the studio wherein carpentry, moulding, tinkering, painting etc., are done in connection with the erection and dismantling of sets as a factory and that the other portions do not come within the provisions of the Act. It is not clear from the evidence that the authorities have ever questioned the correctness of the two notices, Ex. P. 1 being of 7th June 1949.

(5) P. W. 1 inspected the Gemini Studio on 2-10-1950. According to him he found the defects mentioned above, which necessitated the filing of the charge-sheet. The evidence before the lower court lay in a short compass, one witness being examined for the prosecution and one for the defence. In addition to the notice of occupation, Ex. P. 1, and the Form No. 2 prescribed under Rule 79, Ex. P. 2, relating to notice of periods of work for adult workers, we have Ex. P. 3, a notice by the Inspector of Factories, Second Circle, asking the appellant to show cause why prosecution should not be launched against him for contravening the provisions of the Factories Act and the rules. Ex. P. 4 is the reply sent by the appellant to Ex. P. 3 and Ex. P. 5 is the factory inspection report by the Inspector of Factories. Ex. P. 6 is the sanction to prosecute the manager and Ex. P. 7 is the notice dated 10-10-1950 issued by the Inspector of Factories.

(6) The question that has been elaborately argued at the Bar is whether the departments other than those admitted by the appellant as coming within the provisions of the Factories Act, are also of the same nature as carpentry, moulding and tinkering, so as to attract the operation of the Act. According to D. W. 1, whose evidence we have no reason to reject and which we accept, there are a number of departments such as creative, administrative, technical and directory. (1) The creative department comprises of story and dialogue writers, song composers and music composers and musicians; (2) the administrative department consists of the proprietor, secretaries, chief

executive officer, accountants and programme makers; (3) the technical department consists of cameramen, sound engineers, make-up artists, electricians, editor, laboratorians and still-photographers; (4) the directorial department consists of picture directors and art directors. His evidence is also to the effect that for the production of each picture, there should be actors and actresses called artists, some being permanent and others part-time and temporary. The gist of the evidence of D. W. 1 is that excepting the labour department consisting of carpenters, tinkers and moulders for which department a labour officer is in charge and for which a licence had already been taken under the Factories Act, the other departments engaged in producing films in the Gemini Studio are under no obligation to observe the Factories Act and the rules thereunder.

(7) Though there is no evidence let in as regards the production of the films for exhibition, we can take judicial notice of the fact that the completed production of a film is a highly technical and scientific process which requires the services of persons who are experts in that line. Raw films which consist of nothing but celluloid sheets are put into the camera and on them are imprinted the actions of the artists. This is done by means of high-powered electric lights and these films are also made to absorb the sounds and dialogues by means of the sound engineering process. There are also other processes such as the cutting of the films and editing them before they are made fit for being screened. There is no dispute whatever as to how the above processes are being conducted. But the divergence between the parties is as to whether the action of converting a raw film into a finished product by means of the various scientific and physical processes will come within the meaning of the provisions in the Factories Act. According to P. W. 1 all these departments are factories and that persons working in those departments are workers. He deposed that in the laboratory he found persons engaged in developing and printing films with the aid of electric power; in the wardrobe section he found men engaged in making dresses with the aid of sewing machines; in the property room there were persons engaged in keeping and distributing properties to the various departments. In the editing department, films were being tested through "Moviala" editing machines; on the shooting floors persons were engaged in arranging furniture, showing flood-lights, moving cameras and other machines. In the programme department, persons were engaged in preparing call sheets. In the reception department, men were receiving people and directing them to various other departments. In the administrative department were persons engaged in maintaining the accounts and other registers relating to the production of cinema films. In the publicity department workers were found preparing slides and posters for advertisement. The watch and ward department employed men who watched and cleaned the premises and maintained the garden. In this Court the appellant filed a list of the names of the persons engaged, their designation, their salary per mensem and other details relating to each of the departments and though these details were not available to the lower Court, no objection has been taken as regards the correctness of the details contained in this statement. We shall therefore proceed on the



basis that there is no dispute with regard to the nature of the work done or the number of persons employed and other matters.

(8) As against this, it is urged on behalf of the appellant that the fundamental and all-important business in a film studio is the creation of entertainment for the public who pay for it & that movies are essentially entertainment though they may be called media of expression. It is, therefore, urged that in order to bring the work of a cinema studio into the category of a "factory" it will be essential to bring entertainment as an article or a substance. That movies are generally media of expression cannot be disputed and therefore what is finally distributed to the various picture houses for exhibition is not what existed at the initial stage, but it is the story, the plot or the idea that are worked up and knit into a continuous version that constitutes the entertainment that is catered to the public. A correct decision on this topic depends entirely on the proper interpretation to be put upon the sections of the Factories Act and the rules made thereunder. Section 2 cl. (m) of the Act defines "factory" as under: "Factory" means any premises including the precincts thereof—

(i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or

(ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on, but does not include a mine subject to the operation of the Indian Mines Act, 1923 (4 of 1923), or a railway running shed."

"Worker" is defined in S. 2 cl. (1) as follows:

"Worker" means a person employed, directly or through any agency, whether for wages or not, in any manufacturing process, or in cleaning any part of the machinery or premises used for a manufacturing process, or in any other kind of work incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process;" "Manufacturing process" is defined in S. 2 cl. (k) as follows:

"Manufacturing process" means any process for—

(i) making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal or

(ii) pumping oil, water or sewage, or

(iii) generating, transforming or transmitting power; or

(iv) printing by letterpress, lithography, photogravure or other similar work or book-binding, which is carried on by way of trade or for purposes of gain, or incidentally to another business so carried on; or

(v) constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels;"

(9) It is not disputed that in the premises in question there are ten or more individuals working or were working on any day in the

preceding twelve months, but what is disputed is that the persons are not workers and that what is being carried on is not manufacturing process. The learned State Prosecutor has admitted that sub-cl. (ii), (iii) and (iv) of S. 2 clause (k) will not be applicable to the facts of the present case; but what he contends is that the business that is being carried on in the Gemini Studio is a "manufacturing process" within the meaning of the term in the first clause and that the persons employed there directly or indirectly are employed for "wages" in manufacturing process and such being the case, the premises and precincts would be a factory. The necessary implication of this argument is that all the three elements mentioned above are to be found in this factory. First of all we have to see whether what is being carried on is a manufacturing process. Secondly, if it is a manufacturing process, whether the persons engaged in it are those who receive wages in such manufacturing process. And thirdly whether the premises and precincts where these things are carried on is a factory. Before we proceed to discuss the correct interpretation of these sections, it is useful to set out the provisions of the Indian Factories Act, 1934, as well as those of the English Factories Act of 1937. Section 2, cl. (g), Factories Act, 1934, defines "manufacturing process" as follows:

"Manufacturing process" means any process—

(i) for making, altering, repairing, ornamenting, finishing, or packing, or otherwise treating any article or substance with a view to its use, sale, transport, delivery or disposal, or

(ii) for pumping oil, water or sewage, or

(iii) for generating, transforming or transmitting power."

Clause (h) of S. 2 defines "worker" in the following terms:

"Worker" means a person employed, whether for wages, or not, in any manufacturing process, or in cleaning any part of the machinery or premises used for a manufacturing process, or in any other kind of work whatsoever incidental to, or connected with the manufacturing process or connected with the subject of the manufacturing process, but does not include any person solely employed in a clerical capacity in any room or place where no manufacturing process is being carried on;" "Factory" is defined in cl. (j) as follows:

"Factory" means any premises including the precincts thereof whereon twenty or more workers are working, or were working on any day of the preceding twelve months and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, but does not include a mine subject to the operation of the Indian Mines Act, 1923."

The English Factories Act, 1937, in S. 151(1) gives an interpretation of the term "factory" in the following terms:

"Subject to the provisions of this section, the expression 'factory' means any premises in which, or within the close or curtilage or precincts of which, persons are employed in manual labour in any process for or incidental to any of the following purposes, namely:

.....  
And (whether or not they are factories by reason of the foregoing definition) the expression 'factory' also includes the following



premises in which persons are employed in manual labour, that is to say:

(xi) any premises in which the production of cinematograph films is carried on by way of trade or for purposes of gain, so, however, that the employment at any such premises of theatrical performers within the meaning of the Theatrical Employers Registration Act, 1925, and of attendants on such theatrical performers, shall not be deemed to be employment in a factory;

Section 152 of the Act which deals with general interpretation does not contain any definition of the term "wages" or of "worker". But it is clear that cl. (xi) of S. 151(1) as extracted above brings a cinema studio within the meaning of the term "factory".

(10) A comparison of the English statute with the Indian Statute shows that in England the expression "factory" can be applied only to a premises in which, or within the close curtilage or precincts of which, persons are employed in manual labour in any process for, or incidental to, what have been described later on in that section. A general definition of the word "factory" is formulated in the earlier part of the section, and 'ex abundanti cautela' various institutions are brought within the definition specifically, whether they can, or cannot be brought within the general terms of the definition. In other words according to the English statute if an establishment satisfies the general words of the definition and if manual labour is employed in such an establishment it becomes a factory. But even if such an establishment cannot be brought within the wide terms of that definition, still as specifically bringing it within the definition are the various defined institutions. The Indian Act of 1934 in defining "manufacturing process" is not as wide as the definition in the present Act. The Select Committee which considered the Bill before it was passed into an Act stated that the definition of "manufacturing process" has been made much wider and more comprehensive than in the 1934 Act. Section 2(k), sub-cl. (iv) and (v) were added by the Select Committee and it is stated that this addition is intended to amplify the definition so as to include printing and ship-building. The Indian Act did not borrow from the English Act the various amplifications mentioned as items (i) to (x) and (xii) and (xiii) of S. 151(1) of the English Act.

(11) For the State it is conceded that in the definition of "manufacturing process" sub-cl. (ii), (iii), (iv) and (v) of Cl. (k) of S. 2 cannot be made applicable to the Studio in question. What is urged is that in converting a raw film into a finished product on which, by the use of power lights, photographic emblems are printed and sounds absorbed, the process involved is "adapting any article or substance with a view to its use". The other expressions such as making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, and demolition, do not apply to the process that is adapted here. But what is stated is that the raw film which is an article is treated or adapted with a view to its use, the use being the exhibition of the film for entertainment. Therefore the conversion of a raw film into a film fit for exhibition in a cinema is a manufacturing process.

(12) The appellant's contention is that no manufacture takes place at all but that the

production of a finalised talkie film is mostly intangible material constituted by individual genius incapable of regimentation or standardisation. It cannot be said that any artificial or mechanical process is primarily the basis which makes the raw film into a finished product. An illustration is put forward on behalf of the defence that the conversion of a raw film into a finished product is exactly like the writing of a book of poems by a poet wherein the paper and the card board on which they are printed from the raw material for an elaborate production which is finally given to the public. It is urged that in the writing of a book there is a conversion of a raw material, viz., the paper, into a finished product, viz., the book, where the ideas are formulated and exhibited. In short the argument is that it is misleading and incorrect to bring in the idea that a raw film upon which songs and photos are recorded and absorbed constitutes a raw material which is converted into a manufactured article.

(13) The difficulty in accepting this argument is on account of the very wide words used in the statute in defining "manufacturing process". None can dispute that the raw film is an article or a substance and when by the process of treating or adapting, after the sounds are absorbed and the photos imprinted, it is rendered fit to be screened in a cinema theatre, then such a change would come within the meaning of the term "treating or adapting any article or substance with a view to its use". When a negative is cut to match the positive, and is kept in reserve it is certainly adapting for use. In S. 2(g), Factories Act, 1934, the word "adapting" does not find a place. But the definition contained some of the words used in the present definition. The words such as oiling, washing, cleaning, breaking up, demolishing, were also absent in the earlier section. But for purposes of the present case, the insertion of those words in the new section is not of any consequence. It is the case for the State that the introduction of the words "treating or adapting any article or substance with a view to its use", brings the conversion of raw films into a finished product within the meaning of this definition. Under the English Act it is only if manual labour is employed in any process for, or incidental to, the various matters described in the section that the premises would become a factory.

(14) It is strongly urged by Mr. Gopalaratnam for the appellant that film production seeks to purvey an intangible entertainment and not the creation of some commodity which is marketable and while in ordinary manufacturing process it is possible to standardise the product by particular designs or formula whereby success is ensured, film production is incapable of such standardisation. Whatever might be the nature, or the popular appreciation of the work done, in production of cinema films, and the mental exhilaration or outlook which it gives to the public, one thing cannot be gained, that the conversion of a raw film into a finished product comes within the definition of manufacturing process in the section. It is unnecessary for us to expatiate in any detail as to how the process is being worked out for on that part of the case there is no dispute between the parties.

(15) It is next contended that because in the Indian Act, sub-cl. (i) and (vii) of S. 151 (1) of the English Act relating to ship-building and



printing alone are adopted and sub-cl. (xi) which deals with cinematograph films is left out of account, the intention of the framers of the Statute who, when drafting the Factories Act, had the English statute before them, was to exclude from the definition of "manufacturing process" such productions as film productions. It is also said that since the Select Committee on the Act has definitely stated that "manufacturing process" has been made much wider and more comprehensive by the addition of these two clauses by implication, the intention of the statute to be gathered by such expulsion is that film production cannot be manufacturing process within the definition. It is futile to make comparisons between the English Act and ours; for one thing the idea underlying the Factories Act in England is the regulation of the employment of manual labour. There is no such restriction so far as one can see in the Factories Act prevalent in this country. The salient fact that with the English statute before them the framers of the Indian Act did not restrict the operation of the Act to manual labour, cannot be lost sight of. Conditions in England with regard to the control of intellectual labour are not the same as in our country. In India the intelligentsia require protection from the exploitation of capitalists probably in a greater measure than in England. "Educated unemployed" cannot be said to be a feature of English life today. But one need not devote much attention or research to see that in our country with the advancement of higher university education the problem of finding employment to those who have qualified themselves is becoming an acute one. In such circumstances, it is not surprising that the sponsors of the legislation in India thought it necessary to include intellectual as well as aesthetic and artistic portions of labour within the purview of the Factories Act.

(16) Though every alteration of an article does not confer on it a new character as a manufactured article, still in the present case when a raw film is moulded and transformed into a finished product, a new and different article emerges out of it which has a positive and specific use in its new state. In defining the word "manufacture", Abbott C. J. in — *The King v. Wheeler*, (1819) 2 B. & Ald. 345 states that something of a corporeal and substantial nature, something that can be made by man from matters subjected to his art and skill, or at the least some new mode of employing practically his art and skill are required to satisfy the word "manufacture". Applying that definition to the present case, we see that by the art and skill of the various persons as well as by the use of the camera & the sound recording equipment the raw film is transformed into a new substance. It does not require much knowledge of science to understand that by combining various elements a thoroughly different substance from the elements can be manufactured. Chemists are able to manufacture common salt with two such dissimilar elements like sodium and chlorine. The question in such cases will be has there been a transformation? We have no doubt whatever that the conversion of a raw film into a finished product is a transformation which would make it a manufacturing process within the meaning of the term.

(17) If in the Gemini Studio "manufacturing process" can be said to be going on, still strong objection is taken to the view that it is a

factory because the persons employed in that occupation do not receive "wages" and are therefore not "workers" as defined in sub-cl. (1). A "worker" should be a person employed directly or through any agency whether for wages or not in the manufacturing process, the other portions of the definition being immaterial for the purpose of the present case. It cannot be disputed that the antithesis "or not" is not intended to bring within the ambit of the definition persons who receive emoluments which cannot be termed as wages. The expression "whether for wages or not" means whether the person receives as remuneration for his services wages, or whether such a person is an apprentice learning work or is an honorary worker. It is not the case of the State that if a person receives something which is not wages when employed directly or through any agency in any manufacturing process, he can be called a worker. So we proceed on the basis that for the purposes of the present case the phrase "or not" should not cause any difficulty. We have already rejected the contention that the Act is restricted to the employment of manual labour. Therefore even if intellectual or artistic labour is employed, if what is received as remuneration for such labour by the individual concerned can be termed wages in the manufacturing process, then the person so employed is a worker. For this purpose we have to appreciate in the present setting the meaning of the term "wages". That in statutory enactments, the two terms "salary" and "wages" are often employed to describe the same idea or at least different facets of one and the same idea is pressed on us as a consideration for giving a very extended and wide import to the term "wages". What are the legal contents of this word and how it is used in the section have to be correctly determined. In cls. (h) and (i) of the proviso to S. 60, sub-sec. (1), Civil P. C., we have the provision that the wages of labourers and domestic servants, whether payable in money or in kind, and salary to the extent of the first hundred rupees and one half the remainder of such salary, shall not be liable to attachment or sale. These clauses were amended and substituted for the original clause by the Civil Procedure Code (Amendment) Act V of 1943. Therefore, for the purpose of attachment of the emoluments of a person employed, the Code makes a distinction between wages and salary. At page 245 of Mulla's Civil Procedure Code, there is a definition of the term "wages of labourers" in the following terms:

"Wages of labourers: A 'labourer' is a person who earns his daily bread by personal manual labour, or in occupations which require little or no art, skill or previous education. Thus, persons who agree to spin cotton and to receive a certain amount of money for a certain quantity of cotton spun by them are labourers and their wages cannot be attached. The old provision only applied to the wages of labourers and domestic servants and there was no provision to exempt the salary of a person in private employment. From the collocation of words used in the clause it was arguable that the word 'salary' in the clause was intended to mean salary of labourers and domestic servants only. It has, however, been held that though the latter part of the clause should have been the subject of a separate clause, yet on a consideration of the entire section, there is no doubt that the



clause protects from attachment salary of all persons in receipt of it other than public officers and servants of a railway company or local authority so far as the protection goes." In Stroud's Judicial Dictionary, Vol. III, at page 2205 the word "wages" is defined in the following manner:

"Though this word might be said to include payment for any services yet in general the word "salary" is used for payment for services of a higher class and wages is confined to the earnings of labourers and artisans."

In Wharton's Law Lexicon, at page 1052, the definition contemplates:

"Compensation agreed upon by a master to be paid to a servant, or any other person hired to do work or business for him."

Stroud's Judicial Dictionary gives the meaning of the word 'wages' in the various English Statutes as well as in certain enactments in the United States. In the United States the word 'wages' in some of the enactments does not imply that the compensation is to be determined solely upon the basis of time spent in service. It may be determined by the work done. But the English statutes make a distinction between 'wages' and 'salary'.

(18) In — 'Gordon v. Jennings', (1882) 51 LJ QB 417, Grove J. attempted to define and make a distinction between the words 'wages' and 'salary'. The learned Judge was of opinion that regard must be had to the object and intention of the Act, and to the connotation of the words used. In the context of the particular statute he was considering, the use of the word 'wages' is an indication of the object of the Act, for according to the learned Judge though it might be said to include payment for any services, in general the word "salary" is used for payment of services of a higher class, and "wages" is confined to the earnings of labourers and artisans. We find a report of the same case in — 'Gordon v. Jennings', (1882) 9 QBD 45, where the judgment as reported differs in material particulars from that reported in — 'Gordon v. Jennings', (1882) 51 LJ QB 417. At page 46 of the former report, Grove J. makes the following observation:

"The intention of the Act is to abolish the attachment of 'wages'. Now it may be that the term 'wages' according to the etymological meaning of the word, may be correctly applied to any remuneration for services, but it seems to me that the popular signification must be looked to. The term 'wages' is not applied to the remuneration of a high or important officer of the State or a company, for instance, but to that of domestic servants, labourers, and persons of a similar description."

(19) Parke B. in — 'Riley v. Warden', (1849) 18 L. J. Ex. 120, uses the term 'compensation wages'. This decision is followed by Cockburn C. J. in — 'Ingram v. Barnes', (1857) 26 LJQB 319. Observations of a similar kind can be found in — 'Sharman v. Sanders', (1853) 13 C B 166. In — 'Ingram v. Barnes', (1857) 26 LJQB 319, Gresswell J. speaks of personal services being paid in wages.

(20) 'Wages' is defined in the English Statute Truck Amendment Act, 1887, 50 and 51 Vict. Ch. XLVI. In Halsbury's Laws of England, 2nd Edn., Vol. 14, at page 650 we find the following definition for 'wages':

"Any money or other thing had or contracted to be paid, delivered, or given as recompense,

reward, or remuneration for any labour done, or to be done, whether within a certain time or to a certain amount, or for a time or an amount uncertain, is deemed to be wages for such labour."

In the Concise Oxford Dictionary 'salary' is defined as a fixed periodical payment made to a person doing other than manual or mechanical work. The terms 'workman' and 'wages' were also the subject of consideration in a number of English cases: Vide — 'Simpson v. Ebbw Vale Steel Iron and Coal Co.', (1905) 1 K B 453, — 'Bagnall v. Levinstein Ltd.', (1907) 1 KB 531 and — 'Nash v. Hollinshead', (1901) 1 KB 700.

(21) In — 'Simpson v. Ebbw Vale Steel Iron & Coal Co.', (1905) 1 K B 453, the Court of Appeal held that the certificated manager of a coal mine, who is paid a yearly salary, and who, although his duties require his presence in the mine, is not required to engage in manual labour, is not a 'workman' within the meaning of the Workmen's Compensation Act, 1897. There are various passages in the judgments of Collins M. R. as well as in the judgment of the other Lord Justices which deal with the meaning of the term 'workman' and the definition to be put upon 'wages'. At page 459 Collins M. R. observes as follows:

"In my opinion it should be so drawn as to embrace the classes whose remuneration can properly be described as wages. The popular meaning must be given to a definition where we are confronted with such an expression as 'wages', and we must interpret the Act as applying to persons whom 'ex hypothesi' the Legislature regards as not being in a position to protect themselves. None of these considerations apply to the case of a person holding the position of a certified manager of a colliery, who comes within a very different category from that of an ordinary workman."

'Bagnall v. Levinstein Ltd.', (1907) 1 K B 531 which follows — 'Simpson v. Ebbw Vale Steel Iron & Coal Co. Ltd.', (1905) 1 K B 453 is instructive in this way; in that even if a person who is employed in a dye and chemical company under a written agreement for five years service and upon terms with regard to salary, commission on profits of inventions or improvements, had to do manual labour, still it cannot be said that he can be called a "workman" within the meaning of the Workmen's Compensation Act. The criterion applied by the majority of the Court of Appeal in that case was whether the remuneration was a fixed one and a salary was paid. The agreement provided that the person employed was to receive a salary payable monthly at the rate of £ 200 a year in the first year, increasing by £ 15 yearly till the fifth year. In addition to that he was to be paid a commission on the net profits of inventions, improvements and discoveries etc. Since his duties included manual labour it was contended that he was a "workman" though he was receiving a salary. The majority of the Court of Appeal, following — 'Simpson v. Ebbw Vale Steel Iron & Coal Co.', (1905) 1 KB 453 repelled that argument.

(22) To make out the distinction between wages and salary a few Indian decisions have been referred to by the learned counsel for the appellant. 'K. U. Kulkarni v. Ganpati Hiraji', ILR (1942) Bom 287 and — 'Manilal Bhaichand v. Mohanlal Maganlal', AIR 1946 Bom 102, were cited for showing that where the compen-



sation is for manual or physical labour, the term used is wages & not "salary" & that in ordinary parlance the word "wages" cannot be used to apply to persons other than manual labourers. In — *Manilal Bhaichand v. Mohanlal Maganlal*, AIR 1946 Bom 102 it was even suggested that a clerk doing manual labour is not a "labourer" receiving wages and what he gets is "salary". The substance of the decision in — *Raghunandan v. Jaigobind*, AIR 1942 Pat 194 is to the same effect.

(23) Mr. Gopalaratnam then contends that the preamble to the Factories Act should be looked into for the purpose of finding out the intention with which the enactment was brought into being and that the Factories Act of 1948 was an Act to consolidate and amend the law regulating labour in factories. The preamble states that whereas it is expedient to consolidate and amend the law regulating labour in factories, it is hereby enacted as follows: For this purpose he invites the attention of the Court to certain excerpts in — *London County Council v. Bermondsey Bioscope Co. Ltd.* (1911) 1 KB 445. However useful it might be to consider an Act with the aid of its preamble and though such a practice was prevalent in England for some time, the present tendency is not to lay much stress on the preamble unless it is so difficult to determine the scope of the statute by understanding its provisions. We have already expressed our opinion that the Act is not confined to manual labour alone and that its operation is extended to persons whose intellect is utilised and compensation paid for it by the Gemini Studio. It does not therefore seem very helpful to read into the preamble the intention of the framers.

(24) It is very strongly pressed before us that the artists employed in Studio, some of whom receive a monthly remuneration of more than Rs. 3000 can under no stretch of imagination be termed as persons who receive wages. They belong to a category of people whose natural talents, aptitude and expression, have been so trained as to bring out in full blossom the results of a combination of training and equipment. Such people cannot be considered as "workers" who receive wages, is the argument of learned counsel. It is further contended that the directorial department consisting of individuals who regulate the production and whose work is not in any way connected with physical exertion should not be considered a person receiving wages. The same point of view has been put forward in favour of those employed in the departments of art, make-up, music and dance. It cannot be disputed that those engaged in the camera, sound and electricity departments are persons trained in the field of science and the question has to be considered as to whether their emoluments can be treated as wages. Departments like laboratory and wardrobe also can be said to come under the same conditions.

(25) The strenuous argument very forcibly put forward on behalf of the appellant is that it will be doing violence to the language to describe the compensation for work done by the persons engaged in aforesaid departments as "wages" in any sense of the term. One has to visualise an overall and general picture of the whole situation in viewing whether the Factories Act was intended to control the nature of work of such persons. For this purpose a rather extended and wide review of the provi-

sions of the Factories Act and the scheme of the same has been attempted on behalf of the appellant. Looking at the scheme of the Act it is urged that there could be no intention to bring within its purview employees of the category described above. We are told that even a cursory glance of the various parts of the Act would be sufficient to confirm the above view. Chapter III of the Act deals with health, and among the sections are those devoted to cleanliness, disposal of wastes and effluents, ventilation, dust and fume..... artificial humidification, overcrowding, lighting, drinking water, latrines and urinals. Chapter IV deals with the safety of the machines and employees in the factory. Chapter V deals with labour welfare. Chapter VI deals with working hours of adults and Chapter VII deals with the employment of young persons in the factory and S. 67, the first section in that chapter contains a strict and absolute prohibition that no child who has not completed his fourteenth year shall be required or allowed to work in any factory. Chapter VIII concerns itself with leave with wages and Ss. 78 and 79 specifically relate to annual leave with wages and wages during the leave period. S. 79, sub-sec. (1) states that every worker who has completed a period of twelve months' continuous service in a factory shall be allowed during the subsequent period of twelve months' leave with wages for a number of days calculated at the rate of..... so that wages have to be calculated during leave according to the number of days. S. 80 lays down that the worker shall be paid at a rate equal to the daily average of his total full time earnings exclusive of any overtime earnings and bonus, but inclusive of dearness allowance. This section contemplates "daily wages". The learned counsel for the appellant contends that it is ludicrous and highly fanciful if not thoroughly harmful to apply these provisions of the Act to the intellectual labour employed in the Gemini Studio, and such being the case it could not have been the intention of the framers of the Act to bring such an institution within the ambit of the Factories Act. It is rather further argued that if the application of the Act is tested in the light of the considerations to be adumbrated below, then it would mean that insurmountable difficulties & absurdities would ensue by the acceptance of the construction put forward by the authorities. The following are stated as some of them.

(26) According to the argument for the State the managing director of this Studio who controls the working and who feels the throb and the pulse of the whole institution would be a worker, and the manager, the person who is now prosecuted, would also be a worker.

(27) If we are to apply S. 66 of the Act, as is intended to be applied, then no woman can be employed in the shooting of films for acting after 7 p.m. and before 6 a.m. because S. 66(1) clause (b) says that no woman shall be employed in any factory, except between the hours of 6 a.m. and 7 p.m. provided that the Provincial Government may, by notification in the official Gazette in respect of any class or description of factories, vary the limits laid down in clause (b), but so that no such variation shall authorise the employment of any woman between the hours of 10 p.m. and 5 a.m. Such a prohibition would reduce the preparation of a film to a nullity.



(28) Section 79 of the Act which allows annual leave with wages cannot apply to part time workers because they do not work every day or even part of the day. What they turn out is spasmodic work under contracts by which they cannot be subject to regular hours. In the application of Ss. 67, 68 and 71 which relate to the prohibition about the employment of young persons, it is impossible to conform to the provisions of those sections because it is well known that in many films dealing with stories from Hindu Puranas young children will have to act. It is emphatically contended by Mr. Gopalaratnam that if these sections are to be strictly complied with, a Shirley Temple could never act in a studio. Other instances of the impossibility of applying the provisions of this Act are those contained in S. 60 which lays down that no adult worker shall be required or allowed to work in any factory on any day on which he has already been working in any other factory, save in such circumstances as may be prescribed. It is common knowledge that most of the well known actors and actresses have contracts with more than one production studio and therefore one person has to work in different studios at various hours of the day. It is impossible for the management to have any control over them. Lastly it is argued that the Factories Act and rules cannot regulate the work of people like poet, song composers, story writers and others whose art is creative and who rely upon their genius produce works of art and it is urged that this consideration should weigh upon the Court in finding out whether the Act can be applied. It may be that a song composer or a story writer or a poet may find an opportunity to express his genius at odd hours of the day when he has to compose or put down in writing the results of sudden impulses and intentions that come upon him. These persons cannot be regulated by the rules under the Factories Act.

(29) The learned State Prosecutor contends that these difficulties are not insurmountable because under the rules framed under the Act it is possible to exempt such persons. He invites our attention to Rules 81, 82 and 84 framed under the Act. Rule 81 says that the persons mentioned in the schedule thereto are deemed to hold positions of supervision or management and Rule 82 says that the persons mentioned thereunder are deemed to hold confidential positions. The schedule gives the provisions of the Act from which such persons can be exempted. With regard to cinema studios, the nature of the exempted work consists of erection or dismantling of "settings" or the make up of actors and actresses in cinema studios and the extent of exemption relates to Ss. 51, 54, 55, 56 and 61 of the Act. Because there are provisions regarding exemption it is contended on behalf of the State that there is no insuperable difficulty in the application of the Act to Cinema studios. By G. O. No. 5072 (Development) dated 14-11-1951, certain cinema workers are exempted from the operation of S. 64 (2) (b) and (c) and S. 64 (3) such as light boys, shifting furniture or set attendants, and clap boys.

(30) In view of the provisions regarding the exemption we are asked to hold that there can be no difficulty in applying the Act.

(31) The fact that exemption can be given to employees engaged in a 'bona fide' executive, administrative or professional capacity is relied

upon for the contention that the Act is intended to apply to the Studio as such. We are not prepared to accede to the argument that because in certain classes of cases it is possible under the provisions of the Act to grant exemption, such a state of circumstances would make the Act applicable to persons to whom it would not be applicable if the Act is properly construed.

(32) The learned State Prosecutor, by applying analogies, laid stress upon the meaning of the term "wages" occurring in certain similar statutes. In the Payment of Wages Act, 4 of 1936, S. 2 clause (vi) defines wages as follows:

"'Wages' means all remuneration, capable of being expressed in terms of money, which would, if the terms of the contract of employment express or implied, were fulfilled, be payable whether conditionally upon the regular attendance, good work or conduct or other behaviour of the person employed, or otherwise, to a person employed in respect of his employment or of work done in such employment, and includes any bonus or other additional remuneration of the nature aforesaid which would be so payable and any sum payable to such person by reason of the termination of his employment, but does not include..."

Various other provisions of the same statute were brought to our notice viz., S. 5, sub-sec. (4) relating to the payment of wages on a working day, and S. 6 to the effect that all wages, shall be paid in current coin or currency notes or in both. If anything at all can be gathered from the preamble to this Act it is that this legislation is intended to regulate the payment of wages to certain classes of persons employed in industry. One cannot by reference to this Act gather the impression that the term wages is intended to apply to persons who receive a fairly good sum of money as monthly salary. It is noteworthy that S. 1 sub-sec. (6) prohibits the application of the Act to wages payable in respect of a wage-period, which, over such wage-period, average two hundred rupees a month or more. If the intention of the legislature had been that the term "wages" can be applied to monthly salaries, in our opinion, there was no necessity for the enactment of this section. By restricting the remuneration for a wage-period, to Rs. 200 and less, the section seems to suggest that the wage period is something which is less than a month. Otherwise it could easily have said that the wages for a period of one month should not exceed Rs. 200. Moreover the Act is intended to apply to persons to whom wages have to be paid in current coin or in currency notes or in both. It is admitted that in the case of most, if not all, of the highly paid employees, the remuneration is paid in the form of cheques drawn on banks. To such persons if S. 6 is made applicable, then their remuneration would not have been properly paid if the same is paid through cheques drawn on banks. We are inclined to think that on a construction of the various provisions of the Payment of Wages Act, the underlying idea is that the term "wages" should be understood as compensation paid for work done for a period less than a month. It may be either daily or weekly but where the payment is to be made monthly, one finds it difficult to apply the provisions of the Payment of Wages Act to such state of circumstances. Moreover, S. 4, sub-sec. (2) says that no wage period shall exceed one month. That makes it



very plain that the Act is not intended to apply to any kind of salaries payable monthly. The other enactment on which reliance is placed is the Workmen's Compensation Act (8 of 1923) where the word "wages" has been defined in S. 2(1), clause (m) as follows:

"'Wages' includes any privilege or benefit which is capable of being estimated in money, other than a travelling allowance or the value of any travelling concession or a contribution paid by the employer of a workman towards any pension or provident fund or a sum paid to a workman to cover any special expenses entailed on him by the nature of his employment."

Clause (n) defines "workman" in the following terms:

"'workman' means any person (other than a person whose employment is of a casual nature and who is employed otherwise than for the purpose of the employer's trade or business).

(i) ..... .

(ii) employed on monthly wages not exceeding four hundred rupees, in any such capacity as is specified in schedule II."

We do not think that the sections of this Act are in any way in 'pari materia' or even analogous to the provisions of the Act we have to construe. There are schedules to the Workmen's Compensation Act where a large number of persons are defined as workmen coming within the meaning of S. 2(1) clause (n) of the Act and the third paragraph of schedule II is to some extent analogous to the definition "manufacturing process". No useful guidance can be got by considering an analogous statute like the Workmen's Compensation Act determining what meaning should be given to the term "wages" in the Factories Act. We do not feel satisfied that a reference to this Act would in any way help in the solution of the question before us.

(33) The learned State Prosecutor also referred to S. 2 cl. (h), Factories Act of 1934 where "worker" is defined and this clause excludes from its scope any person solely employed in a clerical capacity in any room or place where no manufacturing process is being carried on. In this connection a decision of the Calcutta High Court in — 'Superintendent, Legal Remembrancer Bengal v. H. E. Watson', AIR 1934 Cal 730 was also brought to our notice. At page 733 there are observations to the effect that the expression "worker" need not necessarily be restricted to manual labour. We have on a construction of the present Act, already come to that conclusion. It seems to us that in finding out whether a person employed directly or through any agency in a manufacturing process, is receiving wages, the question has to be determined with regard to the period for which the amount is settled to be paid. We are definitely of opinion that if the remuneration is to be paid daily or weekly, it can be called wages. But where it is monthly remuneration payable on the last day of the month or after that date and where the remuneration, considering the general standards of payment, is fairly high, then it has to be understood as salary. We do not think that in order to bring the compensation within the term "salary" any lower limit need be fixed. In the Payment of Wages Act the same is Rs. 200 and under the Workmen's Compensation Act it is Rs. 400 per

month. So far as the Factories Act is concerned there is no restriction at all. But we also feel that even if the compensation is paid at the end of the month is less than Rs. 200 as laid down in Payment of Wages Act, it would be more appropriate to call it as wages. But where it is Rs. 200 or more the same may be termed as salary". There has been no evidence let in as to how many of the persons employed in directorial, technical and other departments are receiving wages. If ten or more workers are receiving wages, then each of those departments would be a factory. But if there are departments in which less than ten persons receive wages and the rest receive salary, as defined by us above, such departments would not be factories within the meaning of the term. This question has to be gone into before the various departments can be held to employ workers as defined in S. 2 clause (1).

(34) The next question is, what is meant by the expression "premises" including "precincts" in clause (m). There is no difficulty in understanding the term "precincts" because it is usually understood as a space enclosed by walls. We are told that within the enclosed space of the Gemini Studio there are a number of buildings in which the various departments are housed. We have no doubt whatever that each of these buildings if they employ ten or more workers as defined in S. 2 clause (1) will be a factory. Various decisions such as — 'Pragnarain v. The Crown', 8 Lah 666, — 'Emperor v. Ganpat', 32 Bom L R 329 and — 'Ramanathan v. Emperor', 50 Mad 834, were cited before us for the elucidation of the term "precincts". We are not satisfied that these decisions help us in ascertaining whether the buildings in question are factories or not.

(35) The further question has to be considered whether if any one of these departments is a factory as being situated within the precincts of the Gemini Studio, then it is legally possible to separate those departments from the others which cannot be styled as factories. The building where carpenters, moulders, and tinkers are carrying on their work is admittedly a factory and the rules and regulations of the Factories Act apply to that departments. Evidence is lacking as to whether the other departments can be so separated. It is permissible to separate the carpentry, moulding and tinkering departments which are really unnecessary for the production of films from the others. There is no evidence to show that the other departments are so intertwined as to be a composite one without being able to be separated. On that aspect of the case there does not seem to have been any evidence let in. In our opinion it is possible, even if some of those departments are factories, to separate those which are not factories from those which are factories. No attention seems to have been paid to this aspect of the case also.

(36) In the view which we take that it is not specifically determined as to whether workers, as defined in the Act, of the requisite number have been employed in the various departments, it is difficult to sustain the conviction. We therefore set aside the convictions and sentences and direct a retrial of the case to find out whether the persons employed are workers or not. In respect of those departments where the provisions of the Factories Act have been held to be not applicable, there will be no



retrial and the order of the lower court will stand.

A/V.S.B.

Retrial ordered.

**A.I.R. 1953 MADRAS 279 (Vol. 40, C.N. 102)**

**RAJAMANNAR C. J.**

**AND VENKATARAMA AIYAR J.**

C. S. S. Motor Service, Tenkasi and others, Petitioners v. The State of Madras, represented by the Secretary to the Government of Madras, Home Department, and another, Respondents.

Writ Petns. Nos. 333, 334, 615, 200, 723, 777 and 591 of 1951, D/- 25-4-1952.

**(a) Constitution of India, Art. 19 (1) (g), (6) — Motor Vehicles Act (1939) — Validity.**

All public streets and roads vest in the State but the State holds them as trustee on behalf of the public. The members of the public are entitled as beneficiaries to use them as a matter of right and this right is limited only by the similar rights possessed by every other citizen to use the pathways. The State as trustee on behalf of the public is entitled to impose all such limitations on the character and extent of the user as may be requisite for protecting the rights of the public generally. Under the Constitution of India both the contract carriers and common carriers would stand in the same position. The right of a citizen to carry on business in motor transport on public streets, is within the protection of Art. 19 (1) (g). As it is a right guaranteed under Art. 19 (1) (g) the validity of the impugned sections of the Motor Vehicles Act must be determined with reference to the requirements of Art. 19(6). They will be valid only if they are reasonable restrictions imposed in the interests of the public. Case law discussed.

(Paras 21, 24, 25, 26)

**(b) Constitution of India, Art. 19 (1) (g), (6) — Motor Vehicles Act (1939), S. 42 is valid — Motor Vehicles Act (1939), S. 42.**

While a permit system is unconstitutional in so far as it relates to the exercise of fundamental rights, a system of licensing which has for its object the regulation of trades is not repugnant to Art. 19 (1) (g). What is prescribed under S. 42, Motor Vehicles Act, is in substance not a permit but a licence. Section 42 must accordingly be held to be valid. Case law ref.

(Paras 27, 28)

Anno: M. V. Act, S. 42 N. 1.

**(c) Constitution of India, Art. 19 (1) (g) (6) — Motor Vehicles Act (1939), S. 43 A is valid — Motor Vehicles Act (1939), S. 43 A.**

Section 43 A, Motor Vehicles Act, appears to be intended to clothe the Government with authority to issue directions of an administrative character and in that view it would be valid, though particular orders passed thereunder might be open to challenge as unconstitutional. (Para 29)

**(d) Motor Vehicles Act (1939), Ss. 47 and 48 — Power to take into account condition of road — Constitution of India, Art. 19(6).**

The Transport Authorities can take into account the condition of the road in granting or refusing the permit for a stage carriage or limiting its number on a particular route. Conservation of roads is a

matter of general public interest and they have to be well maintained not merely for purposes of motor traffic but also for other vehicular traffic and to enable pedestrians to pass and repass safely and comfortably and their maintenance involves considerable expenditure of public funds. A regulation of motor traffic with the object of conserving the roads must be upheld as protected by Art. 19 (6) of the Constitution: (1926) 70 Law Ed 1101, Rel. on.

(Para 30)

Anno: M. V. Act, S. 48 N. 1.

**(e) Motor Vehicles Act (1939), Ss. 47 and 48 — Consideration of nature of locality — Constitution of India, Art. 19 (6).**

The Transport Authorities can take into account the nature of the locality before deciding whether the use of transport vehicles could be permitted. It is in the interests of the public that where the streets are narrow or the locality is congested there should be a restriction on the running of motor transport vehicles in that area. (1933) 77 Law Ed 1053, Rel. on.

(Para 30)

Anno: M. V. Act, S. 48 N. 1.

**(f) Motor Vehicles Act (1939), Ss. 47 and 48 — Consideration of adequacy of existing services — Constitution of India, Art. 19(6).**

It will not be a proper ground to refuse a permit on the ground that there is no need for extension of service. Under Art. 19 (6) what has to be decided is whether the grant is for the benefit of the public and not whether it is injurious to the interests of the existing operators. (1925) 69 Law Ed 623, (1925) 69 Law Ed 627 and (1926) 70 Law Ed 1101, Rel. on.

(Para 31)

Anno: M. V. Act, S. 48 N. 1.

**(g) Motor Vehicles Act (1939), Ss. 47 and 48 — Consideration of running of unremunerative services by existing operators — Constitution of India, Art. 19(6).**

The Transport Authorities cannot take into consideration that the existing operators are running other services which are not remunerative and they cannot grant permits to them with a view to compensate them for those unremunerative services. This will be clearly opposed to Art. 19 (6).

(Para 32)

Anno: M. V. Act, S. 48 N. 1.

**(h) Motor Vehicles Act (1939), Ss. 47 and 48 — Refusal to grant permit at all — Constitution of India, Art. 19(6).**

The Transport Authorities cannot refuse to grant permit altogether to any applicant. Article 19 (6) of the Constitution is intended only to cover restrictions which are of a regulatory character but a power to regulate does not carry with it the power to prohibit and refusal to grant permits is not a reasonable restriction on the exercise of the right to carry on trade but an unconstitutional denial of it. Case law referred.

(Para 33)

**(i) Motor Vehicles Act (1939), Ss. 47 and 48 — Principles to be applied in granting or refusing permits — Uniformity — Constitution of India, Art. 14.**

Whatever principles be adopted as criteria for making the selection among the applicants it is necessary that they should be applied uniformly and without differen-



tiation as if they had been enacted as part of the statute. This does not, however, prevent the State from altering its rules from time to time when as a result of experience it discovers that they require to be altered in the interests of the public. But what is necessary is that at any given time there must be one set of rules and regulations governing the disposal of all the applications. There should not be two different and opposing principles both in operation at the same time, one being applied to one applicant and the other to the other. Rules should be observed not 'ad hoc' with reference to particular applicants but generally with reference to all applicants. There should be a Government of laws and not of men. (1940) 84 Law Ed 1368 and (1950) 94 Law Ed 381, Ref. (Paras 37, 38)

Anno: M. V. Act, S. 48 N. 1.

**(j) Constitution of India, Art. 19 — Motor Vehicles Act (1939), S. 47 — Validity — Motor Vehicles Act (1939), S. 47.**

In S. 47 (1), clauses (a), (b), (d) and (f) are valid, as being in the interest of the public and clause (e) is invalid as being not in the interests of the public but of the permit holder. With reference to S. 47 (1) (c) adequacy of extension of service can be taken into account only in so far as it is in the interests of the public. The factor to be considered is not whether the existing operators will suffer by competition but whether extension of service will be in the interests of the public. Therefore, S. 47 (1) (c) will not be legal in so far as it provides that the effect of the service proposed upon the existing service should be taken into account. (Para 39)

**(k) Constitution of India, Art. 19 — Motor Vehicles Act (1939), Ss. 48 (a), (b) are valid — Motor Vehicles Act (1939), S. 48.**

The procedure prescribed by S. 48 (a) must be held to be in the interests of the public. S. 48(b) must also be held to be valid. (Para 40)

Anno: M. V. Act, S. 48 N. 1.

**(l) Constitution of India, Art. 19 — Motor Vehicles Act (1939), S. 64A is valid — Motor Vehicles Act (1939), S. 64A.**

The language of S. 64A is undoubtedly wide. But it is a judicial power to review the orders of subordinate officers passed in judicial proceedings. The extent of the powers of those officers is sufficiently defined in the Act and it would be reasonable to construe the powers of the Government under S. 64A as subject to the same limitations as those subordinate authorities. The word "propriety" in S. 64A must be understood as meaning "reasonableness." The words "as it thinks fit" cannot be equated with the words "to its own satisfaction". S. 64A is therefore valid. (1893) 1 Ch 547, (1934) 1 KB 277 and CMP No. 5942 of 1951 (Mad), Rel. on. (Para 42)

**(m) Constitution of India, Art. 19(6) — Power of Court to decide reasonableness of legislation.**

When a legislation which interferes with fundamental rights guaranteed under Part 3 of the Constitution is sought to be sustained as falling within the scope of Art.

19(6) the question whether it is reasonable and made in the interests of the public is one open to judicial review. The decisions of the Transport Authorities granting or refusing to grant permits are liable to be reviewed by the Courts and set aside if they are unreasonable, arbitrary or discriminatory. The observations of Supreme Court in AIR 1952 Supreme Court 192, that the provisions of the Motor Vehicles Act which prescribe an elaborate procedure for the grant of permits are self-contained, that the applicant has no absolute right to get a permit and that it is within the discretion of the authorities to grant or refuse one would correctly represent the position under the Act before the Constitution. They must be limited to cases under the Motor Vehicles Act arising before the Constitution. Case law Relied on; AIR 1952 SC 192, Disting.

(Paras 44, 46, 51, 53)

**(n) Constitution of India, Arts. 301, 305 — Restrictions under Motor Vehicles Act (1939).**

Commerce includes all forms of transportation and motor traffic is within Art. 301 but provisions of any existing law under Art. 305 will cover the Motor Vehicles Act. (Para 45)

K. V. Venkatasubramania Ayyar, K. Hariharan, K. Bashyam Iyengar, M. Natesan, S. Srinivasan, N. G. Krishna Ayyangar and N. Panchapagesa Ayyar, for Petitioners; Advocate General, for Govt. Pleader, for the State, and on behalf of Attorney General of India; M. K. Nambiar, N. G. Krishna Iyengar, G. R. Jagadisa Iyer, R. Raghavachariar, D. Narasaraju, R. S. Venkatachari and T. Chengalvarayan, for Respondents.

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VENKATARAMA AIYAR J.: (W. P. Nos. 333, 334 and 615 of 1951): These applications raise questions of considerable importance about the validity of the permit system under the Motor Vehicles Act and of some of the provisions of that Act.

(2) The facts in W. P. No. 333 of 1951 are these: In the Tenkasi Uthumalai route in the district of Tirunelveli respondent 2 was running one stage carriage. On 25-7-1950 applications were invited for a second stage carriage service over the route. Among the applicants were the petitioner and respondent 2. On 25-8-1950 the Regional Transport Authority granted the permit to respondent 2. On appeal the Central Road Traffic Board set aside this order on 5-11-1950 and granted the permit to the petitioner. The respondent moved the Government under S. 64A of the Act and after various proceedings which it is unnecessary now to detail the Government passed an order on 5-7-1951 setting aside the order of the Central Road Traffic Board and restored that of the Regional Transport Authority. The petitioner

now seeks to set aside this order as unconstitutional.

(3) The facts in W. P. No. 334 of 1951 are these: A new route between Tenkasi and Sendamaram in the district of Tirunelveli was opened in 1950 and applications were invited for two stage carriage permits in that route. The petitioner and respondent 2, who may be mentioned, are the same as in W. P. No. 333 of 1951 were among the sixteen applicants for the permit. On 8-1-1951 the Regional Transport Authority granted one permit to the petitioner and the other to respondent 2 and dismissed the other applications. On appeal by respondent 2 the Central Road Traffic Board passed an order on 2-4-1951 setting aside the grant of permit to the petitioner and granting it to respondent 2. The petitioner moved the Government under S. 64A, Motor Vehicles Act but the Government rejected the petition summarily on 30-7-1951 by an order which is in these terms: "The Government sees no reason to interfere". It is this order that is attacked in W. P. No. 334 of 1951.

(4) In W. P. No. 615 of 1951 the material facts are these: In 1950 it was decided to open a new bus route between Kodavasal and Saliamangalam in the Tanjore district. The petitioner first got permits to run two stage carriages on this route. Later on applications were invited for two more permits. There were eight applicants including the petitioner and respondents 4 and 5. On 2-6-1951 the Regional Transport Authority granted these two permits to the petitioner. On appeal the Central Road Traffic Board passed an order on 10-8-1951 setting aside the grant of the two permits to the petitioner and dividing it between respondents 4 and 5. A revision petition filed by the petitioner under S. 64A was dismissed on 4-10-1951, the order of the Government being in these terms: "Government sees no reason to interfere". It is this order that is questioned in W. P. No. 615 of 1951.

(5) These and other similar petitions were heard together as they raised more or less the same controversies about the validity of the various provisions of the Motor Vehicles Act. Notice was issued to the Attorney General of India as the legislation impugned was an Act of Central Legislature, and the learned Advocate General has addressed us on his behalf as well. We had the benefit of able and exhaustive arguments on various aspects of the case by Mr. K. V. Venkatasubramania Aiyar for the petitioner in W. P. Nos. 333 and 334 of 1951, by Mr. K. Bhashyam Aiyangar for the petitioner in W. P. No. 615 of 1951, by other learned counsel who appeared for the petitioners in other cases, by the learned Advocate General on behalf of the Government respondent and by Mr. M. K. Nambiar on behalf of the successful applicants who are respondents in these petitions.

(6) Before dealing with the several contentions urged in the case it is necessary to set out the relevant provisions of the Act. They occur in Chapter 4 of the Act entitled "Control of Transport Vehicles". Under S. 42 no owner of a transport vehicle can use it in any public place

"save in accordance with the conditions of a permit granted or countersigned by a Regional or Provincial Transport Authority authorising the use of the vehicle in that



place in the manner in which the vehicle is being used."

(7) Section 43A empowers the Provincial Government to issue such orders and directions of a general character as it may consider necessary in respect of any matter relating to the road transport to the provincial transport authority or regional transport authority and such orders are to be given effect to by the transport authority. Application for permit should be made under S. 45 to the Regional Transport Authority and it should contain the particulars mentioned in S. 46. Then follows S. 47 (1) which is in these terms:

"A Regional Transport Authority shall, in deciding whether to grant or refuse a stage carriage permit, have regard to the following matters, namely: (a) the interest of the public generally;

(b) the advantages to the public of the service to be provided including the saving of time likely to be effected thereby and any convenience arising from journeys not being broken;

(c) the adequacy of existing road passenger transport services between the places to be served, the fares charged by these services and the effect upon those services of the service proposed;

(d) the benefit to any particular locality or localities likely to be afforded by the service;

(e) the operation by the applicant of other transport services and in particular of unremunerative services in conjunction with remunerative services; and

(f) the condition of the roads included in the proposed route or routes;

and shall also take into consideration any representation made by persons already providing road transport facilities along or near the proposed route or routes or by any local authority or police authority within whose jurisdiction any part of the proposed route or routes lie or by any association interested in the provision of road transport facilities."

Section 48 runs as follows:

"A Regional Transport Authority may, after consideration of the matters set forth in subsec. (1) of S. 47, — (a) limit the number of the stage carriages or stage carriages of any specified type for which stage carriage permits may be granted in the region or in any specified area or on any specified route within the region;

(b) issue a stage carriage permit in respect of a particular stage carriage or a particular service of stage carriages."

(8) Then follow regulations relating to the timings, load, number of passengers and the like. Section 57 prescribes the procedure to be followed in the grant of permits; S. 59 for their cancellation or suspension. S. 64 provides for appeals to the Central Road Traffic Board against the orders of the Regional Transport Authority specified therein. Then comes S. 64A which is in these terms:

"The Provincial Government may, of its own motion or on application made to it, call for the records of any order passed or proceeding taken under this Chapter by any authority or officer subordinate to it, for the purpose of satisfying itself as to the legality, regularity or propriety of such order or proceeding and after examining such records,

may pass such order in reference thereto as it thinks fit."

(9) On these provisions several contentions have been urged on either side; they may broadly be classed under the following heads:

1. Is a citizen entitled to ply, as a matter of right, transport vehicles for hire on public streets? The petitioners contend that he is entitled and that it is a right protected by Art. 19(1)(g). Mr. M. K. Nambiar for the respondents argues that it is a privilege and not a right and it does not fall within Art. 19(1)(g).

2. If it falls under Art. 19(1)(g) are Ss. 42, 43A, 47, 48(a) and (b) and S. 64A void as inconsistent with the rights declared under that Article? Are they protected by Art. 19(6)? Are the above sections or any of them repugnant to Art. 14 of the Constitution as denying equal protection?

3. What is the extent of the jurisdiction of the Courts to review the order of the authorities constituted under the Act?

4. Are the provisions of the Act obnoxious to Art. 301 which declares that commerce and trade within the territory of India shall be free?

(10) (1) It is contended by Mr. Nambiar that a citizen has no right to ply transport vehicles on public pathways as a matter of right, that it is a mere privilege and that, therefore, it is not protected by Art. 19(1)(g). The arguments in favour of this position may be summarised as follows:

(11) The pathways belong to the State. The only right which the public has over them is to pass and re-pass. Subject to this right the State, as the owner of the pathways has a right to control it in such a manner as it chooses. The citizens cannot, therefore, claim as a matter of right that they are entitled to carry on business on the roads and streets and use them for earning profit; and that if the State permits the streets to be used for the purpose of business it is a privilege and not a right. It is also contended that a citizen has no right to carry on any and every trade, that the business of motor transport is a public utility service over which the State has paramount powers of control, that it is for the Legislature to determine the conditions under which the business could be carried on and that its decision is final in respect of those matters. These contentions are sought to be supported largely by citation of American authorities.

(12) Mr. Venkatasubramania Aiyar, however, argues that the American law relating to business differs widely from the law as laid down in the Constitution; that the right to carry on business is not one of the freedoms expressly protected by the American Constitution; that it was only by a process of judicial construction that it has come to be recognised as comprised in the liberty guaranteed under the 14th amendment, that in American law distinctions were made between trades which could be carried on as a matter of right and trades which could be carried on only with the permission of the Government and between trades which were private and trades which were affected with public interest and that the decisions of the American Courts could not, therefore, be accepted as safe guides for interpreting the rights of the parties under the Constitution.

(13) The right to carry on a trade or calling or profession is not one of the freedoms express-



ly guaranteed by the American Constitution. So far as the States were concerned, there was no constitutional limitation on their power to enact legislation with reference to business so long as it did not encroach on the powers of the Congress to legislate or inter-state commerce and so long as freedom of contract was not violated. "Business" apart from "contract" was not, as such, a freedom protected by the Constitution. In 1868 the 14th Amendment was promulgated. It provided 'inter alia'

"Nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Even under this amendment freedom to carry on business was not expressly mentioned. In 1873 when the butchers of New Orleans challenged a State law which granted a monopoly of that business to a corporation, as unconstitutional, no contention was urged on their behalf that the right to carry on business was one of the freedoms included in the word "Liberty" in the 14th amendment.

It was Bradley J. who observed in his dissenting judgment as follows:

"For the preservation, exercise and enjoyment of these rights the individual citizen, as a necessity, must be left free to adopt such calling, profession or trade as may seem to him most conducive to that end. Without this right he cannot be a free man. This right to choose one's calling is an essential part of that liberty which it is the object of Government to protect; and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed,"

and again

"In my view, a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law. Their right of choice is a portion of their liberty; their occupation is their property." Vide 'Slaughter-house cases', (1873) 21 Law Ed 394 at pp. 421 and 423.

It will be noticed that even in these passages there is no clear conception of a right to carry on a trade as a freedom distinct from the right to hold property.

The view that liberty in the 14th Amendment comprised also freedom to carry on business was stated by Field J. in — 'Munn v. People of Illinois', (1877) 24 Law Ed 77 at p. 90, in the following words:

"By the term 'liberty' as used in the provision, something more is meant than mere freedom from physical restraint or the bounds of a prison. It means freedom to go where one may choose, and to act in such manner not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of his happiness; that is, to pursue such callings and avocations as may be most suitable to develop his capacities, and give to them their highest enjoyment."

The same view was expressed in — 'Butchers Union v. Crescent City Co.', (1884) 28 Law Ed 585 at p. 591 and — 'Powell v. Pennsylvania', (1888) 32 Law Ed 253 at p. 256. In — 'Allgeyer v. State of Louisiana', (1897) 41 Law Ed 832, dealing with the right of citizen to carry on

insurance business the Court observed as follows:

"The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

Thus the right to carry on business came to be recognised as one of the liberties protected by the Constitution but even so it did not acquire the full status of the freedoms which had been expressly mentioned in the Constitution such as the freedom of speech, of person and of religion; and was viewed somewhat in the light of an inter-loper or parvenu among them. Thus in — 'Tyson & Brother v. Banton', (1927) 71 Law Ed 718, where the question was about the powers of the Legislature to control the business of selling theatre tickets, Holmes J. in a dissenting judgment observed as follows:

"I think the proper course is to recognise that a State Legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain."

Thus the freedoms expressly mentioned in the Constitution occupied an exalted position which was denied to the unexpressed freedoms such as the one to carry on business. Under the Indian Constitution the right to carry on business is one of the freedoms expressly protected under Art. 19(1)(g) and it is placed on the same footing as freedom of speech and as liberty of the person. It is accordingly contended, with considerable force, that the decisions of the American Courts and the observations contained therein should be used with reserve in determining the rights of the parties under the Constitution.

(14) Then again under the American law, the doctrine is well established that while some trades could be carried on by the citizens as a matter of common law right there are others which could be carried on only if the State permits. This is called a franchise or a privilege and it has an English origin. Under that law a franchise means a grant made by the Sovereign in exercise of the Royal prerogative, which is thus defined in Halsbury's Laws of England, Vol. 6, p. 443, para 511:

"The Royal prerogative may be defined as being that pre-eminence which the Sovereign enjoys over and above all other persons by virtue of the common law, but out of its ordinary course, in right of his regal dignity, and comprehends all the special dignities, liberties, privileges, powers, and royalties allowed by the common law to the Crown of England."

At page 444 in para 513 it is stated:

"Prerogatives, however, connected with the royal revenues, such as treasure trove, waifs,